Mr. **Charles L. Hawley,** for appellant:

The defendants, having on many previous occasions slowed the speed of the car so uniformly that the plaintiff had many times alighted therefrom without injury, where under an obligation to the plaintiff to do so on the occasion of the accident. The sudden putting on of the power was negligence in this case.

Linch v. *Pittsburgh Traction Co.* 153 Pa. 102.

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descent so obviously perilous that a person of ordinary prudence would not attempt to get off, the act is contributory negligence and will bar a recovery. So if the passenger steps from a rapidly moving train on to the other track without looking to see if a train is coming on it he will be guilty of such negligence as to bar his recovery for injury by a train on the other track. Weber v. Kansas City Cable R. Co. 100 Mo. 194, 7 L. R. A. 819.

Getting off a car in rapid motion is negligence. Saffer v. Dry Dock, E. B. & B. R. Co. 2 Silv. Sup. Ct. 343.

A person injured by attempting to board an electric car when it is running at full speed cannot recover from the carrier for the injury. Woo Dan v. Seattle Electric R. & Power Co. 5 Wash. 466.

In Ricketts v. Birmingham Street R. Co. 85 Ala. 606, the court says there can be no question that the plaintiff was guilty of negligence which proximately contributed to his injury, if while the car was in motion he attempted to step off with a keg of lead in his hands, and would not have been injured had he remained on the car. It is further said that stepping from a moving car without necessity when injury is caused thereby which would have been avoided by remaining on the car is negligence which will defeat a recovery. And that ruling was followed in McDonald v. Montgomery Street R. Co. 110 Ala. 161.

But in cases where the speed was not great, and no other circumstances making negligence plainly apparent were present, the court refuses to decide the question as one of law.

It would be impossible for a court to lay down the rule as to what particular speed would be sufficient notice to a passenger that if he attempted to get on or off he would be guilty of contributory negligence. Cicero & P. Street R. Co. v. Meixner, 160 Ill. 330, 31 L. R. A. 331.

It cannot be announced as a legal principle that a passenger upon a street railway car may not get off the car when it is in motion. Brown v. Seattle City R. Co. 16 Wash. 465.

The mere fact that a car is moving slowly when a man attempts to get onto it does not make him guilty of negligence as matter of law, but the question is for the jury. Morrison v. Broadway & S. Ave. R. Co. 130 N. Y. 105, Affirming 28 N. Y. S. R. 428.

It is not under all circumstances negligence, as matter of law, for a person to get upon a street car while it is in motion. In exceptional cases it may be so, but ordinarily it is a question for the jury. Eppendorf v. Brooklyn City & N. R. Co. 69 N. Y. 195, 25 Am. Rep. 171.

It is not negligence, as matter of law, to step on or off from a moving street car. Omaha Street R. Co. v. Craig, 39 Neb. 601.

In McSwyny v. Broadway & S. Ave. R. Co. 27 N. Y. S. R. 353, the court charged that if the plaintiff had attempted to enter the car while it was in motion she could not recover, and the appellate court held that this was as favorable to defendant as it could demand, because it was settled that it was not, as matter of law, always negligent to pass upon a street car while it is in motion.

In Schacherl v. St. Paul City R. Co. 42 Minn. 42, the court while recognizing the general rule says that the conditions attending the act might, from the undisputed testimony, appear so unfavorable as to warrant the court in holding, as matter of law, that recklessness and negligence were apparent in the attempt.

In Hagan v. Philadelphia & G. Ferry R. Co. 15 Phila. 278, it was held that it was contributory negligence, as a matter of law, for a person to leap from a moving horse car. But there was nothing to show negligence on the part of the carrier in the case except the fact that the car was not stopped when the signal was given so that the ruling could have been placed on the ground that there was nothing to charge the carrier with negligence, and the ruling as to contributory negligence was unnecessary.

And in Nichols v. Sixth Ave. R. Co. 38 N. Y. 131, 97 Am. Dec. 780, it is said that a passenger has no right to jump from a street car while it is in motion.

It is not negligence in law to get on to a slowly moving street car. Valentine v. Broadway & S. Ave. R. Co. 14 Daly, 540; Seitz v. Dry Dock, E. B. & B. R. Co. 16 Daly, 254; Eppendorf v. Brooklyn City & N. R. Co. 51 How. Pr. 475.

How far act is due care as matter of law.

There are a few expressions in some of the cases which would tend to imply that a person getting off from or onto a moving car might be exercising due care as matter of law.

If when the passenger attempts to step off from the car it is barely moving, his attempt will not constitute such negligence as will prevent his recovery for an injury caused by a sudden jerk of the car which throws him to the ground. Chicago City R. Co. v. Mumford, 97 Ill. 563.

If a person has free use of his faculties and limbs, and has given proper notice of his desire to be taken up, and the car has slackened speed in the usual manner, it is not negligence for him to attempt to get on when it is slowly moving. Conner v. Citizens Street R. Co. 105 Ind. 62, 55 Am. Rep. 177.

It would be a hard rule to hold a passenger guilty of contributory negligence in attempting to board a street car moving so slowly that there would be no apparent danger whatever in the attempt—so slowly that a person of reasonable prudence in the exercise of ordinary care would not hesitate to make the effort. Stager v. Ridge Ave. Pass. R. Co. 119 Pa. 70.

If the intending passenger has a right to think from the condition of the car that it is about to stop he has a right to get on. Walters v. Philadelphia Traction Co. 161 Pa. 36.

How far the courts in the above cases intended to decide that the person was exercising due care as matter of law is somewhat uncertain. The question would probably involve the further question of proximate cause so that if the court decided it, the decision would simply be that the act of the passenger did not cause or contribute to the injury. So far as the act was one of negligence simply it would seem to be properly within the province of the jury.

As matter of law the act of getting on a moving street car is colorless. It is for the jury to say whether the passenger is guilty of negligence or was in the exercise of due care. Gilbert v. Third Ave. R. Co. 22 Jones & S. 270.

Although it may not be negligence as matter of law to leave a street car in motion, yet it is not evidence of due care. So, where a person receives injury by stepping from a moving car immediately in front of another car coming from an opposite direction no recovery can be had for the injury. Creamer v. West End Street R. Co. 156 Mass. 320, 18 L. R. A. 490.

A passenger's leaving a slowly moving street car is not *per se* negligence.

Lake Shore & M. S. R. Co. v. *Bangs*, 47 Mich. 470; *Cincinnati, W. & M. R. Co.* v. *Peters*, 80 Ind. 168; *St. Louis, I. M. & S. R. Co.* v. *Cantrell*, 37 Ark. 519, 40 Am. Rep. 105; *Cumberland Valley R. Co.* v. *Maugans*, 61 Md. 53, 48 Am. Rep. 88; *Edgar* v. *Northern R. Co.*

If the passenger has proceeded so far toward getting off before the car stops that he cannot retrace his steps, he will not be negligent in getting off after the car has started. Piper v. Minneapolis Street R. Co. 52 Minn. 289.

To get on or off a moving street car is not necessarily negligence. West Chicago Street R. Co. v. Dudzik, 67 Ill. App. 681.

It is not negligence for a man twenty-six years old, in good health and unencumbered, to attempt to board a slowly moving car, but in case he does so and is injured by coming in contact with a truck standing in the street before he gets safely inside, he cannot recover for the injury for the reason that the injury is due to his own act as much as to the act of the carrier, and there is no ground for recovery. Moylan v. Second Ave. R. Co. 128 N. Y. 583, Reversing 35 N. Y. S. R. 644.

Question for jury.

In the majority of cases it will be a question for the jury to determine whether or not the injured person was negligent. North Chicago Street R. Co. v. Wrixon, 51 Ill. App. 307; Sahlguard v. St. Paul City R. Co. 48 Minn. 222; Omaha Street R. Co. v. Martin, 48 Neb. 65; Munroe v. Third Ave. R. Co. 18 Jones & S. 114; Linch v. Pittsburgh Traction Co. 153 Pa. 102.

If the person is in physical vigor and free from any hindrance the question of negligence is one of fact for the jury. Finkeldey v. Omnibus Cable Co. 114 Cal. 28.

To board or depart from an electric street car in motion is not negligence *per se*, but the question is for the jury. Cicero & P. Street R. Co. v. Meixner, 160 Ill. 320, 31 L. R. A. 351.

The question of negligence in getting into a horse car while it is in motion is for the jury. North Chicago Street R. Co. v. Williams, 140 Ill. 275, Affirming 40 Ill. App. 590, where it is said that the getting on the cars while they were in motion had nothing to do with the accident.

The court will not be authorized to take the case from the jury unless the act as proved by undisputed testimony is seen to be such that the common judgment of men might pronounce it to be negligence. McDonough v. Metropolitan R. Co. 137 Mass. 210.

Where a man sixty-eight years old and weighing nearly 200 pounds attempted to get on to a car going about 4 miles an hour, after signaling the driver to stop, and fell off and was injured, it was held a question for the jury whether or not he was negligent. Briggs v. Union Street R. Co. 148 Mass. 72.

If the car had motion when the passenger attempted to get off, the question of negligence will be for the jury unless the testimony uncontrovertibly shows that it was dangerous motion. Lax v. Forty-Second & G. Street Ferry R. Co. 14 Jones & S. 448.

If a person gets upon the wrong side of the car, and is brought into collision with a pole supporting the trolley wires which is located between the tracks, the question is for the jury whether or not he was negligent in making the attempt, under all the circumstances of the case, to get upon the car when it was moving slowly and he had no knowledge of the existence of the poles. Kowalski v. Newark Pass. R. Co. 15 N. J. L. J. 50.

In Van de Venter v. Chicago City R. Co. 26 Fed. Rep. 32, the court charged the jury that if the plaintiff's injury was caused by her own want of prudence or care in attempting to take the car while it was in motion she could not recover.

Negligence dependent on circumstances.

Whether a person in boarding a moving street car is guilty of negligence must depend upon the circumstances of each particular case. And it cannot be said to be negligence *per se* unless the act be such that under the circumstances but one conclusion can be arrived at, that of negligence. Citizens' Street R. Co. v. Spahr, 7 Ind. App. 23.

The question of negligence or not depends upon the circumstances of each particular case, as, the speed of the car, the activity or infirmity of the person and the like, and is for the jury. Ober v. Crescent City R. Co. 44 La. Ann. 1059.

The act of attempting to board a street car in motion is not of itself negligence as matter of law, but whether such act is negligent must depend upon the particular circumstances upon which it is done. Finkeldey v. Omnibus Cable Co. 114 Cal. 28. The court says it is a matter of common observation that persons do every day get on and off from street cars while they are in motion under circumstances that would not, in the estimation of any reasonable man, be considered negligence.

Particular classes of cases.

If the passenger is at the time of his attempt to leave the car suffering from a wound in his leg which causes lameness or disability, the jury may infer a want of ordinary prudence from an attempt to leave the car under the circumstances. Wyatt v. Citizens R. Co. 62 Mo. 408.

Whether or not it is negligence to step off a moving car, encumbered with bundles, is a question of fact for the jury, depending upon the speed of the car and the circumstances under which the attempt is made. Richmond v. Second Ave. R. Co. 76 Hun, 233.

It is contributory negligence to attempt to board a car with one hand and arm encumbered. Reddington v. Philadelphia Traction Co. 132 Pa. 154.

It is not negligence *per se* for a person with an umbrella in one hand and a handkerchief in the other to attempt to board an electric street car while it is in the act of stopping to receive passengers. White v. Atlanta Consol. Street R. Co. 92 Ga. 494.

In Kirchner v. Detroit City R. Co. 91 Mich. 400, where the plaintiff recovered, the court charged the jury that if the plaintiff with a large package in his hands attempted to leave the car before it had stopped it would be an act of negligence which would prevent his recovery. But as the suit was brought for starting the car with a jerk and throwing the plaintiff before he had time to alight, the finding of the jury in his favor evidently left the question of contributory negligence out of the case.

Stepping off backwards.

It is negligence to step off backwards from a moving car unless the act is induced by the negligent conduct of the carrier. Richmond v. Second Ave. R. Co. 76 Hun, 233.

It is negligence as matter of law to step from a moving car with the face to the rear and retain a hold on the car in such a way that the forward motion of the car will naturally tend to pull the person off his feet. Beattie v. Citizens' Pass. R. Co. (Pa.) 1 Cent. Rep. 633.

A person who attempts to alight from a rapidly moving electric car with his back to the poles supporting the wires which he knows are there will be held to have been the cause of his own injury in case he comes in contact with one of the poles

11 Ont. App. Rep. 452; *Pennsylvania R. Co.* v. *Kilgore*, 32 Pa. 292, 72 Am. Dec. 787; *Johnson* v. *Westchester & P. R. Co.* 70 Pa. 357; *Clow* v. *Pittsburgh Traction Co.* 158 Pa. 410; *Linch* v. *Pittsburgh Traction Co.* 153 Pa. 102.

Mr. **Horace E. Hand**, for appellee:

Acts of accommodation or indulgence do not make a usage.

Lawson, Usages & Customs, § 14, p. 37.

A usage of the servants of the corporation,

while making his attempt. State, Sharkey, v. Lake Roland Elev. R. Co. 84 Md. 163.

Women.

In some cases it has been held to be negligence, as matter of law, for a woman to attempt to get on or off a moving train. But there is a difference of opinion upon this question.

A woman is guilty of contributory negligence in attempting to get off from a street car while it is in motion in violation of the rules of the company without anything being done by the employees of the company to cause her to take the step. Calderwood v. North Birmingham Street R. Co. 96 Ala. 318.

In Wheaton v. North Beach & M. R. Co. 36 Cal. 590, the court says that if the car had started before the plaintiff had commenced to descend she was negligent in not telling the conductor that she wished to get out and in not waiting until he had stopped the car before attempting to do so.

In Central R. Co. v. Smith, 74 Md. 212, it was assumed that it would be negligence for a woman to attempt to leave a car in motion. The court giving an instruction that plaintiff could not recover if there was any failure on her part to exercise ordinary care as by attempting to leave the car while in motion.

In Olfermann v. Union Depot R. Co. 125 Mo. 408, which was a suit by an elderly woman to recover for injuries received in falling from an electric car, the court says that the trial court might well have told the jury that if the plaintiff after getting on the car platform in a place of safety and after the train had started turned around and jumped off and thereby received the injury of which she complained then she could not recover.

But in other cases it has been held that the mere fact that a car is moving slightly when a lady attempts to get off will not prevent her recovery for an injury which was not caused by her attempt at that time. Rathbone v. Union R. Co. 13 R. I. 709.

It is not negligence as matter of law, regardless of the circumstances, for a woman to alight from a moving car. Duncan v. Wyatt Park R. Co. 48 Mo. App. 659.

It is not negligence as matter of law for a woman to attempt to alight from a moving car. Conley v. Forty-Second Street, M. & St. N. Ave. R. Co. 2 N. Y. Supp. 229.

Whether or not the act of a woman in stepping from a slowly moving street car is negligence is a question for the jury under all the circumstances of the case. Fortune v. Missouri R. Co. 10 Mo. App. 252.

Children.

In Brennan v. Fair Haven & W. R. Co. 45 Conn. 298, 29 Am. Rep. 679, it was held that a special duty devolved upon those in charge of the car to see that a ten-year-old boy obeyed the rule of the company not to attempt to get off the car while it was in motion.

In Pittsburgh, A. & M. Pass. R. Co. v. Caldwell, 74 Pa. 421, it was held that a child five years old could not be held to be guilty of negligence in attempting to get off from a street car while in motion, and that it was negligence on the part of the driver to permit it to do so.

But it was held that a boy eleven years old who without signifying his desire to get off goes to the front platform and steps off with his back toward the horses while the car is in motion cannot recover for his injury. Purtell v. Ridge Ave. Pass. R. Co. 3 Pa. Co. Ct. 273.

In North Birmingham R. Co. v. Liddicoat, 99 Ala. 545, where a boy was injured in attempting to board a dummy train, the court says: "It cannot be affirmed as a universal proposition of law that it is negligence *per se* for a person to attempt to board a moving train. The age and physical condition of the person making the attempt, the rate of speed of the train, the nature of the car and of the place, and all the attendant facts and circumstances enter into the question; and while any one of these facts might possibly be sufficient to justify the conclusion of negligence as matter of law, ordinarily it is a question for the jury, the test being whether a person of ordinary care and prudence would, under similar circumstances, have made the attempt."

A street-car company cannot be held liable for the death of a boy seventeen years old who jumps on the front platform of the car, seizes the driver's whip and whips the mules, jumping off and on and urging the mules to go faster, until by a misstep he falls and is caught by the car wheel and killed. Taylor v. South Covington & C. Street R. Co. 14 Ky. L. Rep. 355.

It is a question for the jury whether or not it was negligence for a boy seventeen years old of sound mind to step from a street car in rapid motion. Wyatt v. Citizens Street R. Co. 55 Mo. 485.

Whether a boy fourteen years of age is guilty of negligence in attempting as a passenger to get upon a moving street car will depend upon his experience and intelligence, and the rate of speed at which the car is moving. Sly v. Union Depot R. Co. 134 Mo. 681.

The refusal of the conductor to stop the car will not justify a boy six years old in attempting to get off while the car is in motion. Cram v. Metropolitan R. Co. 112 Mass. 38.

It is negligence *per se* for a boy fifteen years old to attempt to board a moving horse car where the step by which he attempts to ascend is plainly defective. Dietrich v. Baltimore & H. S. R. Co. 58 Md. 347.

Whether it is negligence for a boy thirteen years old to get off from a street car before its motion had ceased is a question for the jury. Crissey v. Hestonville, M. & F. Pass. R. Co. 75 Pa. 83.

So, in case of a child ten years old. Philadelphia City Pass. R. Co. v. Hassard, 75 Pa. 367.

If the negligence of a boy in jumping from a moving car in front of one approaching from the opposite direction is the cause of his injury by the latter car, no recovery can be had for the injury. Hogan v. Central Park, N. & E. River R. Co. 124 N. Y. 647.

Electric or cable cars.

In Corlin v. West End Street R. Co. 154 Mass. 197, it was held that there was nothing to show that any different rule should be applied with respect to its being negligence to get upon a moving electric car than would be applied in case of horse cars.

The rule that the question is for the jury applies to both electric and horse cars. Central Pass. R. Co. v. Rose, 14 Ky. L. Rep. 294, Affirmed in 15 Ky. L. Rep. 209.

But in JAGGER v. PEOPLE'S STREET R. Co. the rule of steam cars seems to have been applied to electric cars, and cases involving railroad trains are cited to sustain the ruling.

not shown to have come to the knowledge of the governing officers of the corporation, does not bind it.

Lawson, Usages & Customs, § 21, p. 50; *Beebe* v. *Ayres*, 28 Barb. 278; *Dietrich* v. *Pennsylvania R. Co.* 71 Pa. 439, 10 Am. Rep. 711.

A custom must be continued; there must be no interruption or temporary ceasing of the right.

Lawson, Usages & Customs, § 13, p. 36.

Plaintiff being a passenger in a street car requested the conductor to stop the car at a particular point. His request not being immediately complied with he leaped from the car and was injured. That this was an act of contributory negligence does not appear to us to admit of doubt.

Hagan v. *Philadelphia & G. Ferry Co.* 15 Phila. 278; *Pennsylvania R. Co.* v. *Aspell*, 23 Pa. 150, 62 Am. Dec. 323; Booth, Street Railways, § 337, p. 461.

A street-railway company is not liable for a

Front platform.

There is no rule of law that stepping upon the forward platform of a horse car is negligence. McDonough v. Metropolitan R. Co. 137 Mass. 210.

Under conductor's direction.

Whether or not it is negligence in a passenger to step off a moving train at the invitation of the conductor depends upon the further inquiry as to whether or not the train was going at such speed as to render the attempt obviously hazardous. Highland Ave. & B. R. Co. v. Winn, 93 Ala. 306.

If the act of jumping off is not the voluntary act of the person injured, but he is forced to do so by those in charge of the car, he will not be guilty of contributory negligence. Baber v. Broadway & S. Ave. R. Co. 10 Misc. 109.

If a boy is compelled to get off the car by the driver while it is in motion he cannot be held guilty of negligence. Day v. Brooklyn City R. Co. 12 Hun, 435.

If a boy ten years old jumps from a moving car because of the threats of the driver the question of his negligence is for the jury. Hestonville, M. & F. Pass. R. Co. v. Gray, 3 W. N. C. 421.

To avoid danger.

If the passenger is placed in a position of peril by the negligence of the carrier so that he is compelled to choose between the two evils of jumping from the moving car or being injured by the other peril, it will not be negligence for him to jump. Twomley v. Central Park, N. & E. R. R. Co. 69 N. Y. 158, 25 Am. Rep. 162.

The fact that a woman gets off a moving car upon its turning into the barns on refusal to stop to let her off, will not prevent her recovery for an injury caused thereby, if she had been subjected to insult upon being carried into the barns on a previous occasion, and thought that her only way to escape the same treatment again was to leave the car. Ashton v. Detroit City R. Co. 78 Mich. 587.

If the passenger is induced to jump off the car by an impending collision he will not be held guilty of negligence. Heath v. Glens Falls, S. H. & Ft. E. Street R. Co. 90 Hun, 560.

If it appears necessary to leave the car to avoid being injured by the running away of the horse it may not be negligence to do so if such action would be ordinary care on the part of careful persons of the class to which the injured person belongs under similar circumstances. Dimmey v. Wheeling & E. G. R. Co. 27 W. Va. 32, 55 Am. Rep. 292.

If the passenger jumps from the car to avoid the consequences of an impending collision his act will not be considered negligent. Washington & G. R. Co. v. Hickey, 5 App. D. C. 436.

Negligence after knowing peril.

In Woodard v. West Side R. Co. 71 Wis. 625, it is said that even if the plaintiff was guilty of negligence in attempting to board a moving car he could yet recover if his injury might have been prevented by the exercise of due care on the part of the driver in stopping the car if he knew that plaintiff had fallen and was being dragged by the car.

In Halohan v. Washington & G. R. Co. 8 Mackey, 316, where a person with one wooden leg was injured in an attempt to get on a moving car, the court assumes his negligence, and the case is made to turn upon the question whether or not the carrier was negligent in failing to take precautions to avoid injuring him after ascertaining that he was in peril.

Summary.

A person in getting onto or off from a street car cannot be reckless but must take proper care of himself.

The mere fact that the driver fails to entirely stop the car will not render the company liable for an injury to a passenger who attempts to get off, but it must also appear that the plaintiff used all reasonable care and diligence to avoid the consequences of the carrier's negligence. West End & A. S. R. Co. v. Mozely, 79 Ga. 463.

It is not any particular rate of speed by which the conduct of the passenger in entering or leaving a moving car is governed, but the rule is that of exercising ordinary care and caution under the circumstances surrounding him. Mettlestadt v. Ninth Ave. R. Co. 32 How. Pr. 428.

A person who attempts to board a moving trolley car at the front platform must exercise more care than though he attempts to enter from the rear platform, or after the car is stopped, and the mere fact that he is injured will not charge the carrier with liability unless negligence on its part is shown. Paulson v. Brooklyn City R. Co. 13 Misc. 387.

The question of proper care will depend on what the ordinarily prudent man would have done under the circumstances. If the speed of the car is great or the person is not in full control of his limbs by reason of injury or encumbrance the court may pronounce him guilty of negligence as matter of law. When the carrier is negligent and the car was moving at such rate when the attempt to board or alight was made that it would not be thought improper to do so by an ordinarily prudent man, the question of negligence is for the jury. And it seems that if the attempt of the injured person did not contribute to the accident the court may hold, as matter of law, that this act will not bar his recovery. A few cases in which the question has arisen have not passed upon it directly.

In Basch v. North Chicago Street R. Co. 40 Ill. App. 583, it seems to be assumed that plaintiff was negligent in attempting to board a moving car.

In Outen v. North & South Street R. Co. 94 Ga. 662, a nonsuit was held proper where at the moment plaintiff attempted to alight the driver struck the horses, which caused a jerk and the fall of the passenger; but it is not distinctly shown whether the ruling is placed upon the ground of want of negligence upon the part of the carrier because the driver did not know that the passenger was attempting to get off, or of negligence on the part of the passenger, a man seventy years old, in attempting to get off from the moving car. H. P. F.

personal injury sustained by a passenger while attempting to get off a car at a street crossing while it is in motion, and in violation of the company's rules, and without anything having been said or done by the company's employees to induce her to get off.

Ray, Negligence of Imposed Duties, 666; Booth, Street Railways, § 337, p. 460; *Nichols* v. *Middlesex R. Co.* 106 Mass. 463; *Reddington* v. *Philadelphia Traction Co.* 132 Pa. 156.

Per Curiam:

The plaintiff, in going from the business part of the city of Scranton to his home, used the defendant's line of cars. To shorten his walk, he was in the habit of leaping from the cars at a point where they did not ordinarily stop, from which point he walked to his home. It is alleged that the conductor and motorman knew of this habit, and, at a signal from him, would slacken the speed of the car down to about 4 or 5 miles per hour, in order to relieve him from the dangers incident to this mode of alighting as much as they reasonably could. The company was not bound by this practice of the plaintiff, or by the good nature of its employees. It is the duty of the street-railway company to stop its cars at suitable places for passengers to leave them, and remain stationary long enough to enable them to do so safely (*Crissey* v. *Hestonville, M. & F. Pass. R. Co.* 75 Pa. 83); and it is contributory negligence to leap from a moving car (*Pennsylvania R. Co.* v. *Aspell*, 23 Pa. 147, 62 Am. Dec. 323). To justify such action, the motion must be so inconsiderable that a person of reasonable prudence, exercising ordinary care, would not hesitate about the safety of the attempt to alight. *Stager* v. *Ridge Ave. Pass. R. Co.* 119 Pa. 70. If the evidence leaves the question whether the car was fairly in motion in doubt, then the question of contributory negligence must go to the jury. If it does not, it is a question of law. This case, upon all the evidence, belongs to the latter class. Whether the attempt to leap from an electric car moving at the rate of from 4 to 5 miles per hour is contributory negligence in the passenger may properly be declared by the court, on a motion for a compulsory nonsuit, and it was properly declared in this case.

The judgment is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

FOSTER D. EDWARDS, *Appt.*,
v.
WARREN LINOLINE & GASOLINE WORKS, Limited,
and
WALWORTH MANUFACTURING COMPANY, Trustee.

(168 Mass. 564.)

1. A partnership association organized under the laws of Pennsylvania is regarded in Massachusetts as an association or partnership, and not as a corporation, for the purpose of bringing an action against it.

2. A statute providing that an association or partnership can be sued in its company name has no extraterritorial force or effect.

(June 15, 1897.)

APPEAL by plaintiff from an order of the Superior Court for Suffolk County dismissing an action which sought to collect a claim against the Warren Linoline & Gasoline Works, Limited, from assets in the possession of the Walworth Manufacturing Company. *Affirmed.*

The facts are stated in the opinion.

Mr. **Robert B. Kendall,** for appellant:

The appellant is in fact and in law a corporation, or at least a quasi corporation.

Brightly's Purdon's Dig. Pa. Stat. tit. *Joint-Stock Companies;* Morawetz, Priv. Corp. §§ 6, 18 and cases cited; Beach, Priv. Corp. §§ 7, 167, 168; 2 Am. & Eng. Enc. Law, p. 1054; *Oliver* v. *Liverpool & L. L. & F. Ins. Co.* 77 U. S. 100 Mass. 531; *Liverpool & L. L. & F. Ins. Co.* v. *Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029, *Thomas* v. *Dakin*, 22 Wend. 9; *Waterbury* v. *Merchants' Union Exp. Co.* 50 Barb. 157; *Dinsmore* v. *Philadelphia & R. R. Co.* 11 Phila. 483; *Malz* v. *American Exp. Co.* 1 Flipp. 611.

The law of comity between the states requires that the rights, powers, privileges, and liabilities of these statutory joint-stock companies should be recognized by our courts, unless they conflict with some settled policy of the commonwealth or directly or unquestionably detrimental to the interests of our citizens.

Story, Confl. L. §§ 36, 37; Morawetz, Priv. Corp. § 962; *Bank of Augusta* v. *Earle*, 38 U. S. 13 Pet. 588, 10 L. ed. 307.

The law of comity is the law of the land, unless expressly or impliedly repealed.

Morawetz, Priv. Corp. § 966; *Cotell* v. *Col-*

NOTE.—As to the nature of limited partnership associations, see also Jennings's Appeal (Pa.) 2 L. R. A. 43, and *note;* Tilge v. Brooks (Pa.) 2 L. R. A. 796; Imperial Refining Co. v. Wyman (C. C. N. D. Ohio) 3 L. R. A. 503, and *note;* Vanhorne v. Corcoran (Pa.) 4 L. R. A. 386; Abbott v. Hapgood (Mass.) 5 L. R. A. 586; Fifth Avenue Bank v. Colgate (N. Y.) 8 L. R. A. 712, and *note.* See also Rouse, H. & Co. v. Detroit Cycle Co. *post*, 794; Staver & A. Mfg. Co. v. Blake, *post*, 798; Carter v. Producers' Oil Co. *post*, —.

As to so-called joint-stock companies, see also People, Platt, v. Wemple (N. Y.) 6 L. R. A. 303; People, Winchester, v. Coleman (N. Y.) 16 L. R. A. 183; and Morris v. Metalline Land Co. (Pa.) 27 L. R. A. 305.

See also 38 L. R. A. 794, 798; 39 L. R. A. 100.

orado Springs Co. 100 U. S. 59, 60, 25 L. ed. 549, 550; *American & F. Christian Union* v. *Yount*, 101 U. S. 356, 25 L. ed. 890.

A joint-stock company, if a mere voluntary association, and not organized under a local statute, is everywhere regarded as a mere partnership. If, however, the company has been organized under a local statute, it may be regarded as a quasi corporation.

2 Am. & Eng. Enc. Law, p. 1054.

Messrs. **Lauriston L. Scaife and Bancroft G. Davis,** for appellees:

The trustee's allegations of fact cannot be contradicted.

Crossman v. *Crossman*, 21 Pick. 25; *Nutter* v. *Framingham & L. R. Co.* 131 Mass. 231; *Fay* v. *Sears*, 111 Mass. 154.

The trustee's disclosures are to be construed liberally and not strictly.

Crossman v. *Crossman*, 21 Pick. 24.

Only such Pennsylvania statutes and decisions are before this court as are pleaded by the trustee or are disclosed by its answers to interrogatories.

Kline v. *Baker*, 99 Mass. 253; *Ely* v. *James*, 123 Mass. 36.

The Pennsylvania law brought before the court by the trustee shows conclusively that the so-called defendant is not a corporation in Pennsylvania, but is a partnership, the liability of the members of which is limited in the state of Pennsylvania.

Eliot v. *Himrod*, 108 Pa. 569; *Sheble* v. *Strong*, 128 Pa. 318.

The Massachusetts courts are bound by the construction given to the Pennsylvania statutes by the courts of Pennsylvania.

Elmendorf v. *Taylor*, 23 U. S. 10 Wheat. 152, 159, 6 L. ed. 289, 292; *Penobscot & K. R. Co.* v. *Bartlett*, 12 Gray, 244, 71 Am. Dec. 753.

Joint-stock companies, limited, organized under the Pennsylvania laws, are treated in Massachusetts as mere partnerships.

Taft v. *Ward*, 106 Mass. 518, 111 Mass. 518; *Bolwell* v. *Eastman*, 106 Mass. 526; *Gott* v. *Dinsmore*, 111 Mass. 51; *Ricker* v. *American Loan & T. Co.* 140 Mass. 348; *McFadden* v. *Leeka*, 48 Ohio St. 518; *Imperial Ref. Co.* v. *Wyman*, 38 Fed. Rep. 574, 3 L. R. A. 503.

The Warren Linoline & Gasoline Works, Limited, being but a partnership in Pennsylvania and being treated in all respects as a partnership in Massachusetts, can sue and be sued in the Massachusetts courts as a partnership only—that is, in the names of the individuals composing it.

Bates, Partn. § 1059; *Seely* v. *Schenck*, 2 N. J. L. 71; Lindley, Partn. Wentworth's ed. *115; *Blackwell* v. *Reid*, 41 Miss. 102; *Crandall* v. *Denny*, 2 N. J. L. 128; *Lanford* v. *Patton*, 44 Ala. 584.

The matters set up in the trustee's answer are matters which a trustee may plead, and are grounds for the trustee's discharge.

Thayer v. *Tyler*, 10 Gray, 164; *Washburn* v. *New York & V. Min. Co.* 41 Vt. 50; *Belknap* v. *Gibbens*, 13 Met. 471. See also *Blake* v. *Jones*, 7 Mass. 28.

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

It is conceded by the plaintiff that as the jurisdiction of the court depends upon charging the Walworth Manufacturing Company as trustee, inasmuch as there was no service upon the principal defendant, the action was properly dismissed upon discharging the trustee. The question, then, is whether the trustee was properly discharged, and this depends upon whether the principal defendant, an association formed under the laws of the state of Pennsylvania, is a partnership or a corporation. The trustee's answers to interrogatories refer to Brightly's Purdon's Dig. 12th ed. 1086–1088, and to the cases of *Eliot* v. *Himrod*, 108 Pa. 569, and *Sheble* v. *Strong*, 128 Pa. 315, as containing the law relative to the statement in the answer that the principal defendant was a partnership, and not a corporation. From the Digest it appears that such an association is styled a "partnership association," and not a corporation. By the terms of the various acts which have been passed upon the subject such an association may be formed by three or more persons. The capital is alone to be liable for the debts. There is no personal liability of the members, except to the extent of any unpaid subscription, if certain provisions of the act are complied with. "Interests in such partnership associations" are declared to be personal estate, and are transferable, under such rules and regulations as shall from time to time be prescribed; but, if there are no such rules and regulations, the transferee of any interest in any such association is not entitled to any participation in the subsequent business of the association, unless elected to membership therein, by a vote of a majority of the members in number and value of their interests. The business is to be conducted by a board of managers. The duration of the association may be fixed by the articles of association, but is not to exceed twenty years. Power to adopt and use a common seal is given in case the association has occasion to execute a deed of conveyance or bonds and mortgages. Land sold to the association or by it is required to be conveyed in the name of the association. It is further provided: "Said association shall sue and be sued in their association name; and, when suit is brought against any such association, service thereof shall be made upon the chairman, secretary, or treasurer thereof, which service shall be as complete and effective as if made upon each and every member of such association." In *Eliot* v. *Himrod*, 108 Pa. 569, 580, it is said by Mr. Justice Trunkey, in delivering the opinion of the court: "The formation of a limited partnership association is materially different from the creation of a corporation. Such association is treated in the statute as a partnership which, upon the performance of certain acts, shall possess specified rights and immunities. In contemplation that the association may consist of many members, for convenience it is clothed with many of the features and powers of a corporation, such as the right to sue and be sued, grant and receive, in the association name. But no man can purchase the interest of a member and participate in the subsequent business, unless by a vote of the majority of the members in number and value of their interests. No charter is granted to the persons who record their statement." *Sheble* v. *Strong*, 128 Pa. 318, is to the same effect.

If the question presented were an open one in this commonwealth, it might well be held that such an association could be considered to have so many of the characteristics of a corporation that it might be treated as one. At common law, a joint stock company formed for business purposes is considered in this commonwealth merely as a partnership. *Tappan* v. *Bailey*, 4 Met. 529; *Tyrrell* v. *Washburn*, 6 Allen, 466. The same rule has been applied to joint-stock associations formed under the laws of the state of New York, which do not differ, in any essential respect, from the laws of Pennsylvania. *Taft* v. *Ward*, 106 Mass. 518, 111 Mass. 518; *Bodwell* v. *Eastman*, 106 Mass. 526; *Gott* v. *Dinsmore*, 111 Mass. 45, 51; *Boston & A. R. Co.* v. *Pearson*, 128 Mass. 445. See also *Frost* v. *Walker*, 60 Me. 468; *Dinsmore* v. *Philadelphia & R. R. Co.* 11 Phila. 483. In *Taft* v. *Ward*, 106 Mass. 518, 524, speaking of the New York statutes, it was said by Chief Justice Chapman: "These statutes provide, in substance, that any association, consisting of seven or more shareholders or associates, may sue and be sued in the name of the president or treasurer; that in such a suit a judgment may be rendered against the company; and until an execution is issued against the company, and returned unsatisfied, no action shall be maintained against individuals. These statutes seem to apply to all copartnerships consisting of seven or more members. The members of such companies are authorized to hold their interests in shares, which are assignable like shares of stock in a corporation, and the action against the members is regarded as supplementary to the action against the company. *Waterbury* v. *Merchants' Union Exp. Co.* 50 Barb. 157; *Robbins* v. *Wells*, 1 Robt. 666. So far as these statutes relate to the procedure in courts for the recovery of debts, they are limited to the state of New York, for each state adopts its own forms of remedy. Story, Confl. L. §§ 556-558. The plaintiff could not in this commonwealth bring an action against the president or secretary, and obtain a judgment against the company by its name; nor could he bring an action against the members, or any of them, as a supplement to such an action. In order to do so, we must hold that the statutes of New York prescribing forms of action are in force here. In this commonwealth, such a company is a mere copartnership." There is nothing inconsistent with an association being a partnership that it has shares, or that the shares are transferable, or that the death of a member shall not work a dissolution of the partnership. *Phillips* v. *Blatchford*, 137 Mass. 510. See also *Hoadley* v. *Middlesex County Comrs.* 105 Mass. 519; *Gleason* v. *McKay*, 134 Mass. 419. The case mostly relied on by the plaintiff is *Liverpool & L. L. & F. Ins. Co.* v. *Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029, which was taken to the Supreme Court of the United States on a writ of error from this court. See *Oliver* v. *Liverpool & L. L. & F. Ins. Co.* 100 Mass. 531. It was a bill in equity, filed by the treasurer of the commonwealth, under Stat. 1862, chap. 224, § 11, to restrain the defendant from prosecuting its business, until the tax assessed upon it by § 2 of the statute had been paid. This section provided that "each fire, marine, and fire and marine insurance company incorporated or associated under the laws of any government or state, other than one of the United States," should annually pay a certain tax. The defendant was an English company, formed for the business of insurance, and organized under a deed of settlement. Its property was divided into transferable shares. It had power to sue and be sued by the name of its chairman, and a suit did not abate by reason of the death of such officer. The company could sue its own members and be sued by them. Execution on any judgment recovered against the company could be issued against any proprietor. The statute under which it was formed, and subsequent statutes, declared that it should not be deemed to be incorporated. The company was composed in part of British subjects, and in part of citizens of the state of New York. This court, after stating that it was not a pure corporation nor a pure partnership, but was an association intermediate between corporations known to the common law and ordinary partnerships, and was so far clothed with corporate powers that it might be treated, for the purposes of taxation, as an artificial body, proceeded to say: "We think the defendants are an association of the kind to which the statute of 1862 was expressly intended to apply, as well as to bodies wholly corporate in their character; and that, being permitted by the comity of our laws to exercise their functions within this commonwealth, they can claim no exemption from regulations appropriate to their collective action on account of the citizenship or nationality of their individual members." In the Supreme Court of the United States the decree of this court was affirmed, on the ground that the company was a foreign corporation; but Mr. Justice Bradley, while agreeing in the result, differed on the question whether the company was a corporation. He was of opinion that it was one of those special partnerships called "joint-stock companies," and that it could not sue or be sued in this country without legislative aid. This view of Mr. Justice Bradley is in accord with the view of this court, and we are not aware that the view taken by the Supreme Court of the United States has been followed in this commonwealth. The decisions which we have already cited show that a foreign joint-stock company is considered as an association or partnership, and not as a corporation.

An examination of the statutes further shows that the legislature has clearly recognized the distinction between the foreign corporations and associations; and that, where it has deemed it best that an act should apply to an association as well as to a corporation, it has said so in plain language. Thus, Stat. 1882, chap. 106, relating to the taxation of foreign mining, quarrying, and oil companies, and requiring the appointment of an agent here, upon whom process may be served, uses the language "every corporation, company, or association." Stat. 1887, chap. 214, in § 1, provides: "When consistent with the context, and not obviously used in a different sense, the term 'company' or 'insurance company,' as used herein, includes all corporations, associations, partnerships, or individuals engaged as principals in the business of insurance." The

language is the same in Stat. 1894, chap. 522, § 1. By Stat. 1888, chap. 429, § 11, "fraternal beneficiary corporations, associations, or societies," organized under the laws of another state, and then doing business here, were allowed to continue business without incorporating under the act. But by Stat. 1892, chap. 40, § 1, this was amended by striking out the words "associations or societies." Stat. 1884, chap. 330, requires "every corporation established under the laws of any other state or foreign country," and hereafter having a usual place of business here, before doing business, to appoint in writing the commissioner of corporations, or his successor in office, to be its true and lawful attorney, upon whom process might be served. Stat. 1888, chap. 321, allows "manufacturing corporations established under the laws of other states," which have complied with the provisions of Stat. 1884, chap. 330, to purchase and hold such real estate here as may be necessary for conducting their business. By Stat. 1895, chap. 311, "foreign corporations engaged in the business of selling or negotiating bonds, mortgages, notes, or other choses in action" are made subject to the provisions of Stat. 1884, chap. 330. Stat. 1896, chap. 391, contains a provision relating to the personal liability, under certain circumstances, of "the officers and members or stockholders in any corporation established under the laws of any other state or other country." See also Stat. 1895, chap. 157. Many other instances of legislation might be given where the distinction between a corporation proper and a mere association or organization is shown to be clearly in mind.

Unless the principal defendant can be considered a corporation, it cannot be sued here under the name which the laws of Pennsylvania authorize it to use. Such laws have no extraterritorial force or effect. The trustee, therefore, was properly discharged.

In the opinion of a majority of the court, *the order discharging the trustee and dismissing the action must be affirmed.*

MICHIGAN SUPREME COURT.

ROUSE, HAZARD, & COMPANY
v.
DETROIT CYCLE COMPANY, Limited, *et al., Plffs. in Err.*

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

1. **Subscriptions to the capital stock of a partnership association** may be paid by the giving of a promissory note, if the note is immediately converted into money and the proceeds applied for the benefit of the corporation.
2. **The jury must determine** whether or not the giving of notes in payment of subscriptions to the capital stock of a corporation was in good faith.
3. **A decree awarding a mandamus requiring a trial judge to take evidence** and award an execution for unpaid subscriptions to capital stock of a corporation as required by statute in a proceeding to which the stockholders are not parties is not *res judicata* upon the question of the right to enforce payment of the subscriptions so as to prevent the stockholders after being made parties to the proceeding from showing that a receiver has been appointed who is entitled to collect all the assets of the corporation.
4. **A proceeding under the statute for an execution for unpaid subscriptions** to corporate stock cannot be maintained after the appointment of a receiver for the purpose of collecting the assets of the corporation.

(December 24, 1896.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in a proceeding brought to hold the individual defendants liable as partners for a debt of the association. *Reversed.*

The facts are stated in the opinion.

Messrs. **Atkinson & Atkinson** and **Malcolm McGregor** for plaintiffs in error.

Mr. **Jonathan Palmer**, Jr., for plaintiff in error John T. Holmes:

A limited partnership association is organized as an artificial being distinct from its members, with an existence and individuality of its own. It exists only from recording the articles and is a creature of the legislature. It holds and conveys its property, sues and is sued as a distinct person. The members have no joint proprietary interests in the specific assets of the association, as have members of a limited partnership.

Bates, Limited Partnership, § 70, and cases cited.

Whether land or chattels, the member's interest is always personal estate (Acts 1885, p. 16, 3 How. Anno. Stat. § 2368) for all purposes, both at law and in equity, and is identical in nature with the interest of a member of any corporation, and it is "stock."

People, Bank of the Commonwealth, v. *Tax & A. Comrs.* 23 N. Y. 192; *Bailey* v. *New York C. & H. R. R. Co.* 89 U. S. 22 Wall. 637, 23 L. ed. 849; *Burrall* v. *Bushwick R. Co.* 75 N. Y. 211; *Barclay* v. *Culver*, 30 Hun, 1; *Be Klaus*, 67 Wis. 407; 1 Thomp. Corp. §§ 1070–1072; Cook, Stock & Stockholders, § 12.

A limited partnership association more closely resembles a corporation than it does a special or limited partnership. It is frequently compared to a corporation and has been held to be a corporation or quasi corporation. It is not a mere common-law partnership plus the attribute of limited liability.

Briar Hill Coal & I. Co. v. *Atlas Works*, 146

NOTE.—As to execution against a shareholder in a limited partnership association, see Rouse, H. & Co. v. Donovan (Mich.) 27 L. R. A. 577.

As to such associations in general, see Edwards v. Warren Linoline & Gasoline Works (Mass.) *ante*, 791, and other cases cited in *footnote*.

38 L. R. A.

See also 38 L. R. A. 791, 798; 39 L. R. A. 100.

Pa. 294; *Oak Ridge Coal Co.* v. *Rogers* 108 Pa. 147; *Billington* v. *Gautier Steel Co.* (Pa.) 8 Cent. Rep. 170.

The Constitution of our own state provides that the term "corporations," shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships.

Mich. Const. art. 15, § 11; *Fargo* v. *Louisville, N. A. & C. R. Co.* 6 Fed. Rep. 787; *Sandford* v. *New York Supers.* 15 How. Pr. 172; *Maltz* v. *American Exp. Co.* 1 Flipp. 611; *Gregg* v. *Sanford*, 28 U. S. App. 313, 65 Fed. Rep. 151, 12 C.C. A. 525; *State, Tide-Water Pipe Line Co.*, v. *Berry*, 52 N. J. L. 308; *Tide-Water Pipe Co.* v. *State Bd. of Assessors*, 57 N. J. L. 516, 27 L. R. A. 684.

A limited-partnership association is clothed with every essential attribute of a corporation at common law, and scarcely differs therefrom except in name. Its powers comprise the substance of the general powers of corporations under the laws of Pennsylvania and also under the laws of New Jersey (which is the source of our own statute), and it is invested by the laws under which it came into being with the essential characteristics of a corporation, and is included under the constitutional provision.

Gregg v. *Sanford*, 28 U. S. App. 313, 65 Fed. Rep. 151, 12 C.C.A. 526; *Tide-Water Pipe Co.* v. *State Bd. of Assessors*, 57 N. J. L. 516, 27 L. R. A. 684; *Billington* v. *Gautier Steel Co.* (Pa.) 8 Cent. Rep. 170; *Oak Ridge Coal Co.* v. *Rogers*, 108 Pa. 47; *Briar Hill Coal & I. Co.* v. *Atlas Works*, 146 Pa. 294; *Whitney* v. *Backus*, 149 Pa. 29; *State, Tide Water Pipe Line Co.*, v. *Berry*, 52 N. J. L. 308.

Express companies possessing all the rights, attributes, privileges, and immunities which usually belong to corporations may be treated by the courts of Ohio as corporations, although they are not designated as joint stock associations by the statute of the state in which they were organized.

State v. *Adams Exp. Co.* 2 Ohio N. P. 98; *People, Platt*, v. *Wemple*, 117 N. Y. 136, 6 L. R. A. 305.

Subscriptions to capital stock may be paid in promissory notes.

Goodrich v. *Reynolds*, 31 Ill. 490, 83 Am. Dec. 240; *Hardy* v. *Merriweather*, 14 Ind. 203; *Stoddard* v. *Shetucket Foundry Co.* 34 Conn. 542; *Ogdensburgh, C. & R. R. Co.* v. *Wooley*, 3 Abb. App. Dec. 398; *Magee* v. *Badger*, 30 Barb. 246; *Vermont C. R. Co.* v. *Clayes*, 21 Vt. 30; *Pacific Trust Co.* v. *Dorsey*, 72 Cal. 55; *Clark* v. *Farrington*, 11 Wis. 307; *Blunt* v. *Walker*, 11 Wis. 349, 78 Am. Dec. 709; *Cornell* v. *Hichens*, 11 Wis. 354; *Lyon* v. *Ewings*, 17 Wis. 62; *Andrews* v. *Hart*, 17 Wis. 298; *Western Bank* v. *Tallman*, 17 Wis. 531.

Where notes and mortgages have been given in payment for stock, the stock must be regarded as paid in, and the notes and mortgages given as for money loaned and invested by the company.

Union Cent. L. Ins. Co. v. *Curtis*, 35 Ohio St. 343.

A note given to a corporation in payment for stock is valid in the hands of a bona fide indorsee.

Magee v. *Badger*, 30 Barb. 246; *Willmarth* v. *Crawford*, 10 Wend. 341.

Good faith within the meaning of the statute, is understood to be the opposite of fraud and bad faith.

McConnel v. *Street*, 17 Ill. 254; *Woodward* v. *Blanchard*, 16 Ill. 432; *Thornton* v. *Bledsoe*, 46 Ala. 73.

The receiver having been appointed and having qualified the assets or whatever property the association had, vested in the receiver, and the whole of the association's property, real, personal, claims, and accounts became under the control of the court.

Prescott v. *Pfeiffer*, 57 Mich. 21; *Tide-Water Pipe Co.* v. *State Bd. of Assessors*, 57 N. J. L. 516, 27 L. R. A. 684.

Messrs. **Bowen, Douglas, & Whiting** for defendant in error.

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

Rouse, Hazard, & Co., the plaintiff in these proceedings, recovered a judgment upon November 3, 1894, for the sum of $1,761, damages and costs, in the Wayne circuit court, against the Detroit Cycle Company, Limited. Upon this judgment, execution was issued, and returned wholly unsatisfied, after being in the hands of the sheriff of Wayne county for more than twenty days. The Detroit Cycle Company, Limited, is a limited partnership association, organized and existing under chapter 79 of Howell's Annotated Statutes; and the respondents herein, Edwin B. Robinson, John A. Matheson, and John T. Holmes, were the original subscribing members thereof, and remained so during the whole course of the proceedings in this case. After the execution was returned unsatisfied, plaintiff applied to the Wayne circuit court, under the provisions of § 2366, 1 How. Anno. Stat., to have ascertained the amount of the subscriptions, respectively, of the respondents to the capital of the Detroit Cycle Company, Limited, not paid up, and for an order that execution issue against said respondents for the amounts so ascertained. The respondents successfully resisted this application in the circuit court, and thereupon the plaintiff applied to this court for a writ of mandamus to require the circuit judge "to compel the Detroit Cycle Company, Limited, and the respondents, to produce the books of the company, especially its subscription list book, showing the names of the members of the association, and the amount of capital remaining to be paid upon their respective subscriptions, and also to receive such other evidence as might be offered by the plaintiff and the members of the association concerning the amount of capital remaining to be paid upon the subscription of the respective members of the association, and, after ascertaining the truth in regard thereto, to forthwith order execution to issue against the said members for the amount of their unpaid subscriptions, if any there should be." The writ was granted after argument in this court, and the case is reported as *Rouse, H. & Co.* v. *Donovan*, 104 Mich. 234, 27 L. R. A. 577. On the filing of the respondents' answers to the plaintiff's bill of complaint, an issue was framed, and or-

dered tried before a jury. The issue was: "In what amount, if any, was the said John T. Holmes, John A. Matheson, and Edwin B. Robinson, and any or each of them, indebted to the said Detroit Cycle Company, Limited, on account of any unpaid subscriptions to the capital of the said company?" This issue was tried before the Honorable Robert E. Frazer, circuit judge, with a jury, on April 16, 1895; and, under the charge of the court, the jury found that each of the respondents was indebted to the Detroit Cycle Company, Limited, on account of unpaid subscriptions to the capital stock of the said company, in the sum of $1,833.33. Certain points of law were reserved by the court for argument after the verdict was rendered; and after an argument of these questions, in accordance with the statute (1 How. Anno. Stat. § 2366) and the mandate of this court, an execution was ordered on January 8, 1896, and issued against each of the respondents, for the amount of $1,833.33, or so much thereof as might be necessary to satisfy plaintiff's judgment, with costs. This order, and the proceedings upon which the same was based, respondents are now endeavoring to review in this court by writ of error.

The Detroit Cycle Company, Limited, filed its articles in the office of the register of deeds for Wayne county, Michigan, as a limited partnership association, under the provisions of chapter 79 of 1 Howell's Annotated Statutes, on November 1, 1892. The respondents were the original members of said association, and subscribed for equal subscriptions, amounting to the sum of $3,333.33 for each respondent. There was paid in by each member thereafter the sum of $1,500, in cash; and there remained still unpaid by each of said members up to about the 6th day of October, 1893, the sum of $1,833.33. On or about October 6, 1893, the association became financially embarrassed, owing the Gormully & Jeffery Manufacturing Company, of Chicago, between $14,000 and $16,000, and owing two local banks in Detroit about $6,000. The debts to the banks were in the form of notes made by the Detroit Cycle Company, Limited, and indorsed by all three of the respondents individually, and were further collaterally secured by an assignment of bicycle contracts. An arrangement was made between the Gormully & Jeffery Manufacturing Company and the respondents, whereby the Gormully & Jeffery Manufacturing Company were given a chattel mortgage on all the property of the Detroit Cycle Company, Limited; and at the same time there were assigned to the Gormully & Jeffery Manufacturing Company all the bicycle contracts, including those held by the banks as collateral security. At the same time, and as a part of the same arrangement, each of the respondents gave to the Detroit Cycle Company, Limited, his note for $1,833.33, given for the purpose, as each of the respondents testify, of paying up their subscriptions to the capital stock of the Detroit Cycle Company, Limited. These notes were immediately indorsed in the name of the Detroit Cycle Company, Limited, by the respondents, and turned over to the Gormully & Jeffery Manufacturing Company as a further security for the indebtedness of the Detroit Cycle Company, Limited, to it. Thereupon the Gormully & Jeffery Manufacturing Company advanced enough money to take up the notes of the Detroit Cycle Company, Limited, in the two local banks in Detroit; and, these notes having been taken up, the collateral security for the same was turned over by the banks to the Gormully & Jeffery Manufacturing Company. These notes were all payable in one year from the date they bore, namely, October 6, 1893, with 6 per cent interest, and were never paid by the respondents, and were never protested, though they are still outstanding. Immediately after the chattel mortgage was given to Gormully & Jeffery Manufacturing Company, the latter sent a man to Detroit to take charge of the business of the Detroit Cycle Company, Limited; and the Gormully & Jeffery Manufacturing Company sent on new goods, and respondents claim they expect to pay them, and conducted the business. No amendments of the original articles of association, and no schedule, as provided for in 1 How. Anno. Stat. § 2365, or any other paper except the original articles of association, were ever filed in the office of the register of deeds for Wayne county, Michigan. It also appeared that in the secretary's records of the minutes of the stockholders' and directors' meetings of the association running from October 14, 1892, to January 11, 1894, no record anywhere appeared authorizing or making a call for the unpaid subscriptions of the capital stock of the association, or authorizing the receipt of the respective members' notes therefor, although under date of October 6, 1893, there is a record of a meeting of the directors, and the authorization by them of the execution and delivery of a chattel mortgage to the Gormully & Jeffery Manufacturing Company. The absence of any record of the receipt of the members' notes was explained by the secretary, from the fact that he did not enter the minutes of all the meetings in his record, although one of the three members testified that he did not hear of any resolution to this effect, but that it was only agreed to between the members.

The defendants requested the court to charge the jury as follows: "It appearing from the undisputed evidence in this proceeding that the respondents gave their promissory notes to the company for the amount of their unpaid subscriptions, which notes were accepted by the company in payment thereof, and which notes are now in the hands of third parties, and the respondents are liable thereon, the verdict must be for the respondents." "It appearing from the undisputed evidence in this suit that the respondents gave their promissory notes for the amount of their unpaid subscriptions to the company, which notes were taken by the company, and the amount thereof realized in cash, and applied upon existing indebtedness of the company, the making of said notes and realization of the money upon them constituted a payment of said unpaid subscriptions, and the verdict must be for the respondents." If the foregoing are refused: "(6) If the jury believes that the notes in question were given in payment of the unpaid subscriptions, and were accepted by the company as such, and by

them transferred to third parties, who now hold them, and the respondents are liable thereon, then the verdict must be for the respondents. (7) If the jury believe that the notes in question were given for the purpose of paying up the unpaid subscriptions, and the same were taken, and cash realized upon them, which cash was applied in satisfaction of existing indebtedness of the company, so that the company received full benefit thereof, the giving of the notes and the application of the proceeds thereof constituted payment of the subscriptions, and the verdict must be for the respondents." The trial judge declined to give these requests. He entertained the view that the statute authorizing the formation of these limited copartnership associations is a special enactment, permitting such organizations with limited liability as to stockholders, and that all the necessary and essential requirements of the statute must be complied with. He held that this had not been done, and that whether the notes had been given and received for the purpose of paying the balance due on subscriptions was not important, and directed a verdict against the defendants.

It is the claim of the plaintiff that the law as applied to limited partnerships is to be applied to associations like the defendant, and that subscriptions to the capital cannot be paid by giving notes. On the part of the defendants it is claimed that the law as applicable to corporations should be applied to these associations, and that if defendants gave their notes to pay for the capital subscribed by them, and these notes were received by the defendant association as payment, and the proceeds of the notes were received by the association and applied to the payment of its debts, this would constitute a good payment of the capital subscribed, and would release the members from further liability.

Nearly all the questions involved in this proceeding are involved in the case of *Slater & A. Mfg. Co.* v. *Blake* (decided at the present term of court). (Mich.) *post*, 798. It will not be necessary to refer to the opinion in that case further than to say that, so far as the question of whether the law of limited partnerships applies to the defendant association or the law of corporations, the answer is that the case must be controlled by the law applicable to corporations.

We have no doubt that subscriptions to capital stock to corporations may be paid by the giving of promissory notes, especially if the notes are at once converted into money, and the proceeds applied for the benefit of the corporation. *Goodrich* v. *Reynolds*, 31 Ill. 490, 83 Am. Dec. 240; *Hardy* v. *Merriweather*, 14 Ind. 203; *Stoddard* v. *Shetucket Foundry Co.* 34 Conn. 542; *Magee* v. *Badger*, 30 Barb. 246; *Vermont C. R. Co.* v. *Clayes*, 21 Vt. 30; *Pacific Trust Co.* v. *Dorsey*, 72 Cal. 55; *Clark* v. *Farrington*, 11 Wis. 307; *Blunt* v. *Walker*, 11 Wis. 349, 78 Am. Dec. 709; *Lyon* v. *Ewings*, 17 Wis. 63; *Andrews* v. *Hart*, 17 Wis. 306; *Western Bank* v. *Tallman*, 17 Wis. 520. It is the claim of the plaintiff that the notes were not given in good faith, and for the purpose of paying up the unpaid portion of the capital. We think the good faith of the transaction was a question for the jury, and that they should have been instructed as requested by counsel for defendants in the sixth and seventh requests to charge.

The record discloses that upon the application of the plaintiff's attorneys, the circuit court, in chancery, had appointed a receiver for the defendant company, Joseph F. Noera, filing the creditor's bill. A judgment creditor's bill was also filed by William A. Hulbert *et al.* against the defendants. John A. Stanberry was appointed receiver in both cases, and claimed the assets of defendant company. Both chancery suits are still pending. The solicitors for the complainants, in their behalf, and in behalf of the receiver in both cases, in open court, waived all claim to any of the unpaid subscriptions to the capital stock of the defendant that were unpaid by Robinson, Matheson, and Holmes against the claims of the plaintiff. Objection was made to this offer, and the court replied that he had serious doubt of the power of the receiver to waive the claim, or of the court to grant the waiver, but expressed himself as being settled in relation to the other points in the case. Defendants also introduced in evidence an application for execution under the same statute as is invoked in this proceeding, against the same respondents, for the same unpaid subscriptions, upon a judgment recovered by the W. Bingham Company, plaintiffs, against the defendants, in the circuit court of the United States for the eastern district of Michigan. The defendants asked to have the following requests to charge given to the jury: "(1) A receiver of all the property and assets of the defendant company having been appointed prior to the judgment in this suit, and being now in office, the plaintiffs have no standing in this proceeding, and are not entitled to the order asked. (2) It appearing that, since judgment was rendered in this suit, a receiver has been appointed in another suit of all the property and assets of the defendant company, the plaintiffs have no standing in this suit, and are not entitled to the order asked. It appearing from the evidence in this case that an application similar to the one in the present case has been made against the respondents in the circuit court of the United States for the eastern district of Michigan, upon a judgment recovered against the Detroit Cycle Company, Limited, by the W. Bingham Company, the respondents are therefore liable to have execution issued against them in each case for the amount of their subscriptions remaining unpaid and to be subjected to a double liability not contemplated by the statute under which the defendant association is organized. This being so, the plaintiffs' remedy is in equity, where the rights of all parties can be protected, and not by an application for an execution, such as is now pending before the court." The court refused to give either of these requests. This is assigned as error. It is now urged by counsel for plaintiffs that defendants cannot avail themselves of any defense they may have to this action growing out of the appointment of receivers, for the reason that the receivers were appointed before these proceedings were begun, and before the mandamus case of *Rouse, H. & Co.* v. *Donovan*, 104 Mich. 234, 27 L. R. A. 577, was decided. It is their claim

that as the defense might then have been interposed, and was not, the matter must be treated as *res judicata*. An inspection of the *Case of Rouse, Hazard, & Co.* discloses that neither of the respondents, Holmes, Matheson, or Robinson were parties to that proceeding, or that they took any part in it, except to appear in the case before the circuit judge, and enter their protest against the circuit judge entertaining jurisdiction over them. There was nothing in the record to indicate that any receivers had been appointed, and we are not prepared to hold that the case is *res judicata*. The record as now made does disclose that, before this proceeding was brought, a receiver was appointed by the chancery side of the court; and he still holds his appointment. A receiver is an officer of the court. He is undoubtedly entitled to the assets of the defendant company if it has any. He is spoken of as the "hand of the court." High, Receivers, chap. 1. It would be a very anomalous position, indeed, if this proceeding can be maintained after a receiver has been appointed for the very purpose of collecting the assets of the defendant association to pay its creditors. Defendants' requests 1 and 2 should have been given.

Judgment is reversed, and no new trial ordered.

Long, Ch. J., and **Montgomery, J.**, did not sit. The other Justices concur.

STAVER & ABBOTT MANUFACTURING COMPANY, *Plff. in Err.*,

v.

Katherine A. BLAKE *et al.*

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

1. **Technical noncompliance with the statute in the formation of a partnership association.** and failure to comply with the statutory requirements in its subsequent management, will not render subsequent stockholders who had no knowledge of the defects and had no intent to become partners liable as such, in the absence of a statutory provision making them so, for goods furnished by one who dealt with the concern as a limited association.

2. **Omission in a single instance by the manager of a partnership association** of the word "limited" in dealing with a correspondent will not render the members of the association liable as partners in the absence of anything to show that any indebtedness, damage, or liability arose in consequence of that act.

(December 24, 1896.)

ERROR to the Circuit Court for Kent County to review a judgment in favor of defendants in an action brought to hold defendants individually liable for goods sold to a limited corporation of which they were members. *Affirmed*.

The facts are stated in the opinion.

Messrs. **Bundy & Travis**, with *Messrs.* **Wylie & Clapperton**, for plaintiff in error:

The joint-stock company is an association of persons for the purpose of business, having a capital stock divided into shares and governed by articles of association.

Cook, Stock & Stockholders, § 504; *Whipple* v. *Parker*, 29 Mich. 381.

It lies midway between a copartnership and a corporation. Like a copartnership it has no limited liability of its members for the debts of the company, and like a corporation it is not dissolved by a transfer of stock.

Cox v. *Bodfish*, 35 Me. 302.

The liability for indebtedness incurred for goods sold to a company of this character seeks out and attaches to the persons engaged in the enterprise, and that whether they intended to be individually liable or not.

Davidson v. *Holden*, 55 Conn. 112.

Exemption from individual liability is derived solely from statutory provisions.

The statutory privilege and immunity offered by the statute can only be secured by the strict fulfilment of the preliminary conditions.

The fund must be paid in money, and in the sole control of the general partner on the day of the special partnership is formed and before the certificate is filed.

Richardson v. *Hogg*, 38 Pa. 153; *Durant* v. *Abendroth*, 69 N. Y. 148, 25 Am. Rep. 158, 97 N. Y. 132; *Maginn* v. *Lawrence*, 13 Jones & S. 235; *Haggerty* v. *Foster*, 103 Mass. 17.

Payment in goods or property does not justify an affidavit of a cash payment.

Bement v. *Philadelphia Impact Brick Mach. Co.* 12 Phila. 494; *Van Ingen* v. *Whitman*, 62 N. Y. 513; *Argall* v. *Smith*, 3 Denio, 435.

The care taken by the statute to prevent parties from being misled by the use of the name, even of the special partner, or by his interference (§ 2343), illustrates the caution with which the common-law, personal liability is relieved.

Farnsworth v. *Boardman*, 131 Mass. 115; *Madison County Bank* v. *Gould*, 5 Hill, 309.

Blake subscribed for $19,800 of the $20,000 capital, of which it is certified that he has paid in $12,800 in cash, but nothing is said of how or when the remaining $7,000 is to be paid in. So, as to more than one third of the total capital, the written statement is defective on its face, and should be so ruled as a matter of law by the court.

Vanhorn v. *Corcoran*, 127 Pa. 255, 4 L. R. A. 386.

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

Maloney v. *Bruce*, 94 Pa. 249; *Eliot* v. *Himrod*, 108 Pa. 569; *Hill* v. *Stetler*, 127 Pa. 145; *Vanhorn* v. *Corcoran*, 127 Pa. 255, 4 L. R. A. 386; *Briar Hill Coal & I. Co.* v. *Atlas Works*, 146 Pa. 290.

The defendants at common law are primarily liable as individuals. The privilege and immunity they claim are a sweeping abrogation of the common law, and the invariable rule applied to all such cases in a strict one.

The question is simply, Have they complied with the statute? If so, they are entitled to its benefit, otherwise not.

NOTE.—As to the nature of limited partnership associations, see the preceding cases of Edwards v. Warren Linoline & Gasoline Works, *ante*, 791; and Rouse, H. & Co. v. Detroit Cycle Co. (Mich.) *ante*, 794, with *footnote* references thereto.

Davison v. *Holden*, 55 Conn. 103; *Vanhorn* v. *Corcoran*, 127 Pa. 268, 4 L. R. A. 386; *Merchants' & Mfrs. Bank* v. *Stone*, 38 Mich. 780; *People, Stewart*, v. *Young Men's Father Matthew & T. A. Benev. Soc. No. 1*, 41 Mich. 67.

A corporation cannot exist in this state, even *de facto*, in the absence of a law authorizing it.

Eaton v. *Walker*, 76 Mich. 579, 6 L. R. A. 102; *Taggart, Mason*, v. *Perkins*, 73 Mich. 303.

A partnership association under such a statute is not a corporation.

Chapman v. *Barney*, 129 U. S. 677, 32 L. ed. 800; *People, Winchester*, v. *Coleman*, 133 N. Y. 279, 16 L. R. A. 183; *Gregg* v. *Sandford*, 28 U. S. App. 313, 65 Fed. Rep. 151, 12 C. C. A. 526.

The estoppel has never been based solely on the fact of recognition by the plaintiff, but there must also have been recognition by the state.

Eaton v. *Walker*, 76 Mich. 590, 6 L. R. A. 102; *Eliot* v. *Himrod*, 108 Pa. 580; *Hill* v. *Stetler*, 127 Pa. 162.

Under the limited partnership acts it has uniformly been held that they must be strictly complied with in order to acquire their benefits.

Argall v. *Smith*, 3 Denio, 436; *Henkel* v. *Heyman*, 91 Ill. 101; *Re Merrill*, 12 Blatchf. 221; Endlich, Interpretation of Statutes, 486; Sutherland, Stat. Constr. § 458; Bates, Limited Partn. 56; *Holliday* v. *Union Bag & Paper Co.* 3 Colo. 342; *Vandike* v. *Rosskam*, 67 Pa. 330; *Van Ingen* v. *Whitman*, 62 N. Y. 513.

The payment of his capital by the special partner must be in actual cash; neither property nor bonds, securities, debts, or promises will suffice, except in states permitting property contribution.

Bates, Limited Partn. 60; *Haggerty* v. *Foster*, 103 Mass. 17; *Benedict* v. *Van Allen*, 17 U. C. Q. B. 234; *Pierce* v. *Bryant*, 5 Allen, 91; *Richardson* v. *Hogg*, 38 Pa. 153; *Haviland* v. *Chace*, 39 Barb. 283; *Re Allen*, 41 Minn. 430; *Andrews* v. *Schott*, 10 Pa. 55; *Gearing* v. *Carroll*, 151 Pa. 79; *Haslet* v. *Kent*, 160 Pa. 80.

These companies cannot be treated as corporations for the purpose of applying the doctrine of estoppel, in order to permit them to evade and ignore the statute with impunity.

Chapman v. *Barney*, 129 U. S. 677, 32 L. ed. 800; *People, Winchester*, v. *Coleman*, 133 N. Y. 279, 16 L. R. A. 183; *Gregg* v. *Sandford*, 28 U. S. App. 313, 65 Fed. Rep. 151, 12 C. C. A. 526.

Our Constitution contains a clause inserted for the express purpose of preventing just what defendants contend happened here.

Thomas v. *Collins*, 58 Mich. 64; *Bissell* v. *Durfee*, 58 Mich. 239.

Mr. **Vernon H. Smith**, *amicus curiæ*, on behalf of plaintiff in error:

There is no provision in the act to exempt anyone from the liability of a partner, unless the statute has been substantially complied with.

Bates, Limited Partn. 27-29; *Van Ingen* v. *Whitman*, 62 N. Y. 513; *Henkel* v. *Heyman*, 91 Ill. 96.

There must be strict compliance with the statute else the partners are personally liable as general partners.

Bates, Limited Partn. 30; Parsons, Partn. 532; *Richardson* v. *Hogg*, 38 Pa. 155; *Andrews* v. *Schott*, 10 Pa. 47; *Vandike* v. *Rosskam*, 67 Pa. 330; *Eliot* v. *Himrod*, 108 Pa. 569; *Gearing* v. *Carroll*, 151 Pa. 79; *Haslet* v. *Kent*, 160 Pa. 85; *Maloney* v. *Bruce*, 94 Pa. 249; *Keystone Boot & Shoe Co.* v. *Schoellkopf*, 11 W. N. C. 132; *Pears* v. *Barnes* (Pa.) 1 Cent. Rep. 569; *Hite Natural Gas Co.'s Appeal*, 118 Pa. 436.

Substantial compliance is held to be necessary by some courts, and the paying in of the capital is a vital element.

Smith v. *Argall*, 6 Hill, 479; *Argall* v. *Smith*, 3 Denio, 435; *Bowen* v. *Argall*, 24 Wend. 501; *Madison County Bank* v. *Gould*, 5 Hill, 311; *Van Ingen* v. *Whitman*, 62 N. Y. 513; *Holliday* v. *Union Bag & Paper Co.* 3 Colo. 342; *Henkel* v. *Heyman*, 91 Ill. 96; *Pfirmann* v. *Henkel*, 1 Ill. App. 145; *Bigelow* v. *Greyory*, 73 Ill. 197; *Haggerty* v. *Foster*, 103 Mass. 17; *Pierce* v. *Bryant*, 5 Allen, 91; *Locke* v. *Lewis*, 124 Mass. 19.

Such an association is a partnership with a limited liability, and not a corporation.

Bates, Limited Partn. 243; *Lennig* v. *Penn Morocco Co.* 16 W. N. C. 114.

The principles governing as to the personal liability of members are the same whether the organization is called a limited partnership or a partnership association, limited.

Hill v. *Stetler*, 127 Pa. 145; *Guillou* v. *Peterson*, 89 Pa. 163; *Hite Natural Gas Co.'s Appeal*, 118 Pa. 436; *Lennig* v. *Penn Morocco Co.* 16 W. N. C. 114.

The party invoking the estoppel must have been misled, and so acted that it would be unjust to seek to undo what has been done.

Doyle v. *Mizner*, 42 Mich. 237; *Welland Canal Co.* v. *Hathaway*, 8 Wend. 480, 24 Am. Dec. 51; *Methodist Episcopal Union Church* v. *Pickett*, 19 N. Y. 487; 1 Thomp. Corp. §§ 1506, 1507; *Hill* v. *Beach*, 12 N. J. Eq. 31; *Eaton* v. *Walker*, 76 Mich. 579, 6 L. R. A. 102.

The doctrine applicable to *de facto* corporations does not apply, because it appears that the attempt to organize was not bona fide.

Beach, Priv. Corp. § 163; *Durant* v. *Abendroth*, 69 N. Y. 148, 25 Am. Rep. 158.

Messrs. **FitzGerald & Barry**, *amici curiæ*, also on behalf of plaintiff in error:

These partnership associations are not in any sense corporations, and are not intended to be governed by the law relating to corporations.

Eaton v. *Walker*, 76 Mich. 579, 6 L. R. A. 102.

The original partners obtained no immunity from personal liability by their actions, and could not transmit any to their assignee, Mrs. Blake, and it is not pretended that any action was taken, tending to association, since her purchase.

Wherefore there is no immunity from the common-law liability, as general partners.

Rouse, H. & Co. v. *Donovan*, 104 Mich. 234, 27 L. R. A. 577; *Hite Natural Gas Co.'s Appeal*, 118 Pa. 436; *Hill* v. *Stetler*, 127 Pa. 145; *Gearing* v. *Carroll*, 151 Pa. 79; *Maloney* v. *Bruce*, 94 Pa. 249; *Haslet* v. *Kent*, 160 Pa. 85.

It is no answer to a suit against partners who have not complied with the statute to say that plaintiff has dealt with the defendants as a partnership association limited, as it is impossible to deal with them in any ordinary

mercantile transaction in any different manner in the one capacity than in the other.

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

Messrs. **Charles B. Blair and Fletcher & Wanty**, for defendants in error:

Assuming that irregularities are shown, and that the organization was not legally made; and also assuming that subsequent irregularities are shown in the way the company and its affairs were conducted,—the plaintiff cannot take advantage of them, nor hold the defendants liable personally as partners, whether the company be held to be a corporation or something else.

This result follows, not so much because it is against public policy (*Society Perun* v. *Cleveland*, 43 Ohio St. 492; *Swartwout* v. *Michigan Air Line R. Co.* 24 Mich. 393; *Pape* v. *Capitol Bank*, 20 Kan. 440, 27 Am. Rep. 183), to allow private persons in a collateral proceeding to question the existence or due organization of a corporation with which they have dealt (*Swartwout* v. *Michigan Air Line R. Co.* 24 Mich. 389; *Toledo & A. A. R. Co.* v. *Johnson*, 49 Mich. 148; *Grand Rapids* v. *Grand Rapids Hydraulic Co.* 66 Mich. 606); or one of the partnership associations (*Briar Hill Coal & I. Co.* v. *Atlas Works*, 146 Pa. 290); but rather because the plaintiff cannot "call in question the corporate existence of the company and charge against the individual members the precise obligation which was unequivocally accepted as a corporate one."

Merchants' & Mfrs. Bank v. *Stone*, 38 Mich. 779; *Gow* v. *Collin & P. Lumber Co.* (Mich.) 2 Det. L. N. 1007; *American Mirror & Glass-Beveling Co.* v. *Bulkley*, 107 Mich. 447; *Swartwout* v. *Michigan Air Line R. Co.* 24 Mich. 389; *Rouse, H. & Co.* v. *Donovan*, 104 Mich. 234, 27 L. R. A. 577; *Stokes* v. *Findlay*, 4 McCrary, 214; *Hawes* v. *Contra Costa Water Co.* ("*Hawes* v. *Oakland*"), 104 U. S. 453, 26 L. ed. 820; *Kleckner* v. *Turk*, 45 Neb. 176; *Second Nat. Bank* v. *Hall*, 35 Ohio St. 166; *Snider's Sons' Co.* v. *Troy*, 91 Ala. 232, 11 L. R. A. 515; *Baker* v. *Backus*, 32 Ill. 100.

Neither creditor nor members can go back of the basis upon which they mutually agreed to deal.

Casey v. *Galli*, 94 U. S. 673, 24 L. ed. 168; *Gartside Coal Co.* v. *Maxwell*, 22 Fed. Rep. 197; *Kleckner* v. *Turk*, 45 Neb. 176; *Laflin & R. Powder Co.* v. *Sinsheimer*, 46 Md. 320, 24 Am. Rep. 522; *Humphreys* v. *Mooney*, 5 Colo. 288; *Planters' & M. Bank* v. *Padgett*, 69 Ga. 159; *American Salt Co.* v. *Heidenheimer*, 80 Tex. 344; *Stout* v. *Zulick*, 48 N. J. L. 599; *Fay* v. *Noble*, 7 Cush. 188; *First Nat. Bank* v. *Almy*, 117 Mass. 476; *Whitney* v. *Wyman*, 101 U. S. 396, 25 L. ed. 1052; *Briar Hill Coal & I. Co.* v. *Atlas Works*, 146 Pa. 290; *Swartwout* v. *Michigan Air Line R. Co.* 24 Mich. 389; *Snider's Sons' Co.* v. *Troy*, 91 Ala. 232, 11 L. R. A. 515; 4 Thomp. Corp. §§ 5254, 5255, 5274, 5275.

Defendants are entirely innocent and occupy the position of bona fide purchasers for value, and "had no better opportunities of knowing the mode and manner of the organization of the corporation, or the worth of the leasehold interest, than any creditor had before he became a creditor."

Young v. *Erie Iron Co.* 65 Mich. 125.

There is no authority for holding these innocent defendants liable, and there is no reason to support such a proposition.

American Mirror & Glass-Beveling Co. v. *Bulkley*, 107 Mich. 447; *Young* v. *Erie Iron Co.* 65 Mich. 111; *American Salt Co.* v. *Heidenheimer*, 80 Tex. 345; *Stafford Nat. Bank* v. *Palmer*, 47 Conn. 443; *Cory* v. *Lee*, 93 Ala. 468; *Central City Sav. Bank* v. *Walker*, 66 N. Y. 424; *Stokes* v. *Findlay*, 4 McCrary, 213.

Partnership associations are corporations.

Thomas v. *Dakin*, 22 Wend. 9; *People, Bank of Watertown*, v. *Watertown Assessors*, 1 Hill, 620; *Sandford* v. *New York Supers.* 15 How. Pr. 172; *Fargo* v. *Louisville, N. A. & C. R. Co.* 6 Fed. Rep. 787; *Green* v. *Graves*, 1 Dougl. (Mich.) 354; *Brooks* v. *Hill*, 1 Mich. 124; *De Bow* v. *People*, 1 Denio, 15; *Niagara County Supers.* v. *People, McMaster*, 7 Hill, 512; *Gifford* v. *Livingston*, 2 Denio, 395; *People, Winchester*, v. *Coleman*, 24 N. Y. S. R. 970, 133 N. Y. 284, 16 L. R. A. 183; *Denton* v. *Jackson*, 2 Johns. Ch. 320; *Waterbury* v. *Merchants' Union Exp. Co.* 50 Barb. 157; *Liverpool & L. L. & F. Ins. Co.* v. *Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029; *Edgeworth* v. *Wood*, 58 N. J. L. 463; 1 Thomp. Corp. §§ 2–6.

Our Constitution is express upon the subject.

Art. 15, § 11; *Sandford* v. *New York Supers.* 15 How. Pr. 172; *Fargo*, v. *Louisville, N. A. & C. R. Co.* 6 Fed. Rep. 787; *Maltz* v. *American Exp. Co.* 1 Flipp. 611; *Gregg* v. *Sandford*, 28 U. S. App. 313, 65 Fed. Rep. 151, 12 C. C. A. 525; *State, Tide-Water Pipe Line Co.*, v. *Berry*, 52 N. J. L. 308; *Tide Water Pipe Co.* v. *State Bd. of Assessors*, 57 N. J. L. 516, 27 L. R. A. 684.

These associations are in form joint-stock companies.

Rouse, H. & Co. v. *Donovan*, 104 Mich. 234, 27 L. R. A. 577; *Globe Refining Co.'s Estate*, 151 Pa. 558; *Whitney* v. *Backus*, 149 Pa. 29.

Such an association has "powers" and privileges of corporations not enjoyed by individuals or partnerships.

Tide Water Pipe Co. v. *State Bd. of Assessors*, 57 N. J. L. 516, 27 L. R. A. 684; *Gregg* v. *Sandford*, 28 U. S. App. 313, 65 Fed. Rep. 151, 12 C. C. A. 525; *Billington* v. *Gautier Steel Co.* (Pa.) 8 Cent. Rep. 170; *Oak Ridge Coal Co.* v. *Rogers*, 108 Pa. 147; *Briar Hill Coal & I. Co.* v. *Atlas Works*, 146 Pa. 294; *Whitney* v. *Backus*, 149 Pa. 29; *State, Tide-Water Pipe Line Co.*, v. *Berry*, 52 N. J. L. 308.

The associates can do business as a distinct person and without any individual liability of the associates. That is the most distinctive attribute of corporations.

Terry v. *Little*, 101 U. S. 216, 25 L. ed. 864; *United States* v. *Stanford*, 161 U. S. 412, 40 L. ed. 751; *Thomas* v. *Dakin*, 22 Wend. 95; *Chase* v. *Lord*, 77 N. Y. 25; *Salt Lake City Nat. Bank* v. *Hendrickson*, 40 N. J. L. 52; *Gray* v. *Coffin*, 9 Cush. 199; *James* v. *Atlantic Delaine Co.* 11 Nat. Bankr. Reg. 393.

No status enabling associates to do this is known to the law except that of corporations.

People, Winchester, v. *Coleman*, 133 N. Y. 279, 16 L. R. A. 183.

The property of the association is not only held in its own name, but the general law of

descent and distribution does not apply, and the rules of succession are different from those applying to individuals and partnerships.

Thompson v. *Waters*, 25 Mich. 245, 12 Am. Rep. 243.

This is alone held to be sufficient to create a corporation by implication, since land cannot be so held by individuals, singly or collectively.

Dunn v. *University of Oregon*, 9 Or. 357; *Mahony* v. *Bank of State*, 4 Ark. 620.

These associations are joint-stock companies.

Rouse, H. & Co. v. *Donovan*, 104 Mich. 234, 26 L. R. A. 577, and cases *supra*.

So are any of our ordinary business and commercial corporations. Both are incorporated joint-stock companies, and the terms "corporation" and "incorporated joint-stock company" are convertible—they mean the same thing.

Lyon v. *Denison*, 80 Mich. 380; *Atty. Gen.* v. *Mercantile Marine Ins. Co.* 121 Mass. 524; *Liverpool & L. L. & F. Ins. Co.* v. *Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029; *Blanchard* v. *Kaull*, 44 Cal. 440; *Habicht* v. *Pemberton*, 4 Sandf. 657; *Stafford Nat. Bank* v. *Palmer*, 47 Conn. 443; *First Nat. Bank* v. *Goff*, 31 Wis. 77.

Express penalties exclude inference of others.

First Nat. Bank v. *Almy*, 117 Mass. 476; *Buck* v. *Alley*, 145 N. Y. 489; Bates, Limited Partn. §§ 35, 37; *Durant* v. *Abendroth*, 69 N. Y. 148, 25 Am. Rep. 158; *Pierce* v. *Bryant*, 5 Allen, 91; *Lancaster* v. *Choate*, 5 Allen, 530; *Haggerty* v. *Foster*, 103 Mass. 19.

The radical difference between a limited partnership and a partnership association is manifest.

People, Bank of the Commonwealth, v. *Taxes & A. Comrs.* 23 N. Y. 192; *Burrall* v. *Bushwick R. Co.* 75 N. Y. 211; *Barclay* v. *Culver*, 30 Hun, 1; *Re Klaus*, 67 Wis. 407; 1 Thomp. Corp. §§ 1070–1072; Cook, Stock & Stockholders, § 12.

Courts cannot attach limitations or provisions to an act because in other similar acts they have been incorporated.

State v. *Sparrow*, 89 Mich. 269; *Keeler* v. *Dawson*, 73 Mich. 601; *Bonnell* v. *Griswold*, 80 N. Y. 128.

Where an act prescribes penalties for failure to observe certain terms it is conclusively presumed that the intent was to exclude other penalties.

Bohn v. *Brown*, 33 Mich. 257; *Fritts* v. *Palmer*, 132 U. S. 289, 33 L. ed. 319; *United States* v. *Stanford*, 161 U. S. 412, 40 L. ed. 751; *Fay* v. *Noble*, 7 Cush. 188; *Humphreys* v. *Mooney*, 5 Colo. 282; *First Nat. Bank* v. *Almy*, 117 Mass. 476; *Whitney* v. *Wyman*, 101 U. S. 392, 25 L. ed. 1052; *James* v. *Atlantic Delaine Co.* 11 Nat. Bankr. Reg. 390; *Fourth Nat. Bank* v. *Francklyn*, 120 U. S. 747, 30 L. ed. 825; *Morley* v. *Thayer*, 3 Fed. Rep. 737.

When the statute is express that before organization the capital shall be paid in cash, this condition precedent is satisfied by a payment in good faith and at a fair value in property or services of the kind necessary in the company's business where such payment is accepted in good faith as the equivalent of money.

Liebke v. *Knapp*, 79 Mo. 22, 49 Am. Rep. 212; *State, Atty. Gen.*, v. *Wood*, 13 Mo. App. 139; *Brant* v. *Ehlen*, 59 Md. 1; *Coates's Case*, L. R. 17 Eq. 169; *Sprago's Case*, L. R. 8 Ch. 407; *Beach* v. *Smith*, 30 N. Y. 116; *Coit* v. *North Carolina Gold Amalgamating Min. Co.* 119 U. S. 343, 30 L. ed. 420; *Young* v. *Erie Iron Co.* 65 Mich. 111; *American Tube & I. Co.* v. *Baden Gas Co.* 165 Pa. 429.

The articles being fair on their face, the existence of the association cannot be questioned collaterally.

Palmer v. *Lawrence*, 3 Sandf. 161; *Buffalo & A. R. Co.* v. *Cary*, 26 N. Y. 75; *Laflin & R. Powder Co.* v. *Sinsheimer*, 46 Md. 315, 24 Am. Rep. 522; *McFarlan* v. *Triton Ins. Co.* 4 Denio, 392; *State, Atty. Gen.*, v. *Wood*, 13 Mo. App. 139; *Stout* v. *Zulick*, 48 N. J. L. 601; *Atty. Gen.*, *Pettee*, v. *Stevens*, 1 N. J. Eq. 378, 23 Am. Dec. 526.

Failure to hold annual meetings to elect officers yearly, the appointment as manager of persons, not members, failure to keep a subscription list,—none of these things can be visited with the highly penal result of holding defendants liable as partners.

Atlas Nat. Bank v. *F. B. Gardner Co.* 8 Biss. 537; *Cahill* v. *Kalamazoo Mut. Ins. Co.* 2 Dougl. (Mich.) 124; *Jhons* v. *People*, 25 Mich. 499; *Druse* v. *Wheeler*, 22 Mich. 444; *Wright* v. *Lee*, 2 S. D. 596.

If a creditor is made aware by direct notice, or by such facts as are the equivalent of notice, that by the actual contract between the parties, some one, or all, of the members of the firm or company have stipulated for an exemption from liability for its debts or some of them, then a creditor dealing with the firm or association is bound by that restriction as to liability, and he cannot hold such member or members to any personal liability.

Edgerly v. *Gardner*, 9 Neb. 130; *Jordan* v. *Wilkins* 3 Wash. C. C. 110; *Bailey* v. *Clark*, 6 Pick. 372; *Burritt* v. *Dickson*, 8 Cal. 113; *Coleman* v. *Bellhouse*, 9 U. C. C. P. 42; *Halbott* v. *Dowdall*, 18 Q. B. 1; *Robinson* v. *Bidwell*, 22 Cal. 379; *Dow* v. *Sayward*, 12 N. H. 275; *Kerridge* v. *Hesse*, 8 Car. & P. 200; *Ohio Life Ins. & T. Co.* v. *Merchants' Ins. & T. Co.* 11 Humph. 28, 53 Am. Dec. 742; *Re European Assur. Soc.* L. R. 1 Ch. Div. 307; *Pollock* v. *Williams*, 42 Miss. 92; *Saufley* v. *Howard*, 7 Dana, 368; *Ensign* v. *Wonds*, 1 Johns. Cas. 171.

Mr. **Otto Kirchner,** *amicus curiæ*, on behalf of defendants in error:

The act, by its terms, negatives any personal liability of the associates directly upon the contract.

Eaton v. *Walker*, 76 Mich. 585, 6 L. R. A. 102.

Members of a *de facto* partnership association, limited, are, by the 2d section of the act, exempted from liability for debts of the association beyond the amount of their subscription to the capital stock remaining unpaid.

Swartwout v. *Michigan Air Line R. Co.* 24 Mich. 389.

The act, in its relation to other acts, *in pari materia*, negatives any personal liability of the associates upon the contract.

Individual immunity from liability for the debts of the concern extends to the members or shareholders in a mere *de facto* corporation.

People, Hughes, v. *May*, 3 Mich. 598; *Galpin* v. *Abbott*, 6 Mich. 17; *People* v. *McKinney*,

10 Mich. 54; *Shannon* v. *People*, 5 Mich. 36; *People, Houghton*, v. *State Land Office Comr.* 23 Mich. 270; *Starkweather* v. *Martin*, 28 Mich. 471; *Reithmiller* v. *People*, 44 Mich. 280; *Simpkins* v. *Ward*, 45 Mich. 559; *Turnbull* v. *Prentiss Lumber Co.* 55 Mich. 387; *Merchants' & Mfrs. Bank* v. *Stone*, 38 Mich. 779; *American Mirror & Glass-Bereling Co.* v. *Bulkley*, 107 Mich. 447; *Gow* v. *Collings & P. Lumber Co.* (Mich.) 2 Det. L. N. 1007.

All persons contracting with the association as such are estopped from disputing its existence, in any matter arising out of the contract *Swartwout* v. *Michigan Air Line R. Co.* 24 Mich. 389; *Jhons* v. *People*, 25 Mich. 499; *Monroe* v. *Fort Wayne, J. & S. R. Co.* 28 Mich. 272; *Merchants' & Mfrs. Bank* v. *Stone*, 38 Mich. 799; *Methodist Episcopal Union Church* v. *Pickett*, 19 N. Y. 485; *Wilcox* v. *Toledo & A. A. R. Co.* 43 Mich. 590; *Stowell* v. *Stowell*, 45 Mich. 365; *Pontiac, O. & P. A. R. Co.* v. *King*, 68 Mich. 114; *Day* v. *Spiral Springs Buggy Co.* 57 Mich. 146, 58 Am. Rep. 563; *Eaton* v. *Walker*, 76 Mich. 579, 6 L. R. A. 102; *American Mirror & Glass Bereling Co.* v. *Bulkley*, 107 Mich. 447; *Gow* v. *Collins & P. Lumber Co.* (Mich.) 2 Det. L. N. 1007; *Casey* v. *Galli*, 94 U. S. 673, 24 L. ed. 168; *Dutchess Cotton Manufactory* v. *Davis*, 14 Johns. 238, 7 Am. Dec. 459; *Leonardsville Bank* v. *Willard*, 25 N. Y. 574; *Eaton* v. *Aspinwall*, 19 N. Y. 119; *Worcester Medical Inst.* v. *Harding*, 11 Cush. 285; *Dooley* v. *Wolcott*, 4 Allen, 406; *Steam Nav. Co.* v. *Weed*, 17 Barb. 378; *Congregational Soc.* v. *Perry*, 6 N. H. 164, 25 Am. Dec. 455; *Newburg Petroleum Co.* v. *Weare*, 27 Ohio St. 343; *Smith* v. *Sheeley*, 79 U. S. 12 Wall. 358, 20 L. ed. 430; *Frost* v. *Frostburg Coal Co.* 65 U. S. 24 How. 278, 16 L. ed. 637; *First Nat. Bank* v. *Almy*, 117 Mass. 476; *Fay* v. *Noble*, 7 Cush. 188; *Hawes* v. *Anglo-Saxon Petroleum Co.* 101 Mass. 385.

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

The defendants are the members and owners of the stock of the Grand Rapids Storage & Transfer Company, Limited, an association organized May 13, 1890, under chapter 79, How. Anno. Stat. The plaintiff is a manufacturing corporation of Chicago, Illinois. It sues for merchandise alleged to have been sold and delivered to the defendants. The declaration is upon the common counts. The bill of particulars is for merchandise sold, for which notes were given, "executed by the name of Grand Rapids Storage & Transfer Company, Limited," dated January, May, and October, 1895. No claim is made that these defendants made individual promises, upon the faith of which these goods were sold and delivered, or that they had ever expressly formed a partnership, or that they had ever held themselves out to plaintiff as copartners. The sole basis for the right of recovery against them is the failure of the original organizers to comply with the statute in organizing, and noncompliance with the statute in carrying on the business after it was organized. These defects are stated by the learned counsel to be as follows: (1) The articles did not state when and how $7,000 were to be paid. (2) They falsely stated that $13,000 in cash had been paid in, when, as a matter of fact, property instead of money had been paid in, without any schedule containing the names of the parties contributing, with a description and valuation of the property contributed. (3) No yearly or other meetings of the members of the association were held for five years. (4) No managers of the association were elected for upward of five years. (5) No subscription book was kept, as required by the statute. (6) The statute was not observed in the matter of contracting debts. (7) The statute was not observed in using the word "Limited" in connection with the associate name. The defendants contend (1) that the company was properly organized; (2) that the plaintiff was estopped to deny that the association was legally organized, and to assert partnership relations, because it dealt exclusively with the association, and not with its members as a partnership; (3) that partnership associations limited are corporations; (4) that the express penalties imposed by the statute for its violation exclude all others; (5) that these defendants are subsequent stockholders, are innocent purchasers, and therefore not liable for irregularities in the organization or its management.

1. The Original Organization. There is no evidence of any dishonesty or bad faith in the formation of this association. It was organized under the advice of eminent counsel, who drew the articles. On March 29, 1890, eight citizens of Grand Rapids signed an agreement to form an association to be known as the Grand Rapids Storage & Transfer Company, Limited. This agreement specified the amount each was to contribute, $12,800 were thus contributed, and, when the articles were formed, this was so stated therein. This money was invested in the purchase of property and the erection of a building for the business of the association. The capital stock was fixed at $20,000. $7,200 remained unpaid, and the articles did not specify when or how it should be paid. Technically, the $12,800 of capital was not paid in cash at the time of the execution of the articles. It was, however, paid in shortly before, and for the purpose of forming the association, and had been expended in the purchase of property for it, and to use in its business.

Subsequent Management. It is true that meetings were not held, and managers elected, and debts incurred, in strict compliance with the statute. The business was conducted in the name of the association, and without any fraudulent intent or acts.

2. The Provisions of the Law. This act was passed in 1887, and is entitled "An Act Authorizing the Formation of Partnership Associations, in Which the Capital Subscribed Shall Alone Be Responsible for the Debts of the Association, Except under Certain Circumstances." Section 1 declares that "the capital shall alone be liable for the debts of such association. . . . Contributions to the capital stock may be made in real or personal estate, at a valuation to be approved by all the members subscribing to the capital of such associations." It also requires a schedule containing the names of such contributors, and the description and valuation of the property so contributed Section 2 provides that the mem-

bers shall not be liable on any judgment, decree, or order which shall be obtained against such association, or for any debt or engagement of such company, otherwise than is provided by the act. This section further provides for proceedings in such cases, and makes the members liable for labor debts. It limits the liabilities of stockholders to the amount of their unpaid subscriptions, and requires a subscription list to be kept, which shall be open to inspection by creditors and members at all reasonable times. Section 6 prohibits division of profits to diminish or impair the capital of the association, and makes anyone consenting to such a divison liable to any persons interested or injured thereby, "to the amount of such division or impairment." Section 3 provides that "the omission of the word 'Limited' in the use of the name of the partnership association shall render each and every member of such partnership liable for any indebtedness, damage, or liability arising therefrom."

3. Plaintiff's action is based upon contract, not upon tort. It insists that the letter of the law, in the formation and conduct of the partnership association limited, has not been complied with, and therefore the law makes the defendants either partners or members of a joint-stock company at the common law, and therefore individually liable. Neither of these defendants was interested in this association at its organization. The husband of Mrs. Blake was one of the principal stockholders. She advanced to him the money which he originally paid in, and also the money with which he purchased, soon after the organization, most of the other stock. The stock was assigned to her as security. Subsequently, she discharged the liability of her husband, and took the stock, and now owns all but $200 worth, owned by the defendants Aldrich and Pantland. None of these were aware of any irregularity in the original organization or in its subsequent management. Plaintiff had for several years dealt with this association as such. Its correspondence was carried on with it. Its contracts were made with it. It had no belief that it was making any contract with these defendants, or that they were individually liable, for the correspondence and course of business refute any such conclusion. The very name of the association implied a warning to plaintiff that it was not dealing with the members or stockholders of this association in their individual capacity, but in their associate capacity, with their liability limited. It is presumed to know the law, and a reading of the statute would have shown it that the members of this association could only be held liable for the amount of stock subscribed. It therefore dealt with this association with full knowledge of the extent of the liability of its members. The liability fixed by statute is still open to it. If the managers or members of the association committed a fraud by which the plaintiff or any other creditor suffered damage, the law provides a remedy in tort, but not in contract. The law does not make contracts for parties. The law takes the contracts which have been made, and interprets them. The law does not permit A to deal and make contracts with B in one capacity, and then hold him liable in another. A partnership can only be held to exist *inter sese* when the parties have so agreed. When no such partnership in fact exists, but a party has held himself out as such to third persons, who have dealt with him upon the faith of that relation, the law estops him to assert the true relation in order to avoid liability. Under no other circumstances does the law hold one liable as a partner who is not in fact a partner. This court said, speaking through Justice Cooley in *Beecher* v. *Bush*, 45 Mich. 193, 40 Am. Rep. 455: "If parties intend no partnership the courts should give effect to their intent, unless somebody has been deceived by their acting or assuming to act as partners; and any such case must stand upon its peculiar facts, and upon special equities." See also *Webb* v. *Johnson*, 95 Mich. 330. We cite no other authorities, as the rule is elementary.

These defendants have never agreed to be partners, and have never held themselves out to plaintiff or to the world as such. By the purchase of stock, they became members of a body, organized under a law, which made its capital and assets alone liable for its debts. This is the legal entity—and it is immaterial what name you give it—with which plaintiff dealt, made contracts, and to which it gave credit. The statute contains not a sentence from which any individual or partnership liability can be inferred. Upon what principle of common sense, justice, or equity can it now be held that plaintiff, having trusted this entity, can recover its entire debt from one with whom it never contracted, and who never promised to pay? It is unnecessary to determine whether these associations are corporations under our Constitution, which provides that the term "corporations" "shall be construed to include all associations and joint stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships." Article 15, § 11. It is the established rule that those dealing with corporations are estopped to deny the lawful existence thereof, and cannot, therefore, hold the stockholders individually liable, unless such liability is imposed by the statute. This rule is based upon two grounds: (1) That it is against public policy to permit the existence of these corporations to be attacked collaterally in suits between them and others. It is reserved for the state alone to question their legal existence through its law department. (2) Because parties have dealt with it as a corporation, and not upon the faith of the individual liability of its stockholders. We see no reason why the doctrine of estoppel should not be applied in the one case as well as in the other. There is no difference in principle between the two. Each is a legal entity, whose sole warrant for existence is found in, and whose powers and liabilities are fixed by, statute. The doctrine of estoppel in this case need not, however, be based upon the determination of the question as to whether the Grand Rapids Storage & Transfer Company, Limited, was a corporation. If these defendants, in the absence of any statute, had associated themselves together upon the same terms as those provided by this statute, had limited their liability in the same manner and for the same amount, had furnished plaintiff with a copy of that agreement, and it had sold them goods,

the law would not permit him to recover against them, either as individuals or as partners. It had dealt with them and trusted them upon the strength of their limited liability. It had agreed to look to this alone, and the law will hold it to its undertaking. This rule is founded in good morals, as well as good law. The policy of the law for partnership associations, limited, is to relax the common-law rule, to permit parties to limit their liability, and exempt themselves from a liability which may be ruinous. Whether the policy is wise or unwise is a question for the legislature, and not for the courts.

The injustice in sustaining the plaintiff's contention is manifest. The law, as construed by counsel for plaintiff, says to A who does not wish to actively engage in business, and be held responsible for its management: "You may invest $1,000 in the stock of one of these associations; and, although the law limits your liability to the amount of capital subscribed, still if there has been any defect, however innocently made, in the original articles of association, or in its subsequent management, you can be held liable for all the debts of the association." Such a rule is not founded in justice, common sense, sound logic, or good morals. Even in construing the statutes for the formation of limited partnership, no such harsh rule is always applied. *Buck* v. *Alley*, 145 N. Y. 488, 496. The law of Michigan prohibited a corporation from doing any business before filing its articles of association. A corporation was formed under this law, but, before it had completed its organization by filing its articles, its prudential committee purchased goods. Suit was brought against this committee, who were directors, based upon the personal liability of the members. The court, in deciding the case, said: "It seems to us entirely clear that both parties understood and meant that the contract was to be, and in fact was, with the corporation, and not with the defendants individually. The agreement thus made could not be afterwards changed by either of the parties without the consent of the other. *Utley* v. *Donaldson*, 94 U. S. 29, 24 L. ed. 54. . . . The corporation having assumed by entering into the contract with the plaintiff to have the requisite power, both parties are estopped to deny it." *Whitney* v. *Wyman*, 101 U. S. 392, 396, 25 L. ed. 1050, 1052. See also *American Mirror & Glass Beveling Co.* v. *Bulkley*, 107 Mich. 447.

We are aware that this decision is not in harmony with the decisions of the supreme court of Pennsylvania, but in so far as those decisions adopt the rigorous rule that the members of these associations are liable as partners because of some irregularity or defect in their organization or management, and thereby read into the statute a penalty which it does not impose, but which, by a fair construction of the statute, is excluded, we cannot follow them.

Other interesting and important questions are raised and ably discussed by counsel, but, inasmuch as the entire controversy is disposed of by the above opinion, we refrain from discussing them.

In one instance, in dealing with the plaintiff, the manager of this association omitted the word "Limited." No testimony was introduced on the part of plaintiff to show that any "indebtedness, damage, or liability" arose to it in consequence of this single act, and therefore no right of action from this cause was shown to exist.

The judgment is affirmed.

Montgomery, J., did not sit. The other Justices concur.

CONNECTICUT SUPREME COURT OF ERRORS.

GUARANTEE TRUST & SAFE DEPOSIT COMPANY

v.

PHILADELPHIA, READING, & NEW ENGLAND RAILROAD COMPANY. James K. O. SHERWOOD, Receiver, etc., *Appt.*

(69 Conn. 709.)

1. An appeal may be taken from an order directing a receiver to restore a schedule of wages to employees, although it is in the nature of a mere administrative direction which ordinarily lies within the discretion of the court, if the question of the power of the court to appropriate the funds in his hands for the purposes covered by the order is distinctly raised and decided.

2. The jurisdiction of a state court which has appointed a railroad receiver to direct him as to the wages to be paid for operating the road within the state is not defeated by the fact that the employees in operating the road crossed the state boundary and incidentally performed some services in another state, although the receivership is ancillary to a receivership in such other state.

(November 3, 1897.)

APPEAL by the receiver of the Philadelphia, Reading, & New England Railroad Company from an order of the Superior Court for Hartford County directing him to restore the schedule of wages for operatives which had been in operation on the road and which he had changed to the detriment of the employees. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Arthur L. Shipman** and **Charles E. Gross** for appellant.

NOTE.—For rights of receiver as to property outside the state in which he is appointed, see generally Gilman v. Hudson River Boot & Shoe Mfg. Co. (Wis.) 23 L. R. A. 52.

Messrs. **Buck & Eggleston,** for petitioners:

The statute of 1897, chapter 194, does not permit questions arising after final judgment has been rendered to be taken to this court for review.

In the case of corporations formed by the concurrent action of two states, or of consolidated lines operated by the same corporation in two states, it is held that a receiver appointed by the courts of one state may exercise jurisdiction over the property in both states; and the courts of the other state will yield all necessary aid to give and maintain the receiver's possession of the property.

3 Wood, Railway Law, p. 1655, § 481; *Northern Indiana R. Co.* v. *Michigan C. R. Co.* 56 U. S. 15 How. 233, 14 L. ed. 674.

But the fact that the property over which a receiver is sought is located partly in one state and partly in another, as in the case of a railway corporation whose line extends through two different states, the company being incorporated in both, will not prevent the courts of one of the states from appointing a receiver to take charge of the railway in a case otherwise appropriate for the relief.

High, Receivers, 2d ed. p. 40, § 44.

Property controlled need not be within the jurisdiction. Nor is the right to confer such authority to be questioned upon any theory that the receiver's power is limited to property found within the state where he is appointed; for it is not necessary that the property should be within the jurisdiction of the court.

20 Am. & Eng. Enc. Law, p. 66; *Merchants' Nat. Bank* v. *McLeod*, 33 Ohio St. 184.

The acts of the receiver in carrying out this proposed order within the state of New York would not be interfered with or disturbed by reason of the laws which, for a better name, has been termed "comity between statutes."

High, Receivers, 2d ed. p. 42, § 47.

In the following cases, wages of railroad employees have been required to be paid by receivers for services rendered both inside and outside of the jurisdictional lines of the courts making the decisions:

Ames v. *Union P. R. Co.* 62 Fed. Rep. 7, 4 Inters. Com. Rep. 619; *Waterhouse* v. *Comer*, 55 Fed. Rep. 149, 19 L. R. A. 403; *Thomas* v. *Cincinnati, N. O. & T. P. R. Co.* 62 Fed. Rep. 17; *Continental Trust Co.* v. *Toledo, St. L. & K. C. R. Co.* 59 Fed. Rep. 514; *Frank* v. *Denver & R. G. R. Co.* 23 Fed. Rep. 757; *United States Trust Co.* v. *Omaha & St. L. R. Co.* 63 Fed. Rep. 737; *Chattanooga Terminal R. Co.* v. *Felton*, 69 Fed. Rep. 273; *Farmers' Loan & T. Co.* v. *Northern P. R. Co.* 69 Fed. Rep. 871; *Northern Indiana R. Co.* v. *Michigan C. R. Co.* 56 U. S. 15 How. 233, 14 L. ed. 674.

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

This is an appeal by the receiver from an order of court directing him to restore the schedule of wages existing at the time of his appointment in respect to persons employed by him in operating the railroad in charge of the court. The order was made in response to a petition by Silas N. Smith and others, being the employees whose wages were reduced by the receiver; and the court ordered that the petitioners be made parties to the record for the purposes of the petition. Smith and others have filed in this court a plea in abatement, which we must consider before disposing of the appeal.

A question might have been raised as to the standing of these petitioners in this court. The superior court has the power to direct a receiver in respect to the wages to be paid in the management of a property under its charge. But it is a power to be exercised only in clear cases of necessity, and with exceeding caution. A main purpose of appointing a receiver is to remit to him those details of management which cannot well be administered by the court. Where plainly necessary, the power may be exercised either by an order establishing a schedule of wages or by the appointment of a receiver in whose discretion the court can place greater confidence. The court may act on the application of a receiver, or without any application. The situation may be such as to justify the employees of the receiver in bringing the subject to the attention of the court by an appropriate petition, and, if an investigation is deemed requisite, they may properly be heard. But that such petition and hearing, in a case like this, where no execution of an existing contract is sought to be enforced, but simply a direction as to the terms of future contracts, can make the proceeding an adversary one, in the legal sense, so that the petitioners are parties to the original action for the purpose of an adjudication, is by no means clear. Some decisions in Federal circuit courts seem to support the theory of a power in the court to determine upon complaint, pleadings, and trial, as in a judicial proceeding, all grievances suffered by the employees of a railroad receiver in the operation of a road. *Continental Trust Co.* v. *Toledo, St. L. & K. C. R. Co.* 59 Fed. Rep. 514, 517; *Thomas* v. *Cincinnati, N. O. & T. P. R. Co.* 62 Fed. Rep. 17, 18, and cases there cited. If these decisions go farther than a recognition of the admitted power of a court to adjudicate and enforce contracts its officer has made, and to direct his conduct as to the terms of those he shall make, they would seem to involve a power in court over all persons who may be employed by the receiver inconsistent with that individual freedom of action and contract deemed essential in all other relations. We express no opinion on this question. Although apparently involved, it has not been raised by the parties. In view of the final conclusion reached, it is of no practical importance in this case, and, under the special circumstances, may properly be treated as waived. Assuming, then, that the petitioners are entitled to appear as parties and file the plea in abatement, it follows that, for the purpose of disposing of this plea, the order appealed from must be regarded as a final adjudication of the rights of parties involved in a judicial proceeding of an adversary nature.

In the course of an action on the equity side of the court in which a receiver is appointed, it is often necessary for the court to make an order which constitutes an adjudication by a judicial finding, separable from the main ac-

tion, affecting in some instances persons who are parties to the action only for the purposes of that proceeding, and which cannot be reviewed unless by an appeal from that order. Orders of such a character, which are in fact a final adjudication of the rights involved, may generally be reviewed by an appellate court. The reasons for the rule are well stated in *Blossom* v. *Milwaukee & C. R. Co.* 68 U. S. 1 Wall. 655, 17 L. ed. 673. Under our statute, when a party to such a final order thinks himself aggrieved by the decision of the court on any question of law arising in the trial, he may appeal and remove the question for review in this court. We have heretofore acted on this construction of the statute, and do not doubt its correctness. *Leonard* v. *Charter Oak L. Ins. Co.* 65 Conn. 529. Even in actions on the law side of the court, a "final judgment," within the meaning of our statute of appeal, may include a judgment in its nature final and separable from any other judgment that may be rendered in the action, although not finally disposing of the action. *Bunnell* v. *Berlin Iron Bridge Co.* 66 Conn. 24, 37. But it is claimed that the order in question is not final as to its subject matter; that it is a mere administrative direction, lying in the discretion of the court, and open to modification at any time. There may be orders of this nature which are not appealable, but without discussing the limits of that discretion which the court has in making a merely administrative order, we think in this case the receiver was entitled to appeal, because the question of jurisdiction, involving the power of the court to appropriate the funds of the estate for the purposes covered by the order, was distinctly raised and decided. The order thus becomes a final judgment in the case, determining the power of the court in the application of funds, and directly affecting the interest of parties to the main action. An appeal from a void order affecting the rights of owners and creditors who are represented by the receiver may be permitted under the general rules of chancery practice, and by the broad language of our statute in respect to receivers (Gen. Stat. §§ 1522, 1942). It is difficult to see how the receiver personally can be aggrieved by the present order; but we cannot say that, as representative of the defendant corporation and creditors, he may not be aggrieved, until the question of law involved is decided. The right of appeal does not depend upon an actual grievance, but on a belief that the decision of a question of law, which, if erroneous, may constitute a grievance, is erroneous. Possibly the insignificance of any effect the present order can have upon interests represented by the receiver might be pressed as sufficient ground for holding that in fact the appeal was taken by him personally, and not in any representative capacity. We think, however, the plea in abatement should be overruled.

The order appealed from relates solely to the wages of engineers and firemen employed by the receiver in running the engines used in operating the road in this state, under the direction of the superior court. Is the order, upon the facts appearing in the record, within the jurisdiction of that court? This is the only question of law presented by the appeal. The material facts appearing in the record and found by the court below are as follows: The defendant corporation owned a railroad within the state of New York. It also was lessee of other railroads, including that belonging to the Hartford & Connecticut Western Railroad Company, a corporation incorporated under the laws of this state. The road belonging to the last-named corporation extends from Hartford, in this state, to Rhinecliff, in the state of New York, and constitutes the principal part of the railroad system of the defendant. The other roads owned and controlled by the defendant were operated in connection with the Hartford & Connecticut Western. On August 13, 1893, the supreme court of the state of New York, second judicial department, appointed Mr. James K. O. Sherwood receiver of the property and effects of the present defendant, upon application of the present plaintiff; and Mr. Sherwood has since operated some portion of the railroads owned and controlled by the defendant under the orders of said court. The parties to the action and the nature of the action in which the appointment was made and the terms of the order making the appointment do not appear. On October 28, 1893, Mr. Sherwood was appointed by the superior court for Hartford county receiver of the defendant corporation in the state of Connecticut. The nature of the action in which this appointment was made does not appear. On November 7, 1893, Mr. Sherwood, by virtue of the order of the superior court, took control of the defendant corporation and its leased lines in the state of Connecticut, and is still managing and operating said railroads and said leased lines subject to the orders and direction of said court. The record is not clear as to the portions of the railroad operated under the controlling direction of the New York and Connecticut courts, respectively; but it must be taken as a fact found that the Hartford & Connecticut Western Railroad, in this state, has, since November 7, 1893, been operated by Mr. Sherwood, as receiver appointed by the superior court, in accordance with the directions of that court. Upon taking possession of the Connecticut road and property of every description belonging to the defendant, and having a situs in Connecticut, Mr. Sherwood found a schedule of wages existing in respect to the engineers and firemen employed in running the engines used in operating the road, and this schedule he followed until May 1, 1897, when (as appears by necessary implication), without any direction of the superior court or of the New York court, he altered the schedule, by reducing the amounts paid for each day's work. Upon this state of facts, the superior court passed the order in question, restoring the rates of pay, and directing Mr. Sherwood, as receiver of the defendant corporation, under appointment of the court, to pay the engineers and firemen in his employ, as such receiver, the same wages they had received previous to the reduction on May 1. It appears that, in operating the Connecticut road, some of its engines are run from places in this state to places in New York state, by the engineers and firemen employed by the Connecticut receiver, and to that extent the services rendered to the receiver in pursuance of that employ-

ment are actually performed within the territorial limits of New York; and it is on this ground, and on this ground alone, that it is claimed the order is void for want of jurisdiction.

It seems very plain that if the receiver, in operating the road, finds it necessary to send his employees into another state, he may do so, and the fact that he does so does not affect the jurisdiction of the court to direct them as to their wages. And it is equally clear that a receiver appointed in one state may be directed by the court of that state in respect to such matters in the operation of the road as must, for the interest of all concerned, follow one rule, although a portion of the line affected by the direction is situate in another state, in which he has also been appointed receiver of the same road. It is true that no court can enforce its orders beyond the territorial limits of its jurisdiction; but it is also true that, by a rule of comity, based in part upon paramount necessity, the authority of receivers appointed in one state will be recognized in many ways by the courts of another state within whose jurisdiction it may be exercised (*Blake Crusher Co.* v. *New Haven*, 46 Conn. 473; *Cooke* v. *Orange*, 48 Conn. 409); and that, ordinarily, a railroad receiver acting under appointment in different states in respect to the same property may be directed by the court of one state in respect to the management of the railroad under the charge of that court; and, if such direction affect portions of the line in other states where he is receiver, the courts of those states, where unity of action is essential to the best interests of all concerned, will refrain from any action interfering with the direction, or will aid its execution by an independent order. In such cases an order of court cannot be held void for want of jurisdiction, because the court may rely for its full enforcement upon an application of this rule of comity by the courts of another state. It appearing, therefore, as it clearly does by the record in this case, that the superior court is the court charged with the direct operation of the Hartford & Connecticut Western road in this state, which is the main part of the defendant's railroad system; that it is the proper court to direct the receiver in respect to the wages of the engineers and firemen employed in the operation of that road; that it is for the interest of all concerned that the employment of these engineers and firemen should include their services in running engines over those portions of the line in New York essential to the beneficial operation of the road by the court,—it follows that the superior court might properly rely upon such application of the rule of comity by the New York court as would aid, and not obstruct, the full effect of the order.

The receiver alleged that any changes in the wages by the superior court would conflict with the business of the road within the jurisdiction of the New York court. This allegation was in issue, and by its judgment the court has found the allegation untrue. The finding may be justified by the facts in the record. Mr. Sherwood was appointed receiver by both courts for the very purpose of preventing such conflict. For four years the receiver has operated the road without such conflict, under the very schedule the court now orders him to restore. Possibly some conflict might arise through the disobedience of the receiver or the failure of a court to apply the rules of comity, but these are contingencies not to be considered in framing the order. Assuming, as we must, upon this record (for it is found by the court, and admitted by all the parties), that the superior court was the proper court to make an order regulating the wages of those employed by the receiver in running the engines used in operating the Connecticut road, there was no error in making the order appealed from.

Our only doubt has been whether the court and all the parties before us have not erred in so conducting the proceedings as to make this assumption imperative; *i. e.*, whether a full examination of all relevant facts might not show that the proper course was to seek the direction of the New York court in respect to the whole matter. That is the court of initial proceeding. The order appointing the receiver in Connecticut recites that he is appointed as ancillary to the receiver in New York, and without such recital, unless it otherwise distinctly appeared, he would, ordinarily, by force of the rule of comity, act as ancillary receiver. In matters of management in respect to a property impracticable or difficult to be managed otherwise than as a whole, the direction of the court of initial proceeding, establishing rules which of necessity must apply to the whole property, will ordinarily be followed by the courts appointing the same receiver in other states. But while the court in New York, as the court of initial proceeding, is presumptively the proper court to direct as to the wages of employees, whose services are rendered as a whole in both states, nevertheless it is possible that the interests of the property may require, and the nature of the proceedings in both courts justify, the direction of the Connecticut court as to the wages of these employees, and such is the condition shown by this record. If the record omits to present facts essential to the case of the appellant, this court can simply affirm the judgment. *Schlesinger* v. *Chapman*, 52 Conn. 271; *Rogers* v. *Rogers*, 53 Conn. 121, 150, 55 Am. Rep. 78.

As the record shows the primary and independent regulation of the wages of the engineers and firemen employed by the receiver in running the engines used in operating the Connecticut road is lawfully in the superior court, and it being evident that the services rendered in the course of their employment within the territorial limits of New York are a necessary incident to the principal employment, and that the treatment of the employment as a whole is essential to the beneficial operation of the road, the same rule of comity which would require the superior court to aid in enforcing the directions of the court of initial proceeding in respect to matters essential to its management of the property as a whole would require that court to recognize as binding on the receiver within its jurisdiction this order made in the administration of that portion of the management committed to the control of the superior court. The rules of comity may not be departed from unless, in

certain cases, for the purpose of necessary protection of our own citizens, or of enforcing some paramount rule of public policy. Such considerations do not enter into the present case, and the limitations of an order passed for that purpose need not be discussed. Upon the facts appearing in the record, the order passed by the superior court is not void for want of jurisdiction, and must be obeyed. The plea in abatement is overruled.

There is no error in the order complained of.

The other Judges concur.

KENTUCKY COURT OF APPEALS.

George W. DALE *et al.*, *Appts.*,
v.
COMMONWEALTH of Kentucky.

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

The pardon of an accused whose bail bond has been forfeited for a departure from court contrary to the conditions of the bond does not affect the forfeiture.

(September 24, 1897.)

APPEAL by defendants from a judgment of the Circuit Court for Lewis County holding them liable on a forfeited bail bond. *Affirmed.*

The facts are stated in the opinion.

Messrs. **George N. Thomas** and **W. B. Pugh**, for appellants:

The pardon relates back to the offense itself, and terminates all proceedings uncompleted, and relieves from the effects of any proceedings completed that will tend to punish the accused for his offense in any manner direct or collateral.

The undertaking for which these appellants are sought to be amerced was and is one without the tinge or shadow of a consideration saving such as the law implies in such cases. Now, if there is no vested right in any person to any portion of the proceeds of a forfeiture here, what good reason can be advanced, legal, equitable, or moral, for insisting that notwithstanding the executive pardon and its pretty extensive effect, the innocent sureties should be required to contribute out of their property to the personal wealth of the various officers who might be entitled to share in a distribution of the proceeds of this forfeited bond upon a final judgment.

Com. v. *Spraggins*, 18 B. Mon. 514.

If a man be deprived or convicted or otherwise punished for an offense during a session of parliament, and at the same session an act pass which pardons the offense, it seem agreed that the conviction or deprivation, etc., are *ipso facto* avoided.

5 Bacon, Abr. 296, tit. *Pardon;* 1 Co. Litt. 126 B; *Com.* v. *Bush*, 2 Duv. 265; 1 Bishop, Crim. L. § 916; *King* v. *Greenvelt*, 12 Mod. 119; *Strickland* v. *Thorpe*, Yelv. 126; *Re Deming*, 10 Johns. 232; *Diehl* v. *Rodgers*, 169 Pa. 316.

On petition for rehearing.

Nothing can make a covenant several which is by its express terms made joint, and where the language of the covenant is ambiguous the interest of the parties will determine.

Parsons, Contr. pp. 12–15, notes.

A bond authorizedly entered into by principal and sureties is joint, and the liability thereon is joint, and consequently a remission in favor of one would operate in favor of all.

Ex parte Garland, 71 U. S. 4 Wall. 333, 18 L. ed. 366.

These sureties were deprived by the pardon of doing what they might otherwise have done; under § 98 of the Criminal Code they might have rearrested the accused, or he might have surrendered himself for sentence.

There was no way in which they could apply for the judicial remission, for arrest or surrender has been held essential to its exercise.

Little v. *Com.* 3 Bush, 22.

Mr. **W. S. Taylor** for appellee.

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

Azariah Dale was indicted by the grand jury of Lewis county for a felony, and, being permitted to give bail in the sum of $200 for his appearance to answer said charge in the Lewis circuit court, the appellants, Dale and Pollitt, became his sureties, with the usual covenants and conditions for the appearance of said Azariah Dale in the circuit court to answer said charge. At the September term, 1896, the case was called for trial, and a jury impaneled and sworn, and thereupon appellants appeared, and consented to remain bound on the bond during trial; and about the time the case was concluded the said accused, Azariah Dale, departed from the court. Whereupon the said Azariah Dale was solemnly called, and, failing to answer, an order was made forfeiting his bail bond, and summons awarded against appellants as his sureties, which was duly issued and executed, and at the next term of the Lewis circuit court judgment was rendered on said bond for the sum of $200, the amount of the bond; and from that judgment this appeal is prosecuted, and a reversal is asked. The name of the accused, Azariah Dale, is not signed to the bail bond, nor does he in that bond undertake to do anything, but

NOTE.—As to the effect of a pardon on fines, forfeiture, or costs, see Fischel v. Mills (Ark.) 15 L. R. A. 35, and *note*.

the sole undertaking is by appellants. The forfeiture of the bail bond was taken September 9, 1896; and on the 18th day of the same month the acting governor issued and delivered to the said Azariah Dale, accused, a full and complete pardon for said offense, and restoring him to all privileges of citizenship. This pardon the appellants, Dale and Pollitt, pleaded and relied on as a bar to any recovery on said bail bond by reason of any order forfeiting same. This plea the circuit court adjudged bad on demurrer, and, appellants failing to plead further, judgment was rendered.

The question of the extent and effect to be given to a pardon issued by the governor to an accused, as it affects a forfeited bail bond or recognizance, has never been before this court, and able counsel has not been able to furnish us with any direct authority in this state. This question, however, was before the supreme court of Kansas in the case of *Weatherwax* v. *State*, 17 Kan. 428. In that case the sureties had pleaded as a defense to a recovery on the forfeited bail bond of the accused a full pardon issued by the governor of the state of Kansas. The court says: "Nor can we see how a pardon could reach a matter wholly independent of the criminal offense charged, or of the punishment therefor. Even if the defendant had been acquitted on the criminal charge, still this action on the forfeited recognizance might be maintained." In the case of *State* v. *Davidson*, 20 Mo. 212, 61 Am. Dec. 603, cited in 3 Am. & Eng. Enc. Law, p. 716, the supreme court of Missouri held that the liability of principal and surety in a recognizance is several, and not joint; and a remission by the governor, after forfeiture, in favor of the principal, does not discharge the surety. We cannot see how it can be that the pardon issued to the accused, Azariah Dale, can affect the forfeiture of the bond of the appellants. The appellants had covenanted to have the accused present when required by the court. The accused was in their custody, in law, at the time he left the court-house, and his bond forfeited, and no reason is given why he so departed. Appellants' counsel contend that, by the pardon of the governor, the same related and had the effect to cancel the forfeiture of the bail bond, and made the accused a new creature, as if born again. In the case of *Mount* v. *Com.* 2 Duv. 95, Judge Robertson, in commenting on the pardon of Mount, says: "The pardon relieved the convict of the entire penalty incurred by the offense pardoned, and nothing else or more," and approved the judgment of conviction, by which Mount was given a greater penalty by reason of the second offense notwithstanding the first offense was pardoned. We are of opinion the pardon issued to the accused did not have the effect to relieve the bail. That question was entirely in the discretion of the circuit judge who tried the case. No reason is given why the accused left the court while being tried, and no statement is made to the court negativing, at least, the idea that his departure was with appellants' consent and knowledge.

Wherefore *the judgment of the Circuit Court is affirmed.*

Rehearing denied.

38 L. R. A.

Adolph SCHMIDT, Trustee, etc., Impleaded with Northern Division of Cumberland & Ohio Railroad Company, *Appt.*,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *et al.*

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

1. **A company which purchases all the property and rights of another railroad company,** including a lease, and which takes charge of the leased road, operates it for a long time, and elects to sue and recover money due the lessee from the lessor, must be held to have assumed the obligations of the lease, and not to be a mere tenant by sufferance.
2. **A trustee for the bondholders** of a railroad company has a right to maintain an action for the enforcement of a contract leasing the road for the benefit of the bondholders.
3. **An abandonment of a railroad lease** by a company which has acquired the lessee's property and rights is not authorized by the mere failure of the lessor to pay money due under the lease when the contract gives the lessee a lien therefor, and does not provide that it shall be a ground of forfeiture, although there are other conditions of forfeiture expressed.
4. **A railroad lease is not so uncertain** and indefinite that it cannot be specifically performed where a fair construction of it will authorize such an operation of the road as the business interests of the community may require.
5. **The operation of a railroad** for a term of years under a lease may be required by mandatory injunction compelling the specific performance of the contract of lease.
6. **The mere fact that a contract having a number of years to run** may turn out a losing investment affords no reason for refusing specifically to enforce it.
7. **A contract fair when made may be specifically performed,** although it has become a hard one by force of subsequent circumstances or changing events.

(June 15, 1897.)

APPEAL by plaintiff from a judgment of the Circuit Court for Shelby County refusing to compel defendants to operate the Northern Division of the Cumberland & Ohio Railroad under a contract by which they were alleged to have leased it and undertaken to operate it. *Reversed.*

The facts are stated in the opinion.

Mr. **G. G. Gilbert,** for Northern Division of Cumberland & Ohio Railroad Company:

The charter granted by the state to the Northern Division of the Cumberland & Ohio Railroad Company is not only a contract, but it presents three contracts:

1. It is a contract between the state and the corporation.

2. It is a contract between the corporation and each and every stockholder of that corporation.

3. It is a contract between the state and each and every stockholder of this corporation.

NOTE.—For specific performance of contract to run street railway, see Prospect Park & C. I. R. Co. v. Coney Island & R. R. Co. (N. Y.) 26 L. R. A. 610.

See also 44 L. R. A. 297.

Cook, Stock & Stockholders, §§ 492, 665.

The purpose of the organization of this corporation is to construct and operate a railroad. This is a public highway, in which the state at large, and the counties through which it passes, and the public generally, are both concerned and deeply interested.

Union P. R. Co. v. *Chicago, R. I. & P. R. Co.* 163 U. S. 564, 41 L. ed. 265.

During the period of thirty years the lessee stands in the shoes of the lessor, and is in full possession of all of this property and of these franchises.

This lessee therefore for the period of thirty years assumes the duties and obligations growing out of the charter, and out of the triple contract created between the state, the corporation, and the stockholders, above named.

When the defendant, the Louisville & Nashville Railroad Company, acquires by purchase, by conduct, or otherwise, the property and franchises of the original lessee, it necessarily assumes the shoes of that lessee, and becomes in fact the lessee itself.

During the existence of this lease, the Louisville & Nashville Railroad Company stands as much bound to respect these contract obligations, as the original corporation under the charter.

Gulf, C. & S. F. R. Co. v. *Newell*, 73 Tex. 334; *Louisville & N. R. Co.* v. *Smith*, 87 Ky. 501.

A railroad company has no right to abandon a public highway of this kind without the consent of the state.

State, Leese, v. *Atchison & N. R. Co.* 24 Neb. 143; *Noll* v. *Dubuque, B. & M. R. R. Co.* 32 Iowa, 66; *Lake Erie & W. R. Co.* v. *Griffin*, 107 Ind. 464; *People* v. *Albany & V. R. Co.* 24 N. Y. 261, 82 Am. Dec. 295; *Atty. Gen.* v. *West Wisconsin R. Co.* 36 Wis. 466; *People* v. *Northern R. Co.* 53 Barb. 98.

To permit the lessee to abandon this lease is to permit one party to the contract to confiscate or destroy this valuable property without the consent of the other party.

Ferguson v. *Meredith*, 68 U. S. 1 Wall. 25, 17 L. ed. 604; *Knoxville* v. *Knoxville & O. R. Co.* 22 Fed. Rep. 758; *Orr* v. *Bracken County*, 81 Ky. 593; Cook, Stock & Stockholders, § 500.

It is the policy of the law to shield this defendant from being harassed by numerous suits when the remedy can be reached in one action.

10 Am. & Eng. Enc. Law, pp. 975, 976, notes 5, 6, pp. 977, 978.

Equity will restrain any corporation as well as any citizen from interfering with a bridge, which is a part of a public highway.

Pittsburg & W. E. Pass. R. Co. v. *Point Bridge Co.* 165 Pa. 37.

Even a mandatory injunction will issue to force any company or any citizen to remove obstructions from a highway.

Boyd v. *Woolwine*, 40 W. Va. 282; *Boland* v. *St. John's Schools*, 163 Mass. 229; *Rock Island & P. R. Co.* v. *Dimick*, 144 Ill. 623, 19 L. R. A. 105.

A mandatory injunction will be granted against a railroad company to compel it to perform the covenants of a lease, and to operate its trains.

Chicago & A. R. Co. v. *New York, L. E. & W. R. Co.* 24 Fed. Rep. 516; *Coe* v. *Louisville & N. R. Co.* 3 Fed. Rep. 775; *Toledo, A. A. & N. M. R. Co.* v. *Pennsylvania Co.* 54 Fed. Rep. 730, 19 L. R. A. 387, 5 Inters. Com. Rep. 522; *Chicago, R. I. & P. R. Co.* v. *Union P. R. Co.* 47 Fed. Rep. 16; 10 Am. & Eng. Enc. Law, p. 789.

The fact that the defendant had been in possession of and operating this road for so many years is an estoppel against its denying the existence of the lease.

Joy v. *St. Louis*, 138 U. S. 1, 34 L. ed. 843.

A specific performance of this contract should be ordered, and such a remedy is not beyond the machinery of the court.

Joy v. *St. Louis*, 138 U. S. 1, 34 L. ed. 843; *Chicago, R. I. & P. R. Co.* v. *Union P. R. Co.* 47 Fed. Rep. 16; *Re Omaha Bridge Cases*, 10 U. S. App. 98, 51 Fed. Rep. 309, 2 C. C. A. 174; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Phillips* v. *Winslow*, 18 B. Mon. 448, 68 Am. Dec. 729.

The damages sustained by the plaintiff by stopping the operation of this road cannot be accurately estimated, and are therefore in legal technology irreparable.

10 Am. & Eng. Enc. Law, p. 939; *Dudley* v. *Hurst*, 67 Md. 44.

Messrs. **Simrall, Bodley, & Doolan, William S. Pryor, J. C. Beckam,** and **William Beckam** for appellant.

Messrs. **Helm & Bruce** and **W. H. Bruce,** for appellees:

Equity will not undertake to enforce specific performance of such a contract as the one alleged by the plaintiffs.

The particular contract in question is too uncertain and indefinite, as to the obligation of the defendant to operate the road in question, to be specifically enforced.

In the contract sued on there is certainly no express obligation on the part of the Louisville, Cincinnati, & Lexington Railway Company, the lessee, to operate the road of the lessor at all. If there is any obligation of this character it is only an implied one. And it is by no means certain that an obligation to this effect can be implied.

Minturn v. *Baylis*, 33 Cal. 129; Pom. Spec. Perf. Contr. § 145; 1 Story, Eq. Jur. § 767; *Dalzell* v. *Dueber Watch Case Mfg. Co.* 149 U. S. 315, 37 L. ed. 749; *Potter* v. *Hollister*, 45 N. J. Eq. 513; *Ham* v. *Johnson*, 55 Minn. 117; *Walcott* v. *Watson*, 53 Fed. Rep. 435; *Zeringue* v. *Texas & P. R. Co.* 34 Fed. Rep. 243; *Ikerd* v. *Beavers*, 106 Ind. 485; *Louisville, N. A. & C. R. Co.* v. *Bedenschatz-Bedford Stone Co.* 141 Ind. 251; *Blanchard* v. *Detroit, L. & L. M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142; *Woolensak* v. *Briggs*, 20 Ill. App. 58, Affirmed in 119 Ill. 453.

The contract contains no specification or details as to how the road is to be operated, but leaves that entirely to the discretion and judgment of the lessee.

For the court to solemnly decree that the lessee shall specifically perform the obligation of this contract by operating this railroad seems almost an absurdity. The contract does not say how it shall be operated.

The contract in question, accepting the appellant's construction of it, is a contract call-

ing for the rendition of continuous services, requiring the exercise of skill and judgment, and is of a character which a court of equity will not attempt to specifically enforce, even if it were more definite and certain than it is.

Pom. Spec. Perf. § 312; 3 Pom. Eq. Jur. § 1343; Waterman, Spec. Perf. § 49, p. 68; Bispham, Principles of Equity, § 377; *Wheatley* v. *Westminster Brymbo Coal & C. Co.* L. R. 9 Eq. 538; *Blackett* v. *Bates*, L. R. 1 Ch. 117; *Johnson* v. *Shrewsbury & B. R. Co.* 3 De G. M. & G. 914; *Powell Duffryn Steam & Coal Co.* v. *Taff Vale R. Co.* L. R. 9 Ch. 335; *Rutland Marble Co.* v. *Ripley*, 77 U. S. 10 Wall. 339, 19 L. ed. 955; *Port Clinton R. Co.* v. *Cleveland & T. R. Co.* 13 Ohio St. 554; *Ross* v. *Union P. R. Co.* 1 Woolw. 26; *Texas & P. R. Co.* v. *Marshall*, 136 U. S. 406, 34 L. ed. 390; *Blanchard* v. *Detroit, L. & L. M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142; *Atlanta & W. P. R. Co.* v. *Speer*, 32 Ga. 553, 79 Am. Dec. 305; *McCann* v. *South Nashville Street R. Co.* 2 Tenn. Ch. 773; *Lattin* v. *Hazard*, 91 Cal. 87; *Louisville, N. A. & C. R. Co.* v. *Bodenschatz-Bedford Stone Co.* 141 Ind. 251; *Electric Lighting Co.* v. *Mobile & S. H. R. Co.* 109 Ala. 190; *Richmond* v. *Dubuque & S. C. R. Co.* 33 Iowa, 486; *Iron Age Pub. Co.* v. *Western U. Teleg. Co.* 83 Ala. 498; *Ewing* v. *Litchfield*, 91 Va. 575; *Fargo* v. *New York & N. E. R. Co.* 3 Misc. 205; *Wharton* v. *Stoutenburgh*, 35 N. J. Eq. 277; *Kendall* v. *Frey*, 74 Wis. 26; *Kidd* v. *McGinnis*, 1 N. D. 331; *Shackley* v. *Eastern R. Co.* 98 Mass. 94; *Alworth* v. *Seymour*, 42 Minn. 526; *Campbell* v. *Rust*, 85 Va. 653; *Woolensak* v. *Briggs*, 20 Ill. App. 58, Affirmed in 119 Ill. 453.

Even if the contract were one which a court of equity will undertake to enforce specifically, plaintiffs in the case at bar have not shown themselves entitled to the relief prayed.

Pom. Spec. Perf. § 323; *Nash* v. *Page*, 80 Ky. 539, 44 Am. Rep. 490; *Kentucky Wagon Mfg. Co.* v. *Ohio & M. R. Co.* 98 Ky. 152, 36 L. R. A. 850.

The lessor railroad company, the Cumberland & Ohio Railroad Company, has no standing in a court of equity to ask that the lessee be compelled to continue the operation of the road under this lease, under which the lessor is over $400,000 in default to the lessee.

A court will not enforce the specific performance of this obligation by the lessee in behalf of these bondholders, even though they may not themselves be in any default; for it is plain that the court cannot enforce the specific performance of the entire contract.

Buck v. *Smith*, 29 Mich. 166, 18 Am. Rep. 87; *Hewitt* v. *Berryman*, 5 Dana, 166; *Campbell* v. *Harrison*, 3 Litt. (Ky.) 293.

There are many contracts as to which a court of equity will say to a complainant that, even though his remedy at law may be difficult, a court of equity will refuse to lend its aid to the enforcement thereof, on account of the harsh results that will follow from the specific performance of the contract.

Pom. Spec. Perf. § 185; *Willard* v. *Taylor*, 75 U. S. 8 Wall. 567, 19 L. ed. 504; *Pope Mfg. Co.* v. *Gormully*, 144 U. S. 236, 36 L. ed. 419.

This contract provides a remedy for these bondholders, independent of and in addition to the ordinary common law action for damages for breach of contract.

Chicago & V. R. Co. v. *Fosdick*, 106 U. S. 68, 27 L. ed. 54.

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

This action was brought in the Shelby circuit court by appellant, Schmidt, trustee, and the Northern Division of the Cumberland & Ohio Railroad Company, against the Louisville & Nashville Railroad Company, etc., to compel said Louisville & Nashville Railroad Company, by mandatory injunction, to continue to operate the Northern Division of the Cumberland & Ohio Railroad, from Shelbyville to Bloomfield, in accordance with a lease and contract set out in the petition. It appears from the allegations of the petition that the Northern Division of the Cumberland & Ohio Railroad Company, in 1879, leased to the Louisville, Cincinnati, & Lexington Railway Company its road from Eminence to Bloomfield, as set out in the lease, which reads as follows:

Lease of C. & O. to L., C. & L. Ry. Co.

This indenture of a lease made and entered into by and between the Northern Division of the Cumberland & Ohio Railroad Company, of the first part, and the Louisville, Cincinnati & Lexington Railway Company, of the second part, both railroad corporations duly organized under the laws of the state of Kentucky, witnesseth: That for and in consideration of $1 cash in hand by the party of the second part, and in consideration of the mutual covenants and stipulations hereinafter contained, the said party of the first part does hereby lease to the said party of the second part all that part of the first party's unfinished roadbed, right of way, with improvements and appurtenances, depots, and depot grounds, machinery, tools, and implements, together with all its property, rights, and franchises, including unpaid subscriptions to capital stock, dues, and demands belonging to or in any wise appertaining to the said first party's line of railway at the town of Eminence, Kentucky, thence southwardly, through a portion of Henry county, and the counties of Shelby and Spencer, and to Bloomfield, in the county of Nelson and the state of Kentucky, for the period of thirty years from the date of full execution hereof, upon the terms, conditions, and stipulations hereinafter set out:

(1) Under direction of the stockholders of said first party, its president and directors will execute a mortgage upon all the property, rights, and franchises belonging to or in any wise appertaining to said first party's line of road hereinbefore described, for the security of $350,000 of mortgage coupon bonds, having twenty years to run, and bearing interest at the rate of 7 per cent per annum, interest payable on the 1st days of June and December of each year, all of which is fully set out in said mortgage. Now, said bonds and coupons are to be fully prepared, signed, and countersigned, and made ready for use, as in the charter of said first party and said mortgage provided, and the same will be delivered

to said second party within sixty days after the delivery of this lease.

(2) Said second party hereby binds and obliges itself that said bonds, or proceeds of such as are sold, shall be used by it in the construction of said first party's line of railway, as provided in this lease, and for no other purpose whatever. It is agreed that enough of said bonds may be sold or used in and about contracts for work, labor, or materials to complete said line of railway, at not less than ——— cents to the dollar; and whatever of said bonds or proceeds, after deducting all sums due said second party, may not be so used, shall, after said completion, after cancelation of bonds, be turned over to said first party, and such surplus bonds destroyed.

(3) A fundamental condition of this lease is that if said second party shall not be able to dispose of bonds amounting at their face value to $250,000, the proceeds to be in money, material, or labor, by or before the 1st day of September, 1880, then this lease terminates, and the parties hereto are released, and said second party is to restore to said first party all bonds: provided, however, that no absolute sale of any of said bonds shall be made by said second party unless and until it can place not less than two hundred and fifty thousand dollars in the value thereof in money or its equivalent; and, when that quantity of said bonds has been disposed of by said second party, it shall as soon as practicable, and not later than the 1st day of September, 1880, begin the construction of said first party's said line of railway, and a failure to begin work within said time shall operate as a termination of this lease. Whenever said $250,000 of said bonds shall have been disposed of as aforesaid, this contract becomes absolute and binding on the parties hereto, and the construction of said line of railway from Eminence to Bloomfield shall be commenced; and, when the construction of said line of railroad is begun, the same shall be pushed to completion as rapidly as possible; and a failure on the part of the party of the second part to so complete the same as to allow the safe and regular passage of trains to and from Eminence and Bloomfield within two years from the commencement of work thereon shall, at the option of said first party, after six months' notice of its election so to do, operate as a forfeiture of this lease. None of said bonds shall be sold with past-due coupons annexed thereto; but, before selling, all past-due coupons shall be cut off, canceled, and returned by said second party to said first party.

(4) When commenced, said construction shall be pushed as rapidly as possible, with due regard to the greatest economy; and the work and superstructure is to be as for a first-class single-track railway, with the same gauge as the track of said second party's line of railway.

(5) It is further agreed that said second party shall furnish all necessary locomotive engines and rolling stock to operate said line of railway; and for the use of same said second party is to receive, out of the gross earnings of said first party's line of road, the cost of wear and tear to such engines and rolling stock as may be so furnished. But the first party reserves the right to furnish all or so much as it can of said rolling stock, and, when so furnished, said first party shall receive the same compensation therefor as is received by said second party on its rolling stock used on said line.

(6) It is further agreed and understood that, in the operation of said line of railway, said second party will make to said first party quarterly returns, giving full details of earnings and operating expenses, including the expense of keeping roadbed in order; and the net profits arising therefrom shall be applied to the payment of interest, and providing for sinking fund, and retiring said mortgage bonds. But out of the gross earnings shall be first deducted annually the sum of $1,000, which shall be paid to said first party, with which to pay the expense of keeping up its organization; and, if the net earnings do not prove sufficient to pay the interest and provide for the sinking fund on said mortgage bonds, then said second party, if all other sources of raising money of said first party prove insufficient, will supply the deficiency, so far as it may be done, by appropriating the net earnings, or so much as may be needed, on its own lines, which may accrue by reason of business coming to it from or over said first party's line. This pledge and assignment shall be made effectual by mortgage properly executed, acknowledged, and recorded; and should it become necessary to use any of the net earnings on the lines of the second party to pay said interest and sinking fund, or any part of either, then all amounts so used, as well as all moneys paid for said first party by said second party, shall be treated as interest-bearing debts, interest at the same rate with said mortgage bonds, payable half-yearly, and to run from date of such payments, the debt and interest to be repaid out of said net earnings thereafter accruing to said first party on its own line, which may be so appropriated consistently with the other provisions of this lease; and, for all sums or any sums of money that may become due from said first party to said second party on its or any account, a lien is hereby created upon all the property, rights, and franchises of said first party owned or to be acquired in favor of said second party, to stand next in priority to said mortgage and bonds for $350,000 as aforesaid. But said second party shall not enforce the collection of said debts, or any of them, by enforcement of said lien, until at least eight years have elapsed from and after the date of the creation of the same.

(7) It is further agreed and understood that whenever the net earnings from the leased premises shall be sufficient to pay off the interest and sinking fund on said mortgage bonds for $350,000, or such portion thereof as is outstanding, and to repay said second party all dues and demands then due or owing, the surplus net earnings, unless used in retiring said bonds, as provided in said mortgage, less one tenth thereof, shall be paid over to said first party, the one tenth of said net earnings to be retained by said second party for its own use.

(8) It is further agreed and understood that, so long as said second party may operate said leased line of railway, no greater rate of charges, either for freight or passage thereon, shall be demanded or received, under its regu-

lar tariff, on its own lines of railway for local freight and passage.

(9) It is further agreed and understood that said first party assigns, transfers, and sets over to said second party all claims, dues, and demands, choses in action, unpaid subscriptions to capital stock (except private subscriptions and all evidences thereof), of every kind and character, to be by said second party collected by suit or otherwise, with power to settle, compromise, arbitrate, or adjust as to it may seem best; but this assignment and transfer does not become absolute (except to so much thereof as may be necessary to refund and indemnify to said second party the cost of printing and issuing said mortgage bonds, or incidental thereto, which is absolute) until said second party give notice in writing to the president of said first party that said $250,000 of said mortgage bonds have been disposed of as hereinbefore provided; and then and after such notice said second party may at once proceed as provided under the clause of this lease.

(10) It is further agreed and understood that this lease is not assignable without the consent of the grantor; that, during the existence of said lease, the second party will pay all taxes lawfully assessed against said leased premises, the amount thereof to be charged to operating expenses; and, at the termination thereof, said leased premises shall be restored to said first party in good repair, unless the same be extended or renewed by mutual consent, or unless prevented by unavoidable casualty, legal proceedings, or operation of law.

(11) The second party hereby agrees to furnish any means necessary to complete said first party's line of road from Eminence to Bloomfield, which may not be derived from the sale of the bonds to be issued by said first party, and also to furnish any means necessary to pay any interest which may become due on said mortgage bonds previous to the completion of said first party's line of road, which may not be derived from the earnings of said line of road. Any means so furnished by said second party is to become a lien debt due to said second party by said first party, and payable upon the same terms and conditions as hereinbefore provided as to the other indebtedness.

(12) If said second party be hindered or delayed in beginning or completing said line of railway by act or omission of said first party, or by legal or equitable proceedings, then the period or periods of such delay shall not be counted as part of the time within which said second party is to do or perform any acts or things under this contract.

In testimony whereof, the said second party, acting under authority and approval of its stockholders, duly had in stockholders' meeting assembled, on the 24th day of June, 1879, has caused these presents to be signed in duplicate, in its corporate name, by its president, and countersigned by its secretary, and its corporate seal hereto affixed; and the said second party, acting under authority and approval of its stockholders, duly had in stockholders' meeting assembled, on the 28th day of July, 1879, has caused these presents to be signed in duplicate in its corporate name, by its president, and countersigned by its secretary, and its corporate seal hereto affixed, this ——— day of ———, 1879.

It will be seen from said lease that it first contemplated building the road from Eminence to Bloomfield, but afterwards the contract was modified, as shown by the contract, which reads as follows:

Modification of Lease.

This contract, made and entered into by and between the Northern Division of the Cumberland & Ohio Railroad Company, of the first part, and the Louisville, Cincinnati, & Lexington Railway Company, party of the second part (both railway corporations duly incorporated under the laws of the state of Kentucky), and Joshua F. Speed, trustee, party of the third part, witnesseth: That for and on account of the difficulties of carrying into effect the contract of the parties of the first and second parts hereto, in relation to the lease, construction, and operation of said first party's proposed line of railway from Eminence to Bloomfield, of date the 25th day of July, 1879, said parties have and do hereby agree upon the following changes and modifications of said contract and the mortgage therein named, to take effect when and as soon as this change and modification shall have been duly and properly approved by a majority of the stockholders of each of said companies, and fully executed and recorded in the proper offices, when, to all intents and purposes, the said contract so amended and modified shall be regarded and taken as the true contract and agreement between the parties hereto.

(1) Whenever said second party shall be able to dispose of said mortgage bonds provided for in said contract and mortgage, amounting at their face value to the sum of $150,000 (one hundred and fifty thousand dollars), and said bonds numbered from 1 to 150, inclusive, the proceeds in money, labor, or materials, the same may be done; and then this contract as amended, and in all its particulars, becomes absolute, and the construction of that portion of said first party's line of railway between Shelbyville and Bloomfield shall be commenced and pushed to completion as rapidly as possible; and a failure to complete said road so as to permit the safe and regular passage of trains between Shelbyville and Bloomfield within two years from the commencement of the work thereon shall, at the option of said first party, after six months' notice thereof, operate as a forfeiture of said lease; but no disposition of any of said bonds shall be made until not less in amount than $150,000 (one hundred and fifty thousand dollars) of the face value thereof, numbered as aforesaid, can be placed for money or its equivalent.

(2) Not more than $250,000 (two hundred and fifty thousand dollars) of the face value of said bonds, numbered from 1 to 250, inclusive, shall be used or disposed of in and about the construction of said railroad between Shelbyville and Bloomfield, and $100,000 (one hundred thousand dollars) of the face value of said bonds, numbered from 251 to 350, both inclusive, shall be set apart and faithfully preserved in such manner as the board of directors of the

first and second parties may agree, for the ultimate construction of said first party's road between Eminence and Shelbyville; but said second party shall not be bound to begin the construction or operation of said last-named portion of said railroad until, in the judgment of the board of directors of the said second party, the operation of the same would result in sufficient earnings to pay operating expenses and interest and sinking fund on the amount required to complete the same; and the mortgage heretofore made to Joshua F. Speed, trustee therein, is hereby so modified that the said 250 bonds to be used in constructing said railroad between Shelbyville and Bloomfield shall constitute no lien on that part of said company's road between Eminence and Shelbyville, until said 100 bonds set apart for its construction shall have been used for that purpose, and then all of said bonds issued shall be a joint and equal lien on the whole property, as set out in the original mortgage; and the said Speed, as trustee, is made a third party hereto, and shall sign this contract as evidence of his consent to the modification in this respect of the said mortgage. It being agreed and understood that at this date none of the said mortgage bonds have been sold or disposed of, but remain in the hands of the said second party; provided that, unless the second party shall complete the construction of so much of said first party's road as lies between Shelbyville and Eminence within five years from the 1st of September, 1880, then the lease of said last-named part of said road shall determine and terminate, at the option of said first party, after six months' notice; and, in the event of such termination of the lease, said bonds, numbered from 251 to 350, both inclusive, as aforesaid, and the coupons thereof, shall at once be canceled, so as to prevent their circulation, or, if the boards of the parties aforesaid so order it, they shall be destroyed.

(3) Before any of said bonds, numbered from 1 to 250, both inclusive, shall be sold or disposed of, each shall have a printed or lithographed indorsement thereon, to the effect that none of them or their coupons have any lien upon the company's property or franchise or line of road from north of Shelbyville until the one hundred bonds aforesaid are issued or used, and that portion of said road between Shelbyville and Eminence shall have been completed, and then all of said bonds and coupons shall have a common and joint lien on the whole property.

(4) The boards of directors of the first and second parties may agree to the use of second-hand rails to be sufficient for the safe transmission of trains, and to be removed and replaced as fast as they become unsafe. The price of said second hand rails to be agreed upon by said boards before being used.

(5) In all respects in which this contract is inconsistent with the original contract or mortgage, said originals are abrogated, and the contract as modified and amended by this agreement shall be taken as the true existing contract between the parties.

In testimony whereof, the said first and second parties, acting under directions of their respective stockholders, have each caused this contract to be signed with their corporate names and seals annexed by their respective presidents, and countersigned by the secretaries, and also duly signed by the said Joshua F. Speed.

Mortgage of C. & O. R. Co.

This indenture, made and entered into this the 2d day of July, in the year of our Lord 1879, between the Northern Division of the Cumberland & Ohio Railroad Company, a corporation duly organized under the laws of the state of Kentucky, party of the first part, and Joshua F. Speed, as trustee, party of the second part, witnesseth: That for and in consideration of $1 cash in hand paid by the party of the second part to the party of the first part; and whereas, it is provided in the charter of said party of the first part that it might issue mortgage bonds to complete its road, to the extent of $15,000 per mile, upon all its property, rights, and franchises; and whereas, the stockholders and board of directors of said first party have determined to issue such mortgage bonds to the extent of $350,000, bearing interest at the rate of 7 per cent per annum, interest payable half-yearly, and bonds being of even date with the said mortgage, and to be paid at the end of twenty years from their dates, and have determined that such mortgage shall be executed and bonds issued by minutes duly entered upon their record books, and have directed the preparation of said bonds, and the same have been prepared, aggregating the said sum of $350,000, and divided into bonds of the denomination of $1,000 each, making 350 bonds, numbered from 1 to 350, both inclusive, and lettered A; all of said bonds have interest coupons annexed thereto, to fall due on the 1st day of June and December of each year, interest and principal payable in the city of New York; and the said bonds have been duly executed, and are now about to be delivered, for the purpose of being sold, in order to complete their line of railway as specified in the lease this day made, from said Northern Division of the Cumberland & Ohio Railroad Company to the Louisville, Cincinnati, & Lexington Railway Company:

Now, therefore, for the equal security of each of said bonds at maturity, and the payment thereon of interest as the same matures, the said first party has this day bargained and sold, and does hereby bargain, sell, and convey, unto the said party of the second part, all the property, rights, and franchises of the said Northern Division of the Cumberland & Ohio Railroad Company, including all the right, title, and interest of said company, free from all liens, mortgages, or claims of any kind, and in and to its line of railroad, from its point of intersection with the line of road of said Louisville, Cincinnati, & Lexington Railway Company, in the town of Eminence, and the county of Henry, and state of Kentucky, through the counties of Henry, Shelby, and Spencer, and to Bloomfield, in Nelson county, Kentucky, together with all its improvements and appurtenances, right of way, lands adjacent thereto, machinery, tools, implements, fixtures, furniture, and materials, and supplies of every description, so as to vest in the said party of the second part all the right, title, and interest

of the said Northern Division of the Cumberland & Ohio Railroad Company in and to all the property owned by it, or in which it has any interest at the date of the execution of this instrument, or hereafter to be acquired by the said first party. To have and to hold the same to the said party of the second part, his successors and assigns, forever. It is expressly to be understood, and is hereby declared to be the true intent and meaning of these presents, that the said second party shall have and hold the premises hereby granted or covenanted so to be, as trustee, for the joint and equal benefit and security of all such persons as may hereafter become the legal holders of any of the bonds aforesaid, and for the security of the principal and interest of each of said bonds, without regard to the time at which the said holders may become possessed thereof; provided, always, that the said first party, its lessees or assigns, shall have and retain exclusive possession, control, and management of said premises until default made as hereinafter provided, and possession taken in consequence thereof, and may, with the approval and concurrence of said second party, sell or lease and make conveyance of any portion of said premises which may be found unnecessary to the workings of said road, the proceeds of such sale being reinvested in other real estate, subject to the same trust, or in liquidation of so much of the bonds issued hereunder; such reinvestment being made also with the approbation of said second party but without the purchaser being required to look to the reinvestment: and provided, further, that if said party shall well and truly pay the several instalments of interest on said bonds, and each of them, as the same shall become due, then this indenture shall become void and of no further effect.

In the event of the failure of said first party to pay any part of any instalment of said interest for more than sixty days after the same shall have become due and been demanded at the place where the said interest shall be properly payable, or in the event of its failure to pay any portion of said principal for more than ninety days after the same shall have become due and payable, and been demanded at the place where same shall be payable, then and in either event, it shall and may be lawful for the said second party, and his successors in the trust hereby created, upon request thereto made in writing by any person holding any of said bonds, in the payment of principal or interest of which default shall have been made as aforesaid, to enter upon and take possession of the railroad, property, and franchises hereby granted or covenanted so to be, and to hold, use, operate, and manage the same for the joint and equal benefit of all the holders of said bonds. And upon such default, and request made and possession taken, the profits arising from the operation and use of the premises shall be appropriated by the party of the second part as follows, to wit: (1) To the payment of the expenses of the trust, including a fair and reasonable compensation to the trustee for his services. (2) If there be any surplus remaining, then to the payment of the interest in arrears on said bonds. (3) If there be still a surplus, then to the payment of the accruing interest on said bonds as it falls due, and to the payment of the principal of said bonds as it shall fall due. But in the event that, after such default and request made and possession taken, it shall become necessary or desirable to sell the premises, in order to the more prompt payment of the interest and principal of said bonds, then it shall and may be lawful for said second party (upon request made in writing by persons legally holding said bonds to the extent of a majority of the bonds outstanding) to sell the said premises to the highest bidder, upon such terms as, not being inconsistent with this indenture, or the tenor or effect thereof, may be determined on by said second party and the person or persons holding said bonds. Said sale may be made for the whole amount of the principal and interest then accrued upon the whole issue of said bonds outstanding, treating the principal as become due by reason of the default in the payment of interest. And the whole purchase money may be required to be paid by the purchaser in the payments not less favorable to him than one third in cash, and the remainder in one and two years from day of sale, with interest from said day; or the purchaser may be required only to pay in like brief periods the interest then accrued and in arrears, and to secure the payment of the principal and accruing interest as they shall become due. But in any sale which may be made a lien shall be retained on the premises to secure the unpaid purchase money, and there shall likewise be reserved a power of resale in case of default in the payment of the purchase money. Said sale shall be made in the city of Louisville, and notice of the time, place, and terms of sale shall first have been given by public advertisement for at least four months in one or more newspapers published in each of the cities of Louisville, Lexington, Cincinnati, and New York. The money arising from any such sale shall be applied (1) to the payment of any interest which may be in arrears upon said bonds, and the expenses of executing the trust, including herein a fair and reasonable compensation to the trustee for his services; (2) to pay the principal of said bonds, or, if there be not sufficient to pay them in full, then to their payment *pro rata*. And, on such sale being made, it shall and may be lawful for said second party, by the execution of all needful and proper instruments of conveyance, to vest in the purchaser the full and perfect title to the premises, subject only to the lien and power of resale aforementioned. And said first party does hereby covenant to and with said second party, his successors and assigns, that it will, on reasonable request thereto, make, do, and execute such other and further deeds of conveyance and assurance of the premises, and particularly of the property, rights, and franchises hereafter to be acquired by them, as to the said second party, his successors and assigns, shall seems necessary and proper fully to effectuate the true meaning and intent of this indenture. And it does further covenant to and with the said second party, his successors, etc., that it will annually, commencing not later than the 1st day of January, 1883, appropriate from the earnings of said road a sum not less than $5,000, which sum shall be annually expended in the purchase and redemption of said bonds,

or in the purchase of other interest-bearing securities approved by said second party, so as to form a sinking fund for the payment of the principal of said bonds when it shall become due.

It is further agreed and understood that said first party, or its lessee or assigns, shall have the option, at any time after the 1st of January, 1883, to redeem and take up said bonds, or any of them, by paying par and accrued interest to date of notice of redemption therefor. If election is made so to redeem, notice thereof shall be sufficient if given by advertisement in some daily newspaper published in the city of Louisville for thirty days; and, after the expiration of said thirty days the bonds called for and the sums due as interest shall cease to bear interest. But said bonds shall be called for in the order of their numbers, beginning at number 1, and following in numerical order. In order to the identification of the bonds whose payment it is intended hereby to secure, it is now declared that they shall each be sealed with the corporate seal of said first party, attested by the signature of the president, and countersigned by its secretary, and each certified on its face by the second party or his successor to be one of the issue intended to be protected.

And it is further agreed by and between the parties to this indenture that in the event of the death, resignation, or failure or refusal to act of the said second party, trustee, as aforesaid, then it shall and may be lawful for the Shelby circuit court, upon the application of the parties holding said bonds to the amount of $70,000 or more, to appoint a trustee or trustees in lieu and stead of said second party; and the trustee or trustees so appointed shall thereupon succeed to and be vested with all rights, powers, and privileges which are by this indenture conferred upon said second party, or intended so to be.

In testimony of all which, the said party of the first part, by its president and board of directors, and in pursuance to action of its stockholders duly had, has caused these presents to be sealed with its corporate seal, and signed with its corporate name, and countersigned by its secretary, this 2d day of July, 1879.

Mortgage of Earnings of L., C. & L. R. Co.

This indenture of mortgage, made and entered into by and between the Louisville, Cincinnati, & Lexington Railway Company, a railway corporation under the laws of the state of Kentucky, party of the first part, and Joshua F. Speed, as trustee, party of the second part, witnesseth: That whereas, by authority of an act of the general assembly of the commonwealth of Kentucky, approved the 18th day of March, A. D., 1878, the party of the first part has entered into a contract with the Northern Division of the Cumberland & Ohio Railroad Company for the lease, construction, and operation of the latter company's line of road from Eminence, in Henry county, Kentucky, though a part of said county and the counties of Shelby, Spencer, and into Nelson county, as far as Bloomfield, all in the state of Kentucky, said lease to continue for thirty years upon the terms therein set out, in which it is stipulated by and on behalf of said first party herein that if the net earnings of said leased premises do not prove sufficient to pay the interest, and to provide for the sinking fund of 350 bonds of $1,000 each, bearing interest at the rate of 7 per cent per annum, payable half-yearly, on the 1st days of June and December, and having twenty years to run from the 2d day of July, A. D., 1879, to be issued by said Northern Division of the Cumberland & Ohio Railroad Company, and if all other sources of raising money of said Northern Division of the Cumberland & Ohio Railroad Company fail to provide for said interest and sinking fund, then said first party herein should supply the deficiency so far as the same may be done by appropriating the net earnings, or so much thereof as may be needed, on its own lines which may accrue to it by reason of business coming to it from or over the said lines of the said Northern Division of the Cumberland & Ohio Railroad Company; and whereas, said contract or lease has been fully consummated by action of the stockholders of the first party herein, and it is now desired to carry into effect the said stipulations as to said net earnings: Now in consideration of $1 cash in hand paid by said second party to said first party, and the premises, the said first party has this day, and does hereby, mortgage and put in lien all net earnings which may accrue to it by reason of business coming to it from or over said lines of the Northern Division of the Cumberland & Ohio Railroad Company, to the said Joshua F. Speed, as trustee, aforesaid (who is the trustee in the mortgage made by said Northern Division of the Cumberland & Ohio Railroad Company to secure said 350 bonds of $1,000 each), conditioned that, if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking fund of said mortgage bonds, then said first party, if all other sources of raising money of said Northern Division of the Cumberland & Ohio Railroad Company prove insufficient, will supply the deficiency, so far as it may be done, by appropriating and paying over promptly the net earnings, or so much thereof as may be needed on its own lines, which may accrue by reason of business coming to it from or over said Northern Division of the Cumberland & Ohio Railroad Company's lines, for the purpose of discharging said interest and sinking fund as they severally fall due.

"In testimony whereof, the said first party, acting under the authority and approval of its stockholders, duly assembled in stockholder's meeting on the 28th day of July, 1879, has caused these presents to be signed in duplicate in its corporate name by its president, and countersigned by the secretary, and its corporate seal hereto affixed, this 28th day of July, A. D. 1879.

It will further be seen that an order to better secure the holders of the bonds stipulated for in said lease, the Louisville, Cincinnati, & Lexington Railway Company executed a mortgage upon its net earnings derived from business coming to it from the lines of the said Cumberland & Ohio Railroad Company. It further appears that the trustee for the bondholders

and the other contracting parties all united in the modified agreement, which, together with said mortgage, constitute one entire contract and agreement. Afterwards the appellee the Louisville & Nashville Railroad Company purchased the entire property, rights, and franchises of the Louisville, Cincinnati, & Lexington Railway Company, including the lease from the Cumberland & Ohio Railroad Company of its line of railroad from Shelbyville to Bloomfield; and it is claimed that the said Louisville & Nashville Railroad Company assumed and became bound to perform all the duties and incur all the obligations undertaken by the said Louisville, Cincinnati, & Lexington Railway Company. It appears that said Louisville and Nashville Railroad Company took possession of said railroad from Shelbyville to Bloomfield, and entered upon the execution of the contract aforesaid, and up to the filing of the petition herein had been operating said road from Shelbyville to Bloomfield, but had given notice of its intention to abandon the operation of said road; and thereupon the said Cumberland & Ohio Railroad Company and appellant Schmidt, trustee for the bondholders, instituted this action for the purpose aforesaid. It will be further seen from the contract aforesaid that the lessee was empowered to sell $250,000 of bonds of the Cumberland & Ohio Railroad Company for the purpose of raising funds for building the road; and various other stipulations as to the operation of said road, including the net earnings thereof, were to be applied to the payment of the interest and principal of said bonds, and, in the event that the earnings should not be sufficient, that the net earnings on its own lines which may accrue to it by reason of business coming to it from or over the said lines of the said Northern Division of the Cumberland & Ohio Railroad Company should also be applied to the payment of the bonds aforesaid. It was also provided that the lessee should furnish various sums of money, which, if not repaid by the earnings of the Cumberland & Ohio Railroad Company, should be a debt in favor of said lessee against the lessor; and it appears that the lessor, by reason of the failure of the road to meet the demands and expenses aforesaid, had become largely indebted to the lessee, for which a personal judgment has been obtained against the lessor in behalf of the appellee the Louisville & Nashville Railroad herein, and same returned, "No property found." It will be seen that, by the terms of the lease, the lessee was to operate said road from Shelbyville to Bloomfield for the term of thirty years. It is alleged in the petition that great and irreparable damage will be sustained by appellant if appellee should cease to operate the road in question, and it is made to appear that no adequate remedy, except a mandatory injunction, can be obtained by appellant. It is further claimed in the petition that the earnings of the Louisville, Cincinnati, & Lexington Railway derived from business coming to it over the Cumberland & Ohio Railroad have always been large, and there is now in the Louisville law and equity court a suit, appealed to this court, brought to enforce the claim of said trustee and said bondholders.

The answer of appellee admits that it purchased from the Louisville, Cincinnati, & Lexington Railway Company all its property rights which that company had the right to convey or assign, except the franchise to exist as a corporation, and that the Louisville, Cincinnati, & Lexington Railway Company undertook to assign and transfer to the appellee the lease from the Northern Division of the Cumberland & Ohio Railroad Company, referred to in the petition, but that said lease, by its express terms, provided that it shall not be assigned without the consent of the lessor, and the consent of the Northern Division of the Cumberland & Ohio Railroad Company was asked, and refused by said company, and said company has never given its consent to the assignment of said lease. But the answer admits that the appellee took possession of said leased property, and has operated same ever since, but claims that it has done so as tenant at sufferance, and not by virtue of the assignment of the lease. It denies that it has made any net earnings on the line of the Northern Division of the Cumberland & Ohio Railroad, or appropriated same to its own use, or that there ever have been any net earnings, but alleges that the necessary cost of operation has exceeded the receipts in the sum of $199,411.70. It is admitted that the appellant instituted suit against the Northern Division of the Cumberland & Ohio Railroad Company, and recovered judgment against it for $419,803.35, and that said company was justly indebted to appellee under the lease referred to, but which it failed and refused to pay. The answer also shows that the execution for said sum was returned "No property found," and judgment was rendered for the sale of the leased road subject to the prior mortgage of the bondholders, but that no one would bid anything for the road subject to the lien of the bondholders; hence no sale was made. It is also alleged that the court refused to give a judgment for sums which the appellee had lost in the necessary operation of said road, but confined its recovery to the amount that had been necessarily paid out by the Louisville, Cincinnati, & Lexington Railway Company in completing the construction of the road, and paying interest on the mortgage bonds. It is also denied that appellee completed the construction of the Northern Division of the Cumberland & Ohio Railroad, but is claimed that it was so completed by the Louisville, Cincinnati, & Lexington Railway Company before the assignment of the lease to the appellee. It also denies that appellant will suffer great or irreparable damages on account of appellee's ceasing to operate the road on December 31, 1895. It is admitted that the charter of the Cumberland & Ohio Railroad Company enjoins upon it the duty to operate its road, and appellee is entirely willing that said Northern Division of the Cumberland & Ohio Railroad Company shall discharge the duty imposed upon it by its charter, but denies that any such duty is imposed upon this appellee under said lease, and insists that no duty rests upon the lessee, except such as grows out of the lease itself, and is to the lessor. It is also claimed that, even if appellee was originally bound by the covenant of said lease, it would be harsh and inequitable to compel it to

perform its onerous duties while said Cumberland & Ohio Railroad Company is continually in default in its covenant to repay to this appellee large sums of money. It also charges that the Cumberland & Ohio Railroad Company is insolvent. Appellee also denies that it owes any duty to the public or the bondholders represented by appellant to operate said road; claims that, if it owes any duty at all, it is only to the Northern Division of the Cumberland & Ohio Railroad Company; and, if it ever owed any duty to said company under said lease, it has been absolved therefrom by the default of the lessor, as aforesaid. It is claimed that appellee owes no duty to the bondholders, unless it is bound by the lease, and only so long as it is bound under and by the terms of said lease to operate said road; that whatever duty the Louisville, Cincinnati, & Lexington Railway Company undertook to perform to the bondholders was by reason of and growing out of the contract of lease with the Cumberland & Ohio Railroad Company; and it only bound itself during the term of said lease to account for the net earnings arising from the operation of said leased line, and to use the same as provided in the lease so far as it might be done towards the payment of the interest and the aggregation of a sinking fund for the retirement of said bonds, and it was only during the term of the lease, or that the lease should be in existence, and the said appellee operated said road under the lease, that it agreed to meet, so far as might be done from the profits on its own line on business coming to it from or over the Northern Division of the Cumberland & Ohio Railroad, the interest on the bonds aforesaid. It is claimed by the terms of the lease that the lessee was given the right to terminate the lease, and the duty of the lessee thereunder, and the rights of the lessor thereunder, by the sale of the franchise of the said Cumberland & Ohio Railroad Company, subject alone to the mortgage of $250,000 resting upon said property and franchise; and, appellee having a right to so terminate said lease and the duties of said lessee thereunder by sale, it also had the right of exhausting all means to compel performance by the Northern Division of the Cumberland & Ohio Railroad Company of its covenant to abandon said leased premises after eight years without sale; that appellee in good faith endeavored, through means of court, to sell the same; and, after failing to sell the same, appellee claims it has a right to abandon the lease, and all rights and duties thereunder, and submits to the court that, under all the circumstances, it would be inequitable, at the instance of the Northern Division of the Cumberland & Ohio Railroad Company or the bondholders, to compel it to continue the operation of said road at great loss to itself, when it is not within the power of the court to compel the Northern Division of the Cumberland & Ohio Railroad Company to perform its material covenants under the lease.

The defendant the Louisville, Cincinnati, & Lexington Railway Company, by its answer, shows that on the first day of November, 1881, it, by deed, sold and conveyed to its codefendant, the Louisville & Nashville Railroad Company, all its property, rights, and franchises, except the franchise to exist as a corporation; that since that day it has had no property, money, or credit, and, as a result, is unable to operate the Northern Division of the Cumberland & Ohio Railroad, or do anything else which requires money or credit. It also has no power to comply with the order of this court, even if it should be made, to operate said road.

The replies of appellant may be considered a traverse of the affirmative allegations of the answer, and the affirmative allegations of the replies are controverted of record. A temporary injunction was granted by the Shelby circuit court, and upon motion to modify or dissolve the injunction thereto before Judge Hazelrigg, of this court, the appellant was required to give an additional bond, and, having failed to do so, the injunction was dissolved. Upon final hearing, the circuit court dismissed the petition, and Adolph Schmidt, individually and as trustee for the bondholders of the Northern Division of the Cumberland & Ohio Railroad Company, has appealed.

It is contended by the appellee that the contract as claimed is too indefinite to be specifically enforced by a court of equity, and, even if the contract was more definite and certain, yet equity will not undertake to specifically enforce performance of a contract calling for continuous service requiring skill and judgment, and calling for continuous supervision upon the part of the court. It is also contended that the lessor in this case being in default, and having failed to comply with its obligation, the contract should not be enforced. It is also contended that this contract should not be specifically enforced because of harsh results that would follow its enforcement. It is further claimed that the appellee the Louisville & Nashville Railroad Company never became bound to operate the road in question for the term of thirty years. It is contended for appellant that appellee the Louisville & Nashville Railroad Company became bound to perform the covenant of the Louisville, Cincinnati, & Lexington Railway Company; secondly, the only way in which the rights of the bondholders under the contract can be protected is through the operation and maintenance of the Louisville, Cincinnati, & Lexington Railway and the Cumberland & Ohio Railroad; thirdly, this is a case of specific performance.

It seems to us that the appellee, having purchased all the property and rights of the Louisville, Cincinnati, & Lexington Railway Company, including the lease in question, and having taken charge of the road in question, and operated the same for a long time, and having elected to sue and recover the sums due to the Louisville, Cincinnati, & Lexington Railway Company from the Cumberland & Ohio Railroad Company, conclusively establishes the fact that it assumed whatever obligations the Louisville, Cincinnati, & Lexington Railway Company were under by virtue of the lease aforesaid; and it further seems clear that the appellee the Louisville & Nashville Railroad Company operated the road under and by virtue of said lease, and not as tenant by sufferance, and thus assumed all the obligations then resting upon the lessee. *Wiggins Ferry Co.* v.

Ohio & M. R. Co. 142 U. S. 408, 35 L. ed. 1059. The leases and mortgages hereinbefore referred to were for the benefit, not only of the lessor and lessee, but also for the benefit of the bondholders of the lessor company; and, this being true, it follows that the trustee for the bondholders has a right to maintain an action for the enforcement of the contract for the benefit of the bondholders. It is true that the lessor has not paid sums of money falling due under the lease to the appellee, but it by no means follows that such failure authorizes the lessee to abandon the contract, and cease to operate the road in question. It will be seen from the lease that certain acts or omissions to act should be held to terminate the lease, but the failure to pay the sums of money falling due from the lessor is not one of the conditions provided for as authorizing an abandonment of the lease. It is provided in the lease that, for the sums of money becoming due to the lessee from the lessor, the lessee might sue and recover the same, and is given a lien, subject to that of the bondholders, upon the road in question; and it may be well argued, this remedy being expressed in the lease, that a forfeiture of the lease was not intended to be allowed either as a remedy or punishment for nonpayment. Moreover, it was a statutory duty of lessor to operate the road, and, the lessee having for a term of thirty years agreed that the lessee should operate the same, it cannot be released therefrom on account of the failure of lessor to pay its indebtedness to the lessee, unless same had been one of the stipulations named in the lease. We are clearly of the opinion that the contract required the lessee to operate the road for the term specified. No other construction seems reasonable or tenable, and this view is sustained by the further fact that the lessee continued to operate the road for many years. But, be this as it may, the bondholders having an interest in the contract in question, and being in law a party thereto, the failure of the lessor to pay the sums due from it to the lessee cannot defeat the rights and interests acquired by the bondholders under and by virtue of the contract aforesaid.

It is earnestly insisted by appellee that the contract is not sufficiently certain to be specifically enforced. It seems, however, to us that the terms of the lease are sufficiently certain and definite to enable the court to compel specific performance. It would not be difficult for the court to safely and intelligently fix and determine the number of trains to be run upon the road, and arrange the various details necessary for the operation of the road; and a fair construction of the lease would authorize such an operation of the road as the business interests of the community from time to time would require. *Robinson* v. *United States*, 80 U. S. 13 Wall. 365, 20 L. ed. 654.

It is further insisted by appellee that a court of equity will not enforce specific performance of a contract calling for continuous service, involving skill and judgment, and requiring continuous supervision on the part of the court. Many authorities are cited in support of this contention, among which are the following: 3 Pom. Eq. Jur. § 1343, which reads as follows: "Contracts for Personal Services or Acts. Where a contract stipulates for special, unique, or extraordinary personal services or acts, or for such services or acts to be rendered or done by a party having special, unique, and extraordinary qualifications,—as, for example, by an eminent actor, singer, artist, and the like,—it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person. It is, however, a familiar doctrine that a court of equity will not exercise its jurisdiction to grant the remedy of an affirmative specific performance, however inadequate may be the remedy of damages, whenever the contract is of such a nature that the decree for its specific performance cannot be enforced and its obedience compelled by the ordinary processes of the court. A specific performance in such cases is said to be impossible, and contracts stipulating for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel an actor to act, a singer to sing, or an artist to paint. Applying the same course of reasoning, the English courts formerly held that they could not negatively enforce the specific performance of such contracts by means of an injunction restraining their violation. Those courts have, however, entirely receded from this latter conclusion. The rule is now firmly established in England that the violation of such contracts may be restrained by injunction, whenever the legal measure of damages would be inadequate, and the contract is of such a nature that its negative specific enforcement is possible. This rule was first applied to stipulations which were in form expressly negative, but was soon extended to affirmative contracts which implied or involved negative stipulations." It will be seen from the foregoing that the contract here sought to be enforced is essentially different from the illustrations or cases cited in the section quoted. *Rutland Marble Co.* v. *Ripley*, 77 U. S. 10 Wall. 358, 19 L. ed. 961, is cited. It will be seen from the opinion in that case that the contract was to deliver a quantity of marble of certain kinds, and in blocks of a kind; and the court there held that specific performance ought not to be granted, on account of the great difficulty of enforcing the same, and, further, that one party had the right at any time to terminate the contract on one year's notice. The case of *Texas & P. R. Co.* v. *Marshall*, 136 U. S. 406, 34 L. ed. 390, is relied on by appellee. It appears from that case that the city of Marshall agreed to give the Texas Railway Company $300,000 in bonds, and 66 acres of land for shops, etc; and the company, in consideration of the donation, agreed to permanently establish its eastern terminus and offices at Marshall, and to establish and construct its machine shops, car works, etc., in said city. The city performed its agreement, and the company made Marshall its eastern terminus, and built a depot, etc., there. After the expiration of a few years, Marshall ceased to be the terminus of the road, and some of the shops were removed. The city filed its bill in equity to enforce the agreement, both as to the terminus and as to the shops. The court held

that establishing the shops, etc., and keeping them there for eight years, and until the interest of the company and the public demanded the removal of some or all of them to some other place, satisfied the contract. It is true that the court also stated in substance that the various duties and acts to be performed were such as a court of equity would not undertake to specifically enforce, if the contract had required perpetual performance. It may be conceded that some of the authorities cited by appellee sustain its contention, but we deem it unnecessary to notice them any further in detail.

It is also insisted by appellee that the enforcement of the contract under consideration would result in great hardship, and equity will not enforce specific performance of a contract that will result in great hardship. We do not think the facts in this case bring it within the rule announced in any of the decisions cited. It is manifest that the loss to appellee by reason of expense incurred in building the road, and for which it has obtained judgment against the Cumberland & Ohio Railroad Company, will remain unaffected by operation of the leased line. A court of equity might refuse to enforce a contract that at the time of its execution involved hardship or was unconscionable; but the mere fact that one having a number of years to run might turn out a losing investment or contract affords no reason of refusal to specifically enforce it. Moreover, if we are to regard the judgment referred to in the pleadings in the case of *Schmidt* v. *Louisville, C. & L. R. Co.* 95 Ky. 289, and 301, the operation of the leased line has by no means been a total loss to the appellee.

It seems clear to us that there is no adequate relief for the bondholders to be had, except by specific enforcement of the contract; hence the important question to be considered is the power of the court to enforce specifically the contract, and whether the same, in equity, should be enforced. As before said, there is some authority cited which sustains the contention of appellee that courts of equity cannot or ought not to specifically enforce a contract requiring skill and long or continuous supervision of the court; but it is insisted by appellant that the weight of recent decisions sustains its contention that such contracts can and ought to be enforced, and he cites several decisions in support of this contention, among which is the case of *Prospect Park & C. I. R. Co.* v. *Coney Island & B. R. Co.* 144 N. Y. 152, 26 L. R. A. 610. It appears that the plaintiff granted to the defendant the use of certain of its tracks in the city, from a point named to said depot, for twenty-one years, from June 1, 1882, free of charge, and defendant covenanted to run cars to plaintiff's depot to connect with trains run to and from the island. The contract contained the provision that, in case defendant should use steam as a motive power on its line between the city and the island, either party could terminate the contract on six months' notice. The parties acted under the contract until October, 1889, when defendant adopted the trolley system of running cars by electricity for use upon its road between the city and the island, ceased to run its cars to said depot, and advised plaintiff that it did not intend to do so. The plaintiff instituted suit to compel specific performance of the contract. In the opinion the court said: "As a final point the learned counsel for the defendant insists that equity will not enforce the specific performance of a contract having some years to run which requires the exercise of skill and judgment and a continuous series of acts. While there is some conflict in the cases, and all are not to be reconciled, yet the great weight of authority permits specific performance in the case at bar. The special term enjoined the defendant from operating any of its cars unless it performs its contract with the plaintiff. The provisions of this contract are neither complicated nor difficult, and are such as a court of equity can enforce in its discretion. A few of the cases may be referred to as illustrating the power vested in a court of equity to compel the specific performance of contracts similar to the one at bar. In *Storer* v. *Great Western R. Co.* 2 Younge & C. Ch. Cas. 48, the court compelled the defendant to construct and forever maintain an archway and its approaches. The court said there was no difficulty in enforcing such a decree. In *Wilson* v. *Furness R. Co.* L. R. 9 Eq. 28, the defendant was compelled to erect and maintain a wharf. See also *Green* v. *West Cheshire R. Co.* L. R. 13 Eq. 44. In *Wolverhampton & W. R. Co.* v. *London & N. W. R. Co.* L. R. 16 Eq. 433, the agreement between the two companies was that the defendant should work the plaintiff's line, and during the continuance of the agreement develop and accommodate the local and through trade thereof and carry over it certain specific traffic. The bill was filed to restrain the defendant from carrying a portion of the traffic which ought to have passed over the plaintiff's line by other lines of the defendant. The point was made that the court could not undertake to enforce specific performance, because it would require a series of orders and a general superintendence to enforce the performance, which could not conveniently be administered by a court of justice. The injunction issued and Lord Selborne said (p. 438): 'With regard to the argument that upon the principles applicable to specific performance no relief can be granted, I cannot help observing that there is some fallacy and ambiguity in the way in which in cases of this character those words "specific performance" are used. . . . The common expression, as applied to suits known by that name, presupposes an executory as distinct from an executed agreement. . . . Confusion has sometimes arisen from transferring considerations applicable to suits for specific performance, properly so called, to questions as to the propriety of the court requiring something or other to be done in specie. . . . Ordinary agreements for work and labor to be performed, hiring and service and things of that sort, out of which most of the cases have arisen, are not, in the proper sense of the word, cases for "specific performance;" in other words, the nature of the contract is not one which requires the performance of some definite act, such as the court is in the habit of requiring to be performed by way of administering superior justice, rather than to leave the parties to their remedies at law. . . . The question is whether, the de-

fendants being in possession, they are not at liberty to depart from the terms on which it was stipulated that they should have that possession.' The American cases are equally clear. In *Lawrence* v. *Saratoga Lake R. Co.* 36 Hun, 467, the defendant was, among other things, to erect a depot at which all trains were to stop. Specific performance was decreed, the court holding that, although under the agreement the defendant could not be compelled to run trains upon its road, yet it might properly be enjoined from running any regular trains which did not stop at the station. The objection that the judgment in this case involves continuous acts and the constant supervision of the court is well met by the reasoning in *Central Trust Co.* v. *Wabash, St. L. & P. R. Co.* 29 Fed. Rep. 546, being affirmed as *Joy* v. *St. Louis*, 138 U. S. 1, 47, 50, 34 L. ed. 843, 858, 859, where Judge Blatchford wrote the opinion. As to inconvenience or circumstances which affect the interest of one party alone constituting a reason why performance should not be decreed, the case of *Rutland Marble Co.* v. *Ripley*, 77 U. S. 10 Wall. 339, 358, 19 L. ed. 955, 961, furnishes a clear discussion of the general principles involved. The rule established by the above and kindred cases is that a contract is to be judged as of the time at which it was entered into; and if fair when made the fact that it has become a hard one by the force of subsequent circumstances or changing events will not necessarily prevent its specific performance. See also *Stuart* v. *London & N. W. R. Co.* 15 Beav. 513; *Mortimer* v. *Capper*, 1 Bro. Ch. 156; *Jackson* v. *Lever*, 3 Bro. Ch 605; *Paine* v. *Meller*, 6 Ves. Jr. 349; *Paine* v. *Hutchinson*, L. R. 3 Eq. 257; *Franklin Teleg. Co.* v. *Harrison*, 145 U. S. 459, 472, 473, 36 L. ed. 776, 780, 781. A large number of other cases might be cited sustaining the power of the court to decree the specific performance of this contract, but we do not deem it necessary There can be no well-founded doubt as to the power of the court in the premises, and the important question is whether, in the exercise of a wise discretion and in view of all the circumstances specific performance should be decreed. After a most careful consideration of this case we have reached the conclusion that the plaintiff is entitled to have the contract specifically performed. The order of the general term is reversed and the judgment of the special term is affirmed, with costs in all the courts."

The case of *Joy* v. *St. Louis*, 138 U. S. 1, 34 L. ed. 843, seems also to sustain the contention of appellant. *Union P. R. Co.* v. *Chicago, R. I. & P. R. Co.*, and *Union P. R. Co.* v. *Chicago, M. & St. P. R. Co.* (decided May 25, 1896) 163 U. S. 564, 41 L. ed. 265, were cases seeking specific enforcement of a contract for the use of certain railroad trackage rights. It was urged in those cases that courts of equity would not undertake to enforce specific performance of a contract requiring skill, and having a long time to run. The court, in discussing that question, said: "(3) The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach It is not contended that multiplicity of suits to recover damages for the refusal of defendants to perform would afford adequate relief, nor could it be, for such a remedy under the circumstances would neither be plain nor complete, nor a sufficient substitute for the remedy in equity, nor would the interest of the public be subserved thereby. But it is objected that equity will not decree specific performance of a contract requiring continuous acts involving skill, judgment, and technical knowledge, nor enforce agreements to arbitrate, and that this case occupies that attitude. We do not think so. The decree is complete in itself, is self-operating and self-executing, and the provision for referees in certain contingencies is a mere matter of detail, and not of the essence of the contract. It must not be forgotten that in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies, 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated;' and 'has always preserved the elements of flexibility and the expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed.' Pom. Eq. Jur. § 111. We regard the case of *Joy* v. *St. Louis*, 138 U. S. 1, 34 L. ed. 843, as determining that this contract was one within the control of a court of equity to specifically enforce. In that case the St. Louis, Kansas City & Colorado Railroad Company acquired by succession under a contract the right of running its trains over the line of the Wabash Company from a point on the northern line of Forest Park, through the park and into the Union Depot at St. Louis, together with the right to use side tracks, switches, turnouts, and other terminal facilities. It was a continuing right and unlimited in time, and the contract contained provisions regulating the running of trains and prescribing the duties of superintendents, trainmasters, and other officers. The objections that are urged against the specific performance of the contract under consideration were urged against the specific performance of that contract and were severally overruled, and it was held that nothing short of the interposition of a court of equity would provide for the exigencies of the situation. This case was cited with approval in *Franklin Teleg. Co.* v *Harrison*, 145 U. S. 459, 36 L. ed. 776. The contract there was one for the use by Harrison Brothers & Co. of a wire of the Franklin Telegraph Company between Philadelphia and New York. It appeared that Harrison Brothers & Co. had been in possession of a certain valuable contract with the Insulated Lines Telegraph Company, to the rights of which company the Franklin Telegraph Company had succeeded. Desiring to have that contract terminated, the Franklin Company entered into a new contract with

Harrison Brothers, by which the Franklin Company agreed to allow Harrison Brothers the right to put up, maintain, and use a telegraph wire on the poles of the Franklin Company. At the expiration of ten years thereafter the wires were to become the property of the telegraph company, after which time the telegraph company was to lease the same to Harrison Brothers for $600 per annum, payable quarterly, and with all the other terms and conditions as they existed before. The ten years having expired, Harrison Brothers continued to use the wire, paying the stipulated sum of $600 per annum therefor; but after this had gone on for about three years the telegraph company served notice on Harrison Brothers putting an end to the agreement, whereupon Harrison Brothers filed a bill to restrain the telegraph company from terminating the contract and to have the same specifically enforced, and this court held that the contract was one proper for specific performance. The same rule was laid down in *Prospect Park & C. I. R. Co.* v. *Coney Island & B. R. Co.* 144 N. Y. 252, 26 L. R. A. 610, where many authorities are cited. In *Denver & R. G. R. Co.* v. *Atling*, 99 U. S. 463, 25 L. ed. 488, this court directed an injunction against the Cañon City Railway Company from preventing the Denver road from using the right of way through the Grand Cañon, and said: 'If in any portion of the Grand Cañon, it is impracticable or impossible to lay down more than one roadbed and track, the court, while recognizing the prior right of the Denver Company to construct and operate that track for its own business, should, by proper orders, and upon such terms as may be just and equitable, establish and secure the right of the Cañon City Company, conferred by the act of March 3, 1875, to use the same roadbed and track, after completion, in common with the Denver Company. In *Express Cases*, 117 U. S. 1, 29 L. ed. 791, the express companies sought to restrain the railway companies from refusing to carry express matter on the terms of contracts which had expired, which the court held could not be done, and it was said: 'The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts; but unless a duty has been created either by usage, or by contract, or by statute, courts cannot be called on to give it effect.' It was objected in *Joy's Case* that the court was proposing to assume the management of the railroad 'to the end of time;' but Mr. Justice Blatchford, speaking for the court, responded that the decree was complete in itself, and that it was 'not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances.' And the court applied the principle that considerations of the interests of the public must be given due weight by a court of equity, when a public means of tranportation, such as a railroad, comes under its jurisdiction. 'Railroads are common carriers and owe duties to the public,' said Mr. Justice Blatchford. 'The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation. The present case is a striking illustration. Here is a great public park, one of the lungs of an important city, which, in order to maintain its usefulness as a park, must be as free as possible from being serrated by railroads; and yet the interests of the public demand that it shall be crossed by a railroad. But the evil consequences of such crossing are to be reduced to a minimum by having a single right of way, and a single set of tracks, to be used by all the railroads which desire to cross the park. These two antagonisms must be reconciled, and that can be done only by the interposition of a court of equity, which thus will be exercising one of its most beneficent functions.' Clearly the public interests involved in the contracts before us demand that they should be upheld and enforced."

It seems to us that the weight of modern authorities sustains the contention of appellant, and a court of equity can enforce specific performance of the contract under consideration. It is pretty well known history of the country that many railroads, and for long terms, have been operated under the direct supervision and control of courts of equity. It does not seem to us that it would be difficult to enforce specific execution of the contract under consideration. The court might enforce its orders by attachment or rule according to equity practice, or, if deemed best, it might place the road in the hands of a receiver, to be operated at the cost and expense of the appellee the Louisville & Nashville Railroad Company.

For the reasons indicated, the *judgment of the court below is reversed*, and the case remanded, with directions to enter judgment requiring the appellee the Louisville & Nashville Railroad Company to operate the leased line until the expiration of the thirty years' lease aforesaid, and for proceedings consistent with this opinion.

PENNSYLVANIA SUPREME COURT.

FARMERS' BANK of Springville, New York, *Appt.*,
v.
J. B. SHIPLEY *et al.*

(182 Pa. 24.)

Payments indorsed on the back of a note before its transfer to the payee do not destroy its negotiability.

(*Sterrett, Ch. J., dissents.*)

(July 15, 1897.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Wyoming County in favor of defendants in an action to enforce payment of a promissory note. *Reversed.*

The facts are stated in the opinion.

Messrs. **W. E. Little, C. A. Little, Joseph Moore,** and **Ross & Dersheimer,** for appellant:

The transfer of a negotiable note by indorsement under seal does not destroy the negotiable character of the note.

Ege v. *Kyle*, 2 Watts, 222.

A note payable "on or before a certain time" is negotiable.

Ernst v. *Steckman*, 74 Pa. 13, 15 Am. Rep. 542.

A note payable in instalments is negotiable.

Carlon v. *Kenealy*, 12 Mees. & W. 139

Payment of an instalment cannot destroy that negotiability.

Ege v. *Kyle*, 2 Watts, 222; *Dunning* v. *Heller*, 103 Pa. 269; *Second Nat. Bank* v. *Morgan*, 165 Pa. 199.

A note may be on interest and retain its character of negotiability.

Woods v. *North*, 84 Pa. 407, 24 Am. Rep. 201.

A note payable in instalments, all to become due on default being made in the payment of the first instalment, does not make the amount uncertain nor the instrument non-negotiable.

Zimmerman v. *Anderson*, 67 Pa. 421, 5 Am. Rep. 447.

A note "payable twelve months after date" (or before, if made out of the sale of a machine) is negotiable.

Ernst v. *Steckman*, 74 Pa. 13, 15 Am. Rep. 542.

A note accompanied by the statement "that it is accompanied with certain collateral" is negotiable.

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

A note similar to the one in suit was declared negotiable.

Second Nat. Bank v. *Morgan*, 165 Pa. 199.

A note transferred as collateral for a debt then created does not lose its negotiability so as to let in evidence of failure of consideration, where the holder took without notice.

Munn v. *M'Donald*, 10 Watts, 270.

NOTE.—*Payments indorsed on note as affecting negotiability.*

FARMERS' BANK OF SPRINGVILLE v. SHIPPEY seems to be the first case in which the question of the effect of indorsements before its maturity of payments upon a note upon its negotiability has been directly considered. There seems to be no doubt that the fact that a note is payable by instalments does not destroy its negotiability. Oridge v. Sherborne, 11 Mees. & W. 374; Carlon v. Kenealy, 12 Mees. & W. 139, 1 Dowl. & L. 331, 13 L. J. Exch. N. S. 64, and cases cited in FARMERS' BANK OF SPRINGVILLE v. SHIPPEY.

But, on the other hand, it has been held that a note giving the right to pay at any time before maturity, deducting the interest until due, is not negotiable. Way v. Smith, 111 Mass. 523.

But neither of those decisions has any material bearing upon the question under consideration. In case of an instalment note the time for the payment of each instalment is fixed so that it is within the rule requiring certainty as to time of payment. On the other hand, the general right to pay at any time before maturity destroys the certainty as to the time of payment. So that such cases are within well-established rules.

In Knebelcamp v. Smith, 3 Ill. App. 244, a default was taken against the maker of a note so that the question of the execution of the note was foreclosed, but the court held that the maker might, on the assessment of damages, show that payments had been indorsed upon the note before its transfer for the purpose of reducing the face of the note by the amount of payments.

In Emerson v. Cutts, 12 Mass. 78, where a note had been returned to the payee after having been negotiated by him, and it was then renegotiated to the one who brought the suit, it appeared that payments had been indorsed on it, but the defense was not made in regard to them, but upon the ground that the note could not be renegotiated after having been returned to the payee.

In Johnson v. Kennion, 2 Wis. 282, where the action was by an indorsee who had been paid a portion of the claim by his indorser, Gould, J., says where the drawer of a bill has paid part it may be indorsed over for the residue.

In Dryden v. Britton, 19 Wis. 23, where a note in favor of a third person which had been transferred to defendant was claimed as a set-off in a suit, it appeared that the payee was to ascertain and indorse upon the note the amount of payments which had been made, and the court held that until such payments were ascertained and indorsed the title did not pass so as to make the note available as a set-off, but there is no claim that the negotiability of the note was destroyed by such indorsement.

The implication from the above cases, so far as it goes, would seem to be in favor of the continued negotiability of the note after the indorsement of payments thereon.

The case which comes nearest to an actual decision is Ege v. Kyle, 2 Watts, 222, in that the headnote states that an indorsement on a negotiable note of a receipt on account of a quantity of iron, "the net proceeds of which are to be credited on the within," does not destroy its negotiable character; but the point is not brought out in the report of the case, although the fact of credit appears in the statement.

The cases in which payments would be indorsed upon the note prior to its maturity are doubtless few, but in a respectable number of cases notes have changed hands after payments have been indorsed on them. No question as to the negotiability of the note has been raised in such cases, however, so that, although the general opinion seems to have been that the negotiability was not affected by such indorsements, the question does not appear to have been previously raised and decided. H. P. F.

See also 41 L. R. A. 175.

A bona fide holder of a negotiable note, for value, without notice, can recover, though he took it under circumstances which ought to excite the suspicion of a prudent man.

Phelan v. *Moss*, 67 Pa. 59, 5 Am. Rep. 402; *Second Nat. Bank* v. *Morgan*, 165 Pa. 199; *Lancaster County Nat. Bank* v. *Garber*, 178 Pa 91.

Messrs. **Charles E. Terry, Edwin J. Jorden,** and **James W. Piatt,** for appellees:

The essential element of a negotiable promissory note is that it should be certain. Certainty is required, first, as to the payee; second, as to the maker; thirdly, as to the amount to be paid; fourthly, as to the time when the payment is to be made; and fifthly, as to the fact itself of payment.

8 Wait, Act. & Def. 165; *First Nat. Bank* v. *Bynum*, 84 N. C. 24, 37 Am. Rep. 604; 1 Wait, Act. & Def. 538.

Certainty is a great object in mercantile instruments.

1 Wait, Act. & Def. 548; *Bunker* v. *Athearn*, 35 Me. 364; *Hays* v. *Gwin*, 19 Ind. 19; *Overton* v. *Tyler*, 3 Pa. 347, 45 Am. Dec. 645.

The indorsement of payments on the back of the note destroyed its negotiability.

Payments were made by persons who had not signed the note. Why did not this create uncertainty as to the terms, conditions, and persons who were to pay the note?

Overton v. *Tyler*, 3 Pa. 348, 45 Am. Dec. 645; *Sweeney* v. *Thickstun*, 77 Pa. 131; 1 Parsons, Notes & Bills, 37; *Woods* v. *North*, 84 Pa. 407, 24 Am. Rep. 201; *Johnston* v. *Speer*, 92 Pa. 227, 37 Am. Rep. 675; *Citizens' Nat. Bank* v. *Piollet*, 126 Pa. 194, 4 L. R. A. 190; *Philadelphia Bank* v. *Newkirk*, 2 Miles (Pa.) 442; *Iron City Nat. Bank* v. *McCord*, 139 Pa. 52, 11 L. R. A. 559; *Lamb* v. *Story*, 45 Mich. 488; *Fralick* v. *Norton*, 2 Mich. 130, 55 Am. Dec. 56; *Way* v. *Smith*, 111 Mass. 523; *Hubbard* v. *Mosely*, 11 Gray, 170.

The amount of this note, moreover, could not be ascertained by calculation.

These defendants were sued and declared against jointly.

Where a note is joint and several the holder may bring separate actions. But he must proceed against all jointly on their joint contract or against the several makers separately.

3 Randolph, Com. Paper, ¶ 1667; *Hart* v. *Withers*, 1 Penr. & W. 285, 21 Am. Dec. 382; *Rowan* v. *Rowan*, 29 Pa. 181; *Coughenour* v. *Suhre*, 71 Pa. 462.

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

The action was assumpsit upon a note of which the following is a copy:

833\frac{33}{100}$. Tunkhannock, July 8th, 1891. One year after date, for value received, we or either of us promise to pay J. Thompson & Co., or order, eight hundred and thirty-three $\frac{33}{100}$ dollars, at the Wyoming National Bank of Tunkhannock, Pa., with interest at 6 per cent per annum, interest payable annually.

This was signed by all of defendants, fifteen in number. On the back of the note were these indorsements: "July 11th, 1891. Rec'd of J. C. Reed thirty-three and $\frac{33}{100}$ dollars, to apply on within note." There was a like indorsement of payment of a like amount as to seven others of the drawers, and indorsement of payment by one other in sum of $66.66, and one other in sum of $16.66. Then followed the indorsement of the payees, "J. Thompson & Co." On notice by defendants, before trial, the plaintiff proved it was bona fide holder, for value, before maturity, without notice of any defense by the drawers. The defendants offered evidence tending to prove that the note represented a part of the purchase price of a horse sold to twenty-five persons by Thompson & Co., through an agent, Shaw; that the whole price was $2,500, for which three notes of a like amount, $833.33 payable in one, two, and three years, were given, and that these notes were not to become obligatory on any one of the purchasers until the whole twenty-five had signed; that this note was not so signed; further, that gross misrepresentations had been made to them by Shaw as to the age and soundness of the horse. The court below, being of opinion that the indorsements destroyed the negotiability of the note, submitted the evidence to the jury on both particulars set up by the defendants. There was a verdict for defendants, and, judgment having been entered thereon, plaintiff now appeals, assigning for error the refusal of the court to affirm its first point, as follows: "The note in suit is a negotiable instrument, and its negotiability is not destroyed by reason of the indorsements of payments thereon."

The reasons for denying the point fairly appear in the language of the court below, as follows: "Here was a note dated 8th July, 1891, due one year from date, and called for the payment of $833.33. Now, nothing can be paid on that note until the year is up, unless by the agreement of the parties and a modification of the contract which the parties then enter into. It seems from the face of the note, by the indorsements that were upon it at the time the plaintiff purchased it, that on the 11th July, 1891, the sum of $33 was paid by various parties, and indorsed upon the back of the note. That was before the note was due, and could only have been placed there by the consent of those who held the note at the time, through a modification of the contract as originally written. Now, the parties have agreed to modify this contract, and that they would agree to treat certain portions of this note as due before the year was up, and permit payments to be made. That reduced the amount of the note from $833.33 to a different amount, which is not stated on the face of the paper or anywhere else upon it. A note or instrument cannot be negotiable unless the amount due upon it is stated in writing or figures. The amount due upon the note in suit is nowhere stated in figures or writing upon it. When this note left the hands of these parties, it was negotiable paper, and remained such until it was modified by a different contract by the parties who held it. When they received any amount before the note was due, it modified the contract; so it is no longer a negotiable instrument, for the reason that the amount due is no longer stated on the face of the paper." The ruling of the court is based on the as-

sumption that the note was executed on the 8th, and the contract modified by accepting payment on the 11th, three days after; that is, the payees of the note, to whom it was delivered on the 8th, subsequently, on the 11th, agreed to a change of contract with part only of the drawers, thereby rendering the amount due uncertain, a certain amount no longer appearing either in words or figures, on the face of the note. Taking the date as of the 8th, and the indorsements as of the 11th, the presumption that the indorsements were made after delivery would be warranted; but the court below seems to have overlooked the undisputed fact that the final execution of the note by delivery did not take place until the 13th. Three of the drawers signed after the indorsement of the payments. So, there was no modification of the contract, as between the drawers and the payee, after delivery. The indorsements were made as between the drawers themselves. Therefore, what would be the effect as to other drawers if part of them, after delivery to the payee, with his consent, modified the original contract, does not arise. When executed by delivery the contract was precisely what it now appears.

The note, on its face, being negotiable, and indorsed by the payee to plaintiff, who took it for value, without notice of any fraud, as between the original parties to it, did the indorsements on the back destroy its negotiability, so that plaintiff took it subject to any defense the drawers had as between them and the payees? "It is a necessary quality of negotiable paper that it should be simple, certain, unconditional, not subject to any contingency." *Woods* v. *North*, 84 Pa. 407, 24 Am. Rep. 201. The note in question in that case had a clause "and 5 per cent collection fee if not paid when due." This court held that these words imported into the paper an undoubted element of uncertainty, because the amount of the collection fees could not be arbitrarily determined by the parties. A reasonable compensation was all that could be recovered, notwithstanding the stipulation. Unquestionably, if the 5 per cent was not unalterably fixed, if only a reasonable compensation, which might be 2, 3, or 4 per cent, could be added, then the face of the note signified no certain amount. It might just as well have been written "with reasonable charges for collection." But how does the indorsement of a payment before execution render the amount called for on the face of the note uncertain? It is a mere matter of computation, which, by reason of numerous payments, may be burdensome, but nevertheless the mathematical result is absolutely certain. In *Ege* v. *Kyle*, 2 Watts, 222, there was indorsed on the note, "Received on the within note, six tons nine hundred one-quarter and nineteen pounds of bar iron, the net proceeds arising from the sale of which are to be credited on the within, which is $397.50." The court below ruled that this indorsement did not affect the negotiability of the paper. And while, as argued by appellee, the principal contention in this court was whether the suit had been properly brought in the name of Kyle, nevertheless that was not the only one, for this point must have been passed on when this court decided: "The other errors are not supported." Although the case is meagerly reported, it is quite obvious that counsel had but little confidence in his point, and it was probably not pressed in either court. *Ege* v. *Kyle* was approved as a precedent on this point, in *Dunning* v. *Heller*, 103 Pa. 269, Paxson, J., delivering the opinion, saying: "It was held in *Ege* v. *Kyle* [2 Watts, 222], that an indorsement on a negotiable note of a receipt on account of a quantity of iron, 'the net proceeds of which are to be credited on the within,' . . . did not destroy its negotiable character." Such indorsement could not render the amount less certain than a promise to pay with interest; yet such a stipulation does not destroy the negotiability of the paper. "A negotiable note may be made payable with interest from its date, and, if more than lawful interest is stipulated for, it does not in Pennsylvania make the contract void, but only the usury." *Woods* v. *North*, 84 Pa. 407, 24 Am. Rep. 201. In the case of *Second Nat. Bank* v. *Morgan*, 165 Pa. 199, the suit was on a note of the precise amount of this one, and given for a like consideration. The question was as to the sufficiency of an affidavit of defense averring precisely the same misrepresentations and fraudulent conduct on part of payee, and that plaintiff had notice of the same, as were set up by the drawers in this case. It was held by this court that the note was negotiable, and the affidavit was insufficient. But, although a credit was indorsed by the payees on the back of the note of $116.66, neither the affidavit, the counsel for defendants, the court below, nor this court, intimate that that fact affected its negotiability. All assume it did not. The rarity of cases on a question which must be of such frequent occurrence as indorsements of payments on negotiable paper only indicated that since *Ege* v. *Kyle*, decided more than sixty years ago, the profession generally has assumed that such indorsements do not affect the negotiability of such paper. We are of the opinion that these indorsements did not take from the note its character as commercial paper, and that the learned judge of the court below erred in deciding otherwise. It is wholly immaterial who made the payments. When made, they were to that extent in relief of the drawers' liability, and, being made while the paper was still in their possession, the presumption, as between them and a bona fide holder, is absolute that they were made with their authority. The note being negotiable, the suit in favor of this plaintiff can be sustained jointly against all the drawers.

The judgment is reversed, and a *v. f. d. n.* awarded.

Sterrett, Ch. J., dissents.

President, etc., of DELAWARE & HUDSON CANAL COMPANY, *Appts.*,
v.
David HUGHES *et al.*

(183 Pa. 66.)

Adverse possession of the surface of land for sufficient time to give title, by one who has actual notice that a third person has purchased the underlying coal and is using the vein as part of his mine, which includes a larger tract, does not give title by adverse possession to the coal under the surface.

(October 25, 1897.)

APPEAL by plaintiffs from a decree of the Court of Common Pleas for Lackawanna County in favor of defendants in a suit brought to enjoin defendants from mining coal on plaintiffs' land. *Reversed.*

The facts are stated in the opinion.

Messrs. **William H. Jessup** and **James H. Torrey,** for appellants:

This is a case of first impression. We have been unable to find a decision upon the exact point in any of our reported cases.

Where a severance has taken place of the surface from the underlying strata of coal or other minerals, no possession of the surface constitutes any possession of the underlying strata.

Plummer v. *Hillside Coal & I. Co.* 160 Pa. 483; *Kingsley* v. *Hillside Coal & I. Co.* 144 Pa. 613; 1 Am. & Eng. Enc. Law, p. 262, note 1; *Putnam Free School* v. *Fisher*, 34 Me. 172; *Caldwell* v. *Copeland*, 37 Pa. 431, 76 Am. Dec. 436.

How, then, may one in possession of the surface merely obtain title by the statute of limitations to the minerals or strata of coal lying underneath?

Tyrwhitt v. *Wynne*, 2 Barn. & Ald. 554; *Lord Cullen* v. *Rich*, Bull. N. P. 102*b*; *Rich, Lord Cullen*, v. *Johnson*, 2 Strange, 1142; *Armstrong* v. *Caldwell*, 53 Pa. 284.

Title to mines or quarries, whether open or unopened, as a separate subject-matter, is capable of acquisition under the limitation acts if the person claiming them has already the exclusive right to the surface, and if his acts show such a possession of them as, if he were not already entitled to the surface, would have enabled him to acquire a title to them as part of the entire *solum* from the surface down to the center; they will enable him to acquire a title to them as a separate subject-matter.

MacSwinney, Mines, pp. 27, 526, 527; *Thew* v. *Wingate*, 10 Best & S. 714, note; *M'Donnell* v. *M'Kinty*, 10 Ir. Law Rep. 527; *Earl Dartmouth* v. *Spittle*, 19 Week. Rep. 445; *Ashton* v. *Stock*, L. R. 6 Ch. Div. 726; *Seaman* v. *Vawdrey*, 16 Ves. Jr. 392; *Barnes* v. *Mawson*, 1 Maule & S. 84.

To constitute a continuous possession of mines, it is only necessary that the operations be prosecuted as continuously as the nature of the business and the custom of the country permit.

Stephenson v. *Wilson*, 50 Wis. 95; *Wilson* v. *Henry*, 40 Wis. 594.

Messrs. **S. J. Strauss, Thomas P. Duffy,** and **John T. Lenahan,** for appellees:

Whoever owns the surface is presumed to own, and would originally actually own, whatever might be beneath the surface, until he shall have granted away the one or the other and thus separated their ownerships.

2 Washb. Real Prop. 3d ed. 345; MacSwinney, Mines, London ed. 1884, 26.

Whatever is in a direct line between the surface and the center of the earth belongs to the owner of the surface.

Dallas's Bainbridge, Mines, 1871, *5; *Caldwell* v. *Copeland*, 37 Pa. 430, 78 Am. Dec. 436; *Armstrong* v. *Caldwell*, 53 Pa. 284; *Kingsley* v. *Hillside Coal & I. Co.* 144 Pa. 613; *Plummer* v. *Hillside Coal & I. Co.* 160 Pa. 483.

Actual possession is superior to constructive possession as the substance is superior to fiction. There is not in this case a conflict between two actual possessions, but between one actual and one constructive.

If any principle in the law of Pennsylvania can be regarded as settled by argument and authority, it is that which affirms that the legal title to uncultivated lands draws to it the possession, and that this possession is to be deemed actual for all purposes of remedy until it is interrupted by an actual entry, and adverse possession taken by another.

Miller v. *Shaw*, 7 Serg. & R. 134; *Barr* v. *Gratz*, 17 U. S. 4 Wheat. 213, 4 L. ed. 553; *Hole* v. *Rittenhouse*, 25 Pa. 492.

A mere physical possession of one seam of coal does not of itself create a presumption of the possession of all the other seams of coal lying thereunder.

MacSwinney, Mines, pp. 41, 42.

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

This case presents a question of considerable importance to the owners of mineral lands, which does not seem to have been decided by the courts, or to have been discussed by text-writers, so far as I have been able to discover. It will be readily understood from a brief statement of the facts out of which it arises. The plaintiff company is engaged in mining and selling anthracite coal. As early as 1825 it was the owner of a considerable body of contiguous lands which had been purchased by it because of the coal underlying it. A tract known as the "Porter Tract," containing 200 acres, was part of this body of coal land. The coal upon it was opened by the company at some time between 1830 and 1835, and mining operations begun under it. From that time to the present the company has been in the possession of its mineral deposit under the surface of the Porter tract by actual mining and by the use of the openings and gangways for purposes connected with the removal of coal from adjoining lands belonging to it. The defendant derives his title from one Alexander McDonald, who was an employee of the plaintiff, and who entered upon the surface of the Porter tract in 1836 or 1837, and began a residence upon and the cultivation of a small portion of it. It does not seem to admit of

NOTE.—For running of statute against action for removal of coal, see Lewey v. H. C. Frick Coke Co. (Pa.) 28 L. R. A. 283.

serious doubt that from 1850, and perhaps somewhat earlier, down for a period of more than twenty-one years, the possession of McDonald and his vendees of the land in controversy has been open, notorious, hostile, and exclusive. As to the surface, therefore, the defendant has acquired a title under the statute of limitations. The question raised by this record is whether he has also, under the circumstances just stated, acquired a title to the underlying coal. The general principles regulating the titles to upper and lower estates in the earth's crust are pretty well settled by our own cases. The ownership of the surface carries with it, if there be no obstacle to the application of the general rule, title downward to the center of the earth and upward indefinitely. So long as mineral deposits remain in place, they are part of the freehold, and pass with it by deed, gift, or other form of conveyance; but when the minerals are removed from their position or bed by mining they become personal property, and are sold like other personal chattels. If the owner grants to another the right or privilege of taking coal from his lands, this grant, if not an exclusive one, is not the grant of an interest in the land, but of an easement or incorporeal right, which leaves the title to the coal in place remaining in the grantor. But a grant of all the coal, or of the exclusive right to mine the coal, is a sale of the coal in place. The conveyance of the coal creates in the vendee an interest in land. The deed or other conveyance is within the recording acts, and is subject to all the rules and regulations governing conveyances of the surface. It may convey an estate in fee simple in the coal or other mineral, or any lesser estate, in the same manner, and by the same words of grant, made use of in conveyances of the surface. When such a conveyance has been made of the coal or other mineral it works a severance of the estate so conveyed from the surface; and, if the deed be recorded, it is constructive notice to all the world of the fact of severance. Thenceforward the owner of the soil may cultivate, inclose, and reside upon his estate for any length of time, but his possession will not extend below it. It will not grasp or affect in the slightest degree the estate below him which has been severed by the deed. In like manner the owner of the mineral estate may enter upon and operate it while the owner of the surface is leaving his estate unoccupied and wild, but the possession of the lower estate will not reach upward, and attach to the surface. Each estate may be occupied, conveyed, encumbered, sold by the sheriff, or allotted in partition, without any effect upon the other. If a trespasser enters either estate, and maintains possession, he can acquire title by the statute of limitations after twenty-one years to so much as he has actually held for that length of time; but his title will not extend above or below the estate on which he enters. If he would acquire any part of the mineral, he must make his entry upon, and maintain his position within the limits of the mineral estate for the requisite period of time in an open, notorious, exclusive, and continuous manner. *Caldwell* v. *Copeland*, 37 Pa. 427, 78 Am. Dec. 436; *Armstrong* v. *Caldwell*, 53 Pa. 284; *Kingsley* v. *Hillside Coal & I. Co.* 144 Pa. 613. A covert or clandestine entry will not do. Such an entry will confer no right on the wrongdoer until his entry is, or by the exercise of due diligence might be, discovered by the owner. Until then the owner cannot know that his possession has been invaded. Until he has, or ought to have, such knowledge, he is not called upon to act, for he does not know that action in the premises is necessary, and the law does not require absurd or impossible things of anyone. *Lavery* v. *H. C. Frick Coke Co.* 166 Pa. 536, 28 L. R. A. 283; *Scranton Gas & Water Co.* v. *Lackawanna Iron & C. Co.* 167 Pa. 136. Possession, to be adverse, must be open as well as continuous. The intruder must keep his flag flying in a visible and hostile manner. *Plummer* v. *Hillside Coal & I. Co.* 160 Pa. 483. So far on in our inquiry we have a well-beaten path to travel, but from this point forward we are without any definite landmark to guide us. The real question presented is, May there be a severance of the mineral estate from the surface by the acts of the owners of the original freehold? And, if so, May there be notice in fact of such severance to other persons that will affect them in the same manner as the constructive notice arising from the recording of the deed? It is very clear, as we have seen, that if the deed to the plaintiff had been for the coal under the Porter tract only, the entry of McDonald upon the surface, and his inclosure of a part of it, would have had no effect upon the lower estate. The rule is well settled by the cases cited above. The reason of the rule is that the sale of the coal severed it from the surface, and the recording of the deed gave constructive notice to McDonald of such severance, whether he had any knowledge of it or not. But the plaintiff's deed was for the whole of the land, including the soil and minerals. The company had the right, however, to develop and operate the mineral estate alone, if that was to its interest, and leave the surface untilled and uncleared. It elected to do so. It erected its breakers, opened its mine, extended its gangways, arranged its tracks and sidings, and began the production of coal for the market from beneath the surface of the Porter tract and its adjoining lands. In this manner it entered upon the actual possession of its mineral estate. For more than sixty years it has continued its possession without interruption in a manner that has been obvious to all persons in the neighborhood. No person could pass or enter upon the land without being confronted with the unmistakable proofs of the possession and active operations of the plaintiff in this, its subterranean estate. These proofs, including the structures, the culm piles, the prepared coal, the movements of men and cars about the pit's mouth, brought the knowledge of the plaintiff's operations to even the most casual observer in a much more effective and satisfactory manner than it could have been done by the mere existence of a recorded deed. Why should it not have the same legal effect? In this case there is still another element of notice, for the defendant not only made his entry upon the surface with full knowledge, from the acts of the owner, of his severance, and the occupancy of

the lower estate by it, but he was in its employ, assisting in its mining operations. He was one of the persons by whose labor the plaintiff preserved its possession, and kept its own flag flying. Surely, notice could go no further than this. The recording of a deed is notice, notwithstanding the party to be affected by it may never have known of its existence, or of the severance wrought by it, because he might have known, if he had exercised the vigilance the law requires of him, and examined the record. So, it is well settled, possession is notice, although the person to be affected did not know of it. It was his duty to take notice of the possession as well as of the record, and, if he failed to do it, it was his folly. He is held to know, because he might have known if he had made the examination which it was his duty to make. Here the possession of the owner was known. The estate in which it was at work was known, and the defendant was in its service, contributing by his own labor to the development of the mineral estate, and to the maintenance of his employer's possession. This was notice by, and because of, the clearest knowledge of all the facts. McDonald had this knowledge when he first entered upon the surface, and he was affected by it. He knew of the actual severance of the estates in the Porter tract. He knew the owners were in the exclusive possession of the lower one, and himself assisted as an employee in the work by which that possession was made visible and notorious. He never did anything to challenge their possession of the mineral estate. On the contrary, all he did, aside from the erection of a shelter on the surface, was as servant of the owner, under its direction, and in the clearest recognition of, and subserviency to, its title. Under such circumstances it is plain that, if he acquired a title to the surface of the 6 acres he claims, he could not clutch also the mineral estate, or any part of it, that lay below the surface. It would be inequitable and unjust to hold otherwise in this case. He had stolen in upon the surface while at work for the company that owned both it and the coal. He knew of the severance in fact of these estates, and aided in the general work that made the severance evident to the world. If, entering under such circumstances, he could acquire the surface, he is limited to it. Knowing all the facts, he was bound, if he desired to acquire title to his employer's mine, or any part of it, to enter upon the mineral estate at some point, take possession, hold it openly and adversely for twenty-one years, so that his position and claim could have been known to the owner. Any different holding would lead to very absurd results. It would require us to hold that constructive notice is better than actual notice. Even this is short of a full statement of the result of the contrary doctrine, for in reality it would require us to hold that notice in fact had no significance, and bound no one. If McDonald was not bound by the complete knowledge he possessed and the opportunity for inquiry which his relations to the owner afforded him, it would follow that actual knowledge did not so much as put him upon inquiry. It would be much more reasonable to strike down the constructive notice which the law raises from the recording of a deed than thus to put it out of the power of an owner to protect himself by the clearest disclosure of his possession of his estate, and its purpose, to one of his own employees. But it is said that the company was not engaged in mining immediately under the 6 acres of surface occupied by McDonald, and that there was considerable unmined coal in place directly below his inclosure. McDonald entered upon the surface of the Porter tract knowing of the severance of the coal under it from the surface. The plaintiff's mineral estate was protected as fully by this actual knowledge as it would have been by constructive notice, and no title by the statute of limitations could be acquired within the limits of that estate without an entry upon it. An entry upon another estate—that upon the surface—can have no effect outside the estate entered. If there is no severance, an entry upon the surface will extend downward, and draw to it a title to the underlying minerals; so that he who disseises another, and acquires title by the statute of limitations, will succeed to the estate of him upon whose possession he has entered. But, if a severance is made before his entry, and he has notice of that severance, either by the record, or by the state of the possession acquired both by observation and by years of service in the employment of the owner, his entry upon either of the estates will not affect the other. Possibly the question of the extent of the possession of a trespassing miner acquired by reason of his entry upon the mineral estate may sometime be presented. If so, it will be time to consider it when it comes before us. It is not in this case. As applicable to the facts now before us, we hold that the Porter tract, or so much of it as was accessible from the pit's mouth in use, so that coal could be mined and removed therefrom by the ordinary methods of mining, was in the actual possession of the plaintiff, and that no inclosure upon the surface of that tract by one who had notice of the severance would draw to it any part of the mineral estate within its limits. This disposes of the suggestion that the unmined coal under the 6 acres has been or could be acquired by McDonald by virtue of his possession on the surface. He acquired the surface because he put his actual possession against the constructive possession of the owner. He did not acquire the coal because he had actual notice of its severance from the surface by the owner. This limited his possession to the estate on which he entered.

These views require us to reverse the decree of the court below, to restore the preliminary injunction, and upon the facts that are undisputed to make the injunction perpetual; the costs of this appeal to be paid by the appellees.

INDIANA SUPREME COURT.

Benjamin F. WAMPLER, *Appt.*,
v.
STATE of Indiana, *ex rel.* Virgil H. ALEXANDER *et al.*

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

1. **The facts stated in an alternative writ of mandamus** may be supplemented by those stated in the application in determining whether or not they are sufficient to withstand a demurrer.
2. **Mandamus may be invoked to force a township trustee to meet** with others for the purpose of appointing a county superintendent as required by law, when they have met on a day fixed by law for that purpose, and have adjourned from day to day for want of a quorum.
3. **The court knows** judicially the proper biennial year in which the law requires trustees of each county in the state to meet and elect officers.
4. **The statutory provisions naming the time for trustees to convene** in order to appoint a county superintendent are directory only, and the failure to get a quorum on that day does not prevent a meeting for that purpose on a subsequent day.
5. **An applicant for the writ of mandamus need not show any legal or special interest** in the result, but only that he is a citizen and as such interested in common with other citizens in the execution of the law when the object of the action is to enforce the performance of a public duty or right in which the people in general are interested.

(October 26, 1897.)

APPEAL by defendant from a judgment of the Circuit Court for Blackford County in favor of relators in a mandamus proceeding to compel him to meet with relators in his official capacity of township trustee for the purpose of transacting township business. *Affirmed.*

The facts are stated in the opinion.

Mr. **Jay A. Hindman,** for appellant:

In the earlier practice it was held that the application, petition, or affidavit for the writ constitutes the complaint, and that the alternative writ is in the nature of a summons or notice.

Cory v. *Carter*, 48 Ind. 327, 17 Am. Rep. 738; *Draper* v. *Cambridge*, 20 Ind. 268; *State, Fulkeart,* v. *Buckles*, 39 Ind. 272; *Lewis* v. *Henley*, 2 Ind. 332.

Later, a rule of practice was declared that the alternative writ constitutes the complaint, and must, within itself, state a prima facie cause of action.

Clarke County Comrs. v. *State, Lewis*, 61 Ind. 75; *Boone County Comrs.* v. *State, Titus*, 61 Ind. 379; *Jessup* v. *Carey*, 61 Ind. 584; *Johnson* v. *Smith*, 64 Ind. 275; *Smith* v. *Johnson*, 69 Ind. 55.

This rule was modified in the case of *Gill* v. *State, Ripley County Comrs.*, 72 Ind. 266, where it was held that the application and the writ constitute the complaint, and that the office of the alternative writ is to notify the defendant what it is sought to have him commanded to do, and to give him an opportunity to show cause against such mandate. This rule seems to be a departure from the established practice in almost every other jurisdiction, and is evidently not well supported by authority or fundamental principles of pleading.

In ordinary actions the rules of pleading are not so lax.

Farris v. *Jones*, 112 Ind. 498.

To adopt a rule of practice in extraordinary proceedings that would not be tolerated in ordinary actions seems to be without sanction of law, and in violation of fundamental principles of pleading.

Clarke County Comrs. v. *State, Lewis*, 61 Ind. 75; *Caffyn* v. *State, Rader*, 91 Ind. 324; *State, Sigler,* v. *Madison County Comrs.* 92 Ind. 133.

The application, strictly speaking, is not a part of the pleadings in the case.

High, Extr. Legal Rem. 2d ed. §§ 508-510, 514.

The alternative writ being regarded as the foundation of all the subsequent proceedings in the case, and resembling, in this respect, a declaration in an ordinary action at common law, it must show upon its face a clear right to the relief demanded, and the material facts upon which the relator relies must be distinctly set forth, so that they may be admitted or traversed by the return.

High, Extr. Legal Rem. §§ 536–538; *Hamilton* v. *Dexter*, 89 Mo. 188; 14 Am. & Eng. Enc. Law, p. 212; *Florida C. & P. R. Co.* v. *State, Tavares*, 31 Fla. 482, 20 L. R. A. 419.

In many jurisdictions a private citizen must have some special interest or right to be protected, independent of that which he holds in common with the public at large, to entitle him to mandamus.

Mitchell v. *Boardman*, 79 Me. 469; *People, Russell,* v. *Inspectors & Agents of State Prison*, 4 Mich. 187; *Heffner* v. *Com., Kline*, 28 Pa. 108; *Reedy* v. *Eagle*, 23 Kan. 254; *State, Bamford,* v. *Hollinshead*, 47 N. J. L. 439.

In other jurisdictions a more liberal rule obtains, and when the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has a special interest in the subject-matter of the action. But in these jurisdictions, where the rule is most liberal, it must at least be shown that the relator is a citizen and as such has an interest in the execution of the laws.

Decatur County Comrs. v. *State, Hamilton*, 86 Ind. 8.

The demurrer to the alternative writ called in question the right or authority of the relators to institute or maintain this suit.

Farris v. *Jones*, 112 Ind. 498.

The averments in the writ should show that the thing asked can be done, that its performance is not impossible, and that the relators

NOTE.—As to quorum, see also Lawrence v. Ingersoll (Tenn.) 6 L. R. A. 308, and *note:* Tillman v. Otter (Ky.) 29 L. R. A. 110; and State, Stanford, v. Ellington (N. C.) 30 L. R. A. 552.

have a clear right to the granting of the writ.

State, Oliver, v. *Grubb,* 85 Ind. 213.

The writ of mandamus only issues where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy.

High, Extr. Legal Rem. 3d ed. § 9.

Since the act in question could be performed only in conjunction with other persons, a time ought to have been fixed in the writ for the doing of the thing commanded, otherwise the mandate could not be obeyed by the respondent.

Especial care should be taken in framing the mandatory clause of the alternative mandamus, since the writ must be enforced in the terms in which it is issued, or not at all, and the relator is concluded by its terms.

High, Extr. Legal Rem. § 539; *Florida C. & P. R. Co.* v. *State, Tarares,* 31 Fla. 482, 20 L. R. A. 419.

The courts are powerless to award the peremptory writ of mandamus in any other form than that fixed by the alternative writ.

High, Extr. Legal Rem. § 548; 14 Am. & Eng. Enc. Law, p. 214.

Mandamus will not lie to compel the appointment of a county superintendent at a time other than that fixed by statute.

State, Fry, v. *Martin County Comrs.* 125 Ind. 247; *Williamsport* v. *Kent,* 14 Ind. 306; *State, Walden,* v. *Vanosdal,* 131 Ind. 388, 15 L. R. A. 832; *State, Laughlin,* v. *Porter,* 113 Ind. 79.

Mr. **John A. Bonham** for appellees.

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

This was a proceeding in the lower court on the part of the relators, Virgil H. Alexander and Alexander Gable, to obtain a writ of mandate against the appellant, a township trustee of Blackford county, Indiana, to compel him to meet with them (who are also township trustees) for the purpose of electing a county superintendent of schools. On the filing of the application the court awarded an alternative writ. After being served with this writ the appellant appeared in court, and demurred, for insufficiency of facts, (1) to the application; (2) to the alternative writ; (3) to the application and alternative writ taken as one pleading. Each of these demurrers was overruled, and the proper exceptions were reserved. Appellant refusing to plead further, the court granted a peremptory writ of mandate, as prayed for by the relators, commanding the appellant to meet at the auditor's office at 9 o'clock A. M. on June 23, 1897, for the purpose of appointing a county superintendent. The several rulings of the court upon the demurrers are assigned as errors.

The following facts, among others, are substantially alleged in the application, and in part recited in the alternative writ: At and for more than one year prior to the filing of the application, on June 8, 1897, the relators were resident citizens and taxpayers of Blackford county, Indiana, and were each township trustees of said county. That there are four townships in that county, and no more; and appellant at the beginning of this action, and for more than one year prior to said time, was the duly elected, qualified, and acting trustee of Harrison township, of said county. That these relators and appellant, as such trustees, were, in pursuance of law, required to meet at the office of the county auditor on the 1st Monday of June, 1897, for the purpose of appointing a county superintendent. That in pursuance of the statute, and a previous written notice given by the county auditor to each and all of said trustees to meet at the time and place aforesaid stated, the relators, as such trustees, did on the 1st Monday in June, 1897, the same being June 7, 1897, at 9 o'clock A. M. meet at the office of the said auditor for the purpose of appointing a superintendent, but appellant, as such trustee, failed and refused to meet at said hour on said day, or at any other time during said day. That, by reason of the fact that there were four township trustees, it was necessary for three, at least, of that number to meet, in order to organize and proceed with the business of electing a superintendent. During all of said day none of the trustees except these relators met at said auditor's office, whereby they were prevented from perfecting an organization and appointing a county superintendent. That relators, from the time they met as aforesaid with the auditor at his office, remained there, ready to organize and appoint a superintendent, until the hour of 12 o'clock midnight on said day; and no other trustees having appeared at said meeting, or being present thereat, and that they being unable to transact any business, by reason of the absence of the other two trustees, they adjourned to meet at the same place on the day following (June 8, 1897) at 9 o'clock A. M. The relators again met at the time and place, in accordance with their adjournment, but neither the appellant nor the other trustee appeared at said meeting on said following day. It is further shown that these relators continued their meeting at the auditor's office on the day last mentioned, up to the time of filing their application herein; and it is alleged that they intend to meet for the purpose of electing a county superintendent, and adjourn from day to day, until a quorum is secured, etc. They aver that the business of appointing a superintendent cannot be effected without the appellant being present with them at said meeting, and that no other adequate remedy exists.

The first contention of counsel for appellant is that the facts as alone recited in the alternative writ are not sufficient to withstand a demurrer. Prior to the decision of *Clarke County Comrs.* v. *State, Lewis,* 61 Ind. 75, a practice of treating the application as the complaint, in actions for mandate, even where the alternative writ had been issued, seems to have been recognized by this court. In the case above cited a departure was made from this practice and it was there held, in view of the provisions of the Code of 1852 relative to mandamus suits, and upon the authority of Moses on Mandamus, that the alternative writ must be taken as in the nature of a complaint in the cause, and the facts stated therein must be sufficient to entitle the party to the writ. In *Gill* v. *State, Ripley County Comrs.,* 72 Ind. 266, the

former decisions of this court, including *Clarke County Comrs. v. State, Lewis*, 61 Ind. 75, upon this question, were reviewed, and the rule was there stated as follows: "The alternative writ, when issued, will be taken as in the nature of a complaint in the cause, and 'must show what is claimed, and in itself, or in connection with the complaint, petition, or affidavit on which it issued, show the ground on which the claim is made; and the facts stated must be sufficient in law to entitle the party to the writ.'" The court further saying: "This, we think, in harmony with the spirit of the Code, and with the practice which has long obtained in this class of cases, and, while it does not overrule, will prevent any undue extension or misapplication of the rule enunciated in the later cases referred to." This holding was followed in *Potts v. State, Ogg*, 75 Ind. 336. Since the decision in *Gill v. State, Ripley County Comrs.*, 72 Ind. 266, it has been the practice, in at least some of the trial courts in this state, to call in question by the same demurrer, the sufficiency of the facts stated in the writ and application, taken together; and this procedure seems to have been recognized by the appellant in the lower court, by addressing, as he did, in one particular, a demurrer to both the writ and application. In the case of *La Grange County Comrs. v. Cutler*, 7 Ind. 6, this court held that it had been the practice to look into the whole record and determine whether mandamus is the appropriate remedy, as well as the question whether the allegations are sufficient to authorize the writ. While it may be and ought to be considered the proper practice, under the more recent decisions of this court, which assert a rule of practice consistent with that generally prescribed by authorities on mandamus proceedings, to treat the alternative writ, unless the issuing thereof has been waived by the defendant, as a complaint, upon which issues of law and fact may be joined, and, generally speaking, the facts therein recited ought to be sufficient to justify the court in awarding the peremptory writ, nevertheless those alleged in the verified application, upon which the alternative writ rests, may be, when necessary, used or looked to in order to supplement those embraced in the writ, and the application may be considered by the court in connection with the alternative writ to which the demurrer may have been addressed. Therefore, if the facts in the writ alone, or when supplemented by those in the application, are sufficient to entitle the applicant to the peremptory writ, a demurrer addressed to the alternative writ alone, or to both the writ and application, should be overruled. This rule is in harmony with the holding in the cases of *La Grange County Comrs. v. Cutler*, 7 Ind. 6; *Gill v. State*, 72 Ind. 266, and *Potts v. State, Ogg*, 75 Ind. 336, and does not militate against other decisions of this court wherein, in effect, it is held that the writ, when considered alone, without reference to the application, must be sufficient. This point being settled, we are not, therefore, in this case, as insisted by appellant, compelled to confine our inquiry only to the facts in the writ, but may consider them together with those alleged in the application.

The principal question submitted for our decision is, Are the facts disclosed by the alternative writ and application, when considered together, sufficient to warrant the lower court in its action in overruling the demurrer to the writ and ordering the peremptory writ of mandate to issue, requiring the appellant to meet with the relators at the auditor's office of Blackford county on the day mentioned, for the purpose of appointing a county superintendent? The theory of the insistance of appellant's counsel is (1) that relators herein are not shown to have the requisite interest to entitle them to prosecute this action; (2) that, under the facts, mandamus will not lie to compel the appellant to meet for the purpose of electing a superintendent on a day subsequent to the 1st Monday in June, or, in other words, that he did not have the power, under the statute in controversy, of meeting after the time provided therein, for the reason, as contended, that the law is mandatory in this respect, and restrains him from doing so. Hence, on this ground, the principal contention is that he cannot be mandated by the court to exercise a power which he did not possess after the 1st Monday in June, 1897, and consequently there can be no meeting and election by the trustees until the next biennial year. It is also insisted that it does not appear from the facts that any vacancy had occurred in the office of superintendent in Blackford county, which was required to be filled on the 1st Monday in June, 1897. Rev. Stat. 1894, § 5909, Rev. Stat. 1881, § 4424, provides: "The township trustees . . . of each county shall meet at the office of the county auditor of such county, on the 1st Monday in June, 1873, and biennially thereafter, and appoint a county superintendent . . . whose official term shall expire as soon as his successor is appointed and qualified. . . . Whenever a vacancy shall occur in the office of county superintendent, by death, resignation, or removal, the said trustees, on notice of the county auditor, shall assemble at the office of such auditor, and fill such vacancy for the unexpired portion of the term . . . and the county auditor shall be clerk of such election in all cases, and give the casting vote in case of a tie," etc. Rev. Stat. 1894, § 1182; Rev. Stat. 1881, § 1168, being § 804 of the Code of Civil Procedure, provides: "Writs of mandate may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law especially enjoins, or a duty resulting from an office, trust, or station." Under this provision of our Code, the rule is well affirmed that mandamus is the proper remedy to coerce an officer to discharge a public duty, and any person having an interest in the matter involved may apply for the writ. *Hamilton v. State, Bates*, 3 Ind. 452; *Henderson v. State, Overman*, 53 Ind. 60; *Holiday v. Henderson*, 67 Ind. 103. Mandamus is regarded as an extraordinary remedy of an equitable nature, which will lie only where the law affords no other adequate remedy, and hence, without the aid of the writ, there would be a failure of justice. The statute, in express terms, lodges the election of a county superintendent in the township trustees of each county, and imposes upon each of them the duty of meeting on the 1st Monday in June, beginning in 1873, and on

the same day biennially thereafter, at the place designated, and of appointing a county superintendent. This being a duty enjoined upon these officials by law, therefore, in the event they refuse or neglect to discharge it, it then becomes one of the peculiar functions of a mandate to compel them to obey the law by discharging this duty, as there are no other adequate means to meet and remedy the evils and injustice which would result by reason of the failure or refusal of these public servants to respect and obey the law. Certainly, it cannot be successfully controverted but what mandamus may be invoked to force township trustees, or any one thereof, to meet with each other at the same time and place prescribed by law, and proceed with the business of appointing a county superintendent. This being true, then, if it can be said that they are not restrained or prohibited by the statute in question from meeting and performing this duty after the day prescribed, but still have the power to subsequently do so, there is no question but what, in the event of their failure or refusal to meet for the purpose mentioned after the lapse of the time fixed by law, they may also be compelled to do so by a writ of mandate, on the application of any person shown to be invested with the right in the particular instance to demand it. *People, Smith*, v. *Schiellein*, 95 N. Y. 124.

Having reached this conclusion, we may proceed to determine whether, in view of the facts in this cause and the law applicable thereto, the appellant still had the legal power to meet for the purpose provided by the statute after the expiration of the time therein fixed, and was it his duty to exercise this power? We may, however, first say, in answer to appellant's insistence, namely, that there are no facts alleged showing that any vacancy had occurred in the office of superintendent of Blackford county which required a meeting of the trustees on the 1st Monday in June, 1897, in order to fill the same, that we recognize no merit in this contention. Under the provisions of the statute the official term of a county superintendent extends from one biennial election to the next, and terminates as soon as his successor is elected and qualified; and anyone appointed to fill a vacancy holds only for the unexpired part of the term, and until his successor is elected and qualified at the next ensuing biennial election. We accordingly judicially know that 1897 is the proper biennial year in which the trustees of each county in the state were required to meet on the 1st Monday in June and elect successors to the superintendents then in office. In arriving at a correct interpretation of the only point now involved, we may consider it, first, in the light of our own decisions which have a bearing thereon, and next in that of other authorities. In the case of *State, Dickerson*, v. *Harrison*, 67 Ind. 71, it appeared that the trustees, being twelve in number, met on the 1st Monday in June, 1879, but were unable to choose a superintendent. On the morning of the next day they adjourned *sine die*. In pursuance of a notice from the auditor, eleven of them convened again at his office on June 16, 1879, and organized, and were proceeding to appoint a superintendent, when three of the number withdrew from the meeting, and the remaining eight selected a superintendent. The election was held invalid. The question, as there involved, seems to have received but a cursory consideration, and the only reason given to support the decision is the bare mention of the fact that the appointment not having been made on the 1st Monday in June, and no vacancy existing, by reason of removal, resignation, or death, the appointment of the appellant therein was not authorized. In *Sickett* v. *State, Foreman*, 74 Ind. 486, the statute there involved required the common council of each city to annually elect at its first regular meeting in June one school trustee. The common council of the city of New Albany having failed to elect such trustee at its first regular meeting in June, in 1880, it performed this duty at a regular session held on July 19 of that year, and this action of the council was sustained. This court held in that case that, while the election should have occurred at the first regular meeting in June, still the statute could not be construed as limiting the power of the council to the time prescribed, but that it could be legally exercised by electing a trustee on a subsequent day. In course of the opinion, on page 489, it was said by the court, per Woods, J.: "The counsel for the appellee, on the contrary, insist that, under the law, the duty to elect is imperative, and that, in so far as it prescribes the time when the election shall be had, the statute is directory only. We concur in this position. The opposite view leads directly and necessarily to results which it is impossible to believe could have been intended by the legislature, and which an examination of the provisions of the law will plainly show were not intended. A failure to elect at the appointed time, as may well have been conceived, is liable to happen from many causes. A quorum of the common council may be wanting on account of accident, or of sickness or of absence of its members, and, when a quorum is not wanting a tie vote may defeat a choice. But if it be held that a failure to elect suspends the power to elect until the recurrence of the prescribed day, it is easy to see that corrupt motives and influences may intervene for the purpose of preventing an election at the appointed time. If reasonably possible to be escaped, an interpretation of the law which promotes or tends to such results should not be adopted." The case of *State, Dickerson*, v. *Harrison*, 67 Ind. 71, was distinguished in this last appeal, and in referring to it Judge Woods said: "It may well be doubted, however, whether, if an election had been accomplished upon the second day, or upon the day of an adjourned meeting, held within a reasonable time, it would have been declared invalid; and possibly, after the adjournment without day, a mandamus might lawfully have issued to compel a reassemblage, in order to perform the work which they ought to have done before adjourning." In *State, Walden*, v. *Vanosdal*, 131 Ind. 388, 15 L. R. A. 832, the trustees met on the 1st Monday in June of the required year, and remained in continuous session until after midnight on that day, after which hour they elected a superintendent. This election was held valid. In *People* v. *Allen*, 6 Wend. 486, the militia law

of the state of New York made it the duty of certain commanding officers to appoint brigade court martials on or before the 1st day of June in each year. The commanding officer omitted to appoint the court-martial in that case until July next following the time fixed by the law. The appointment was held valid. In reviewing the question of the power of the officer to appoint the court-martial the court said: "Where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered directory merely, unless the nature of the act to be performed, or the language used by the legislature, shows that the designation of the time was intended as a limitation of the power of the officer." This statement of the law, at least in five appeals, has been expressly approved by this court. See *Nave* v. *King*, 27 Ind. 356; *Day* v. *Herod*, 33 Ind. 197; *Jones* v. *Carnahan*, 63 Ind. 229; *Sackett* v. *State, Foreman*, 74 Ind. 486; *Jones* v. *Swift*, 94 Ind. 516. In Dill. Mun. Corp. 3d ed. § 839, the author says: "In this country it has been decided that an election for municipal officers may be held after the charter day, and that a mandamus may be granted to compel the proper officers to give notice thereof." In *State, Parker*, v. *Smith*, 22 Minn. 218, the common council of the city of Duluth was invested by law with the appointment of a city assessor. The time fixed for his election by the city charter was at the first meeting of the council after the annual city election, or at an adjournment thereof. In 1874 the annual election was held on the 1st Tuesday in April. After this election the common council met, on the 14th of that month, and adjourned *sine die*, without having elected an assessor. On the 29th of April in the same year the council convened pursuant to an irregular adjournment, by a less number than a quorum, from a previous regular meeting, and elected an assessor. It was held that the latter was legally elected and entitled to the office. The court, in considering the point raised in the case, said: "In our judgment, the meeting held on April 14, 1874, with the presumed assent and participation of all of its members, was a valid meeting. Assuming that this was the proper time for the election of an assessor, the failure of the council then to act upon the matter, and its adjournment *sine die*, did not relieve it from the duty, which the law imposed upon it, of making an election. So far as relates to the time when such election should be made, the statute is simply directory. Having neglected its duty at the proper time, from whatever cause, the obligation still rested upon it to elect at the earliest opportunity."

While it is true that the statute in controversy does not in express terms provide for a meeting of the trustees on a day subsequent to the one named, neither does it expressly limit the power or right to meet on the day prescribed, and not thereafter. The duty of the trustees, under the statute, to elect a superintendent biennially, is imperative, and each of them is obligated to convene with the others on the 1st Monday in June of the proper year for that purpose. But there are no negative words in the statute, nor any features or provisions therein to indicate that the legislature, under all circumstances, intended to limit their power to meet for the discharge of the duty assigned to the day appointed, and thereby restrain or prohibit them from effectually executing it after the expiration of the time named. Upon this view of the case, under the rule so firmly settled by the authorities heretofore referred to, and others hereafter cited, the provisions of this statute naming or fixing the time for the trustees to convene must be considered as directory only, and not as prohibiting the exercise of the power or discharge of the duty imposed after the termination of the time named or appointed therein. Guided by this principle, and it is manifest, we think, that the legislature in naming the 1st Monday in June, intended it as a direction to the township trustees to meet on that day and proceed to transact the required business of appointing a county superintendent. There is nothing in the character of the particular power with which the trustees are invested to warrant the inference or belief that, on their failure to meet at the time mentioned, they could not lawfully and effectually execute it on some subsequent day, as reasonably near as possible to that fixed by the statute. The following additional authorities support this construction of the statute in controversy: Smith, Const. & Stat. Constr. §§ 670, 674; Sedgw. Stat. & Const. L. p. 316; Potter's Dwar. Stat. pp. 221, 228; *People, Young*, v. *Fairbury Trustees*, 51 Ill. 149; *State, Anderson*, v. *Harris*, 17 Ohio St. 608; *Webster* v. *French*, 12 Ill. 302; *Pond* v. *Negus*, 3 Mass. 230, 3 Am. Dec. 131; *Williams* v. *School Dist. No. 1*, 21 Pick. 75, 32 Am. Dec. 243; *Savage* v. *Walshe*, 26 Ala. 619; *Lovell* v. *Hadley*, 8 Met. 180; *Ex parte Heath*, 3 Hill, 42; *Gale* v. *Mead*, 2 Denio, 160; *People, Westcott*, v. *Holley*, 12 Wend. 481; *Jackson, Hooker*, v. *Young*, 5 Cow. 269, 15 Am. Dec. 473; *Colt* v. *Eres*, 12 Conn. 243.

To place the interpretation upon the statute urged by the appellant would enable designing trustees to defeat its very object. By the failure or refusal of a sufficient number to meet on the day named, they might prevent a quorum from being obtained, and consequently no legal election could be effected on that day. If, then, as contended by appellant, there can be no valid meeting had or appointment made, by either compulsory proceedings or otherwise, until the same day at the next biennial period, the people would be at the mercy of such unfaithful officials, and the possible result might be to keep an incumbent in office perpetually. Under such an interpretation of this statute, a like result might follow if a sufficient number of trustees should be prevented from assembling on the prescribed day, so as to defeat a quorum, by reason of sickness, or any other legitimate cause. Such results were not intended by the legislature in the passage of the law in question. There were four trustees in Blackford county, any three of whom, had they been present, would have secured a quorum for the lawful transaction of the business before them. *State, Walden*, v. *Vanosdal*, 131 Ind. 388, 15 L. R. A. 832, and the cases there cited. Relators, being less than a quorum, could do nothing more than adjourn, as they did. Roberts, Rules of Order, § 43; Cushing, Manual of Parliamentary Law, § 19;

1 Beach, Priv. Corp. § 276; 1 Thomp. Corp. § 721. Appellant's presence, under the circumstances, was essentially necessary, and, having the legal ability to be present, he refused to yield his obedience to the law and meet with relators, and thereby assist to carry out its object and purpose; and now, when confronted with the strong arm of the court, compelling the performance of a wilfully omitted duty, he seeks to shield himself from its performance under the claim and upon the ground asserted that he no longer possesses the power to do so. This claim, as we have seen, the law does not support. The authorities constrain us to hold that under the facts the obligation to perform this important public duty continued to rest on appellant after the expiration of the legally appointed day, and the law did not deprive him of the power to perform it thereafter, and mandamus is the proper action to remedy the wrong perpetrated by him. In addition to other authorities on this point, see Smith, Addison, Torts, p. 648. Where the question involved in a mandamus proceeding is of a public concern, as is the one herein, and the object of the action is to enforce the performance of a public duty or right in which the people in general are interested, the applicant for the writ is not required to show any legal or special interest in the result sought to be obtained. It is only necessary that he be a citizen, and as such interested in common with other citizens in the execution of the law. High, Extr. Legal Rem. § 431; *Decatur County Comrs.* v. *State*, 86 Ind. 8, and cases there cited. It follows, therefore, that the relators are shown to have the requisite degree of interest to enable them to maintain this action. It is to be regretted that appellant, as a public official, intrusted, under the law, with a public duty, should disregard its plain provisions and commands. Such neglect or refusal to perform a duty which he had sworn to discharge merits severe condemnation. When public officers charged with the execution of the law refuse to obey its mandates, or wilfully ignore them, the evil results which must necessarily follow from such acts tend to undermine the very foundation of civil government. When such officers fail or refuse to discharge their plain duties under the law, not only do they violate their official oaths, but also subject themselves to the penalty imposed by Rev. Stat. 1894, § 2105 (Rev. Stat. 1881, § 2018). It follows from the conclusion reached that the lower court was fully justified in overruling the demurrers, and in awarding the peremptory writ of mandate, as it did. So far as the holding in *State* v. *Harrison*, *supra*, may be in conflict with this opinion, it must be deemed and held to be overruled.

Judgment affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

Sarah A. TERRY, *Plff. in Err.*,
v.
City of RICHMOND.

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

1. **Permission to lay tracks under a street** is within the power given to a city council to determine and designate the route and grade of any railroad to be laid in the city.
2. **The caving of an excavation under a street** through the negligence of the railroad company making it does not make a city liable for injuries to adjacent buildings, if the company had authority from the state to lay its tracks within the city, and the city had legally granted its permission.
3. **Taking a bond from a railroad company which is about to lay tracks** in its streets to save the city from the results of possible negligence of the company will not increase the liability of the city in case of such negligence.

(April 15, 1897.)

ERROR to the Richmond Law and Equity Court to review a judgment in favor of defendant in an action brought to recover damages for injuries to plaintiff's property which were alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Pollard & Sands**, for plaintiff in error:

The owners of lots abutting on the streets own the fee in those streets, subject to the lawful use thereof by the city.

Page v. *Belvin*, 88 Va. 985; *Hodges* v. *Seaboard & R. R. Co.* 88 Va. 653; *Western U. Teleg. Co.* v. *Williams*, 86 Va. 700, 8 L. R. A. 429; *Warwick* v. *Mayo*, 15 Gratt. 528.

Any person or corporation which disturbs the soil of the street except for the purposes incident to the public easement is liable as a trespasser as against the abutting owner, and can be held to respond in damages for such trespass.

Petersburg v. *Applegarth*, 28 Gratt. 343, 26 Am. Rep. 357; Shearm. & Redf. Neg. § 120; 2 Dill. Mun. Corp. § 1037; *Pekin* v. *Brereton*, 67 Ill. 477, 16 Am. Rep. 629; *Stack* v. *East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619. See also *Nevins* v. *Peoria*, 41 Ill. 502; *Rigney* v. *Chicago*, 102 Ill. 64; *Chicago* v. *Union Bldg. Asso.* 102 Ill. 379, 40 Am. Rep. 598; *Chicago* v. *Taylor*, 125 U. S. 161, 31 L. ed. 638; *Salt Lake City* v. *Hollister*, 118 U. S. 260, 30 L. ed. 177.

Actions of trespass may be brought either against the hand actually committing the injury, or against the person or corporation by whose order or authority the act was done.

1 Addison, Torts, § 422.

The city gave its assent to the construction of an underground railroad in one of its streets, reserving the right to supervise the removal

NOTE.—As to excavations under highways, see Babbage v. Powers (N. Y.) 14 L. R. A. 398, and *note*. 38 L. R. A.

See also 48 L. R. A. 331.

and reconstruction of any sewer that might become necessary.

It was liable for negligence.

Fink v. *St. Louis*, 71 Mo. 52.

Many Virginia cases hold that a municipal corporation is liable for mere negligence in the exercise of their charter rights.

Orme v. *Richmond*, 79 Va. 86; *Smith* v. *Alexandria*, 33 Gratt. 208; *Noble* v. *Richmond*, 31 Gratt. 280, 31 Am. Rep. 726; *Detroit* v. *Blackeby*, 21 Mich. 84, 4 Am. Rep. 450; Bishop, Non-Cont. L. §§ 518, 525.

An owner whose land adjoins a public street is entitled to have the lateral support of his land remain undisturbed, and a wrongful destruction of it has been held to be a taking within the meaning of the Constitution.

Elliott, Roads & Streets, 157; *Stearns* v. *Richmond*, 88 Va. 992; 2 Dill. Mun. Corp. § 987.

When a municipal corporation has ample power to remove a nuisance which is injurious to the health, endangers the safety, or impairs the convenience of its citizens, it is liable for all the injuries that result from a failure on its part to properly exercise the power possessed by it.

Elliott, Roads & Streets, p. 489; *Noble* v. *Richmond*, 31 Gratt. 280, 31 Am. Rep. 726; 2 Dill. Mun. Corp. § 723d; *Petersburg* v. *Applegarth*, 28 Gratt. 343, 26 Am. Rep. 357; *Chalkley* v. *Richmond*, 88 Va. 402; *Bentley* v. *Atlanta*, 92 Ga. 623; *Mahon* v. *New York C. R. Co.* 24 N. Y. 660. See also *Kiley* v. *Kansas*, 69 Mo. 109, 33 Am. Rep. 491; *Fort Worth* v. *Crawford*, 64 Tex. 202, 53 Am. Rep. 753; *Stange* v. *Dubuque*, 62 Iowa, 303.

The damage suffered by the plaintiff is the result of the city's failure to superintend and inspect the construction of the tunnel, and to enforce its proper construction.

Orme v. *Richmond*, 79 Va. 89, following *Sawyer* v. *Corse*, 17 Gratt. 230, 99 Am. Dec. 445; *Richmond* v. *Long*, 17 Gratt. 375, 94 Am. Dec. 461, and *Barnes* v. *District of Columbia*, 91 U. S. 551, 23 L. ed. 443.

Liability arises as well from omissions of corporate authorities as from positive acts.

2 Dill. Mun. Corp. § 966; *McCarthy* v. *Syracuse*, 46 N. Y. 194. See also *Ehrgott* v. *New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Fink* v. *St. Louis*, 71 Mo. 52.

The construction of a railway in or under a street is a nuisance, if constructed without the abutters' consent, or without proper condemnation proceedings.

2 Dill. Mun. Corp. § 723d; *Mahon* v. *New York C. R. Co.* 24 N. Y. 660; *Stange* v. *Dubuque*, 62 Iowa, 303.

Mr. **C. V. Meredith,** for defendant in error:

A municipality is only responsible for some failure of local executive duty, and is not responsible for failure to perform some duty pertaining to the welfare of the people of the state at large.

Richmond v. *Long*, 17 Gratt. 375, 94 Am. Dec. 461.

Here there was no duty upon the city of any kind.

2 Dill. Mun. Corp. § 710; Elliott, Roads & Streets, p. 532; *Green* v. *Portland*, 32 Me. 431; *Port of Mobile* v. *Louisville & N. R. Co.* 84 Ala. 115. See also *Murphy* v. *Chicago*, 29 Ill. 279, 81 Am. Dec. 307.

The city, in authorizing the railroad company to run under the street, instead of along the same at some grade to be determined, acted within her power.

Chicago v. *Rumsey*, 87 Ill. 348.

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

The Richmond & Chesapeake Railroad Company, a corporation created by the general assembly of Virginia, was authorized by its charter to construct and operate a railroad from the city of Richmond to a point on the Chesapeake bay, near the mouth of the Potomac river.

The council of the city, under the authority vested in it by the charter of the city, adopted an ordinance authorizing the railroad company to enter the city and use its streets for its roadway, and to build and construct a tunnel for a double railway track under Eighth street.

The company began the construction of the tunnel, and, after partly excavating it, ceased to work upon it. The tunnel, not being properly supported or arched, subsequently gave way in the center of the street, and the superincumbent earth caved in. This caused the earth to recede from the front of plaintiff's lot, and greatly injured two tenement houses thereon belonging to her. The city, after the caving in of the tunnel, caused the excavation to be filled, and the street to be repaired.

This suit was brought by the owner of the property to recover from the city the damages she had sustained. The question to be decided is whether or not the city is liable for the negligence or wrongful acts of the railroad company.

The railroad company being created and chartered by the sovereign power of the state, and authorized to construct and operate a railroad from the city of Richmond, and the council of the city being authorized by its charter to permit the railroad company to enter and use its streets for its roadway, the legality of the action of the council in granting such permission is beyond question, and no liability therefor can be maintained.

The right of the council to determine and designate the route and grade of any railroad to be laid in the city includes the authority to permit the railroad company to run under the street as well as upon it. The servitude is the same in each case. As was said in the case of *Chicago* v. *Rumsey*, 87 Ill. 364: "There is no principle upon which the right to locate a railroad upon a street, as a legitimate use of the street, can be sanctioned which will not also sanction the construction of a tunnel in a street. The tunnel does not change the character of the street or apply it to a new use."

The ordinance adopted by the council in granting to the railroad company the right to occupy the streets of the city, and construct the tunnel, shows that great care was taken by the requirement of proper safeguards to prevent the obstruction of or interference with the reasonable and legitimate use of the streets by the public.

The building of the railroad and the con-

struction of the tunnel were solely the undertaking of the railroad company. It alone paid or was liable for all the expense of the work. Beyond prescribing the route and grade of the road and making due provision for the safety of its streets and the preservation of its culverts, sewers, and water and gas pipes, and seeing that its requirements in respect to these matters were observed, the city exercised no control of the enterprise, nor took nor had any part in it. The improvement was not undertaken for its profit, but was a private enterprise for private profit. The railroad company was in no sense the agent of the city, but in constructing and operating the road it was acting and would act for itself, and not for the city.

The permission granted to enter and use the streets of the city for a roadway conferred no right whatever upon the railroad company to take or invade the property of any citizen without just compensation, or sanctioned any tort it might commit, any more than a license to a person to engage in some legitimate private business requiring such license would render it liable for a tort that such person might commit in the pursuit of the business he was so licensed to carry on.

In Elliott, Roads & Streets, p. 532, the law on this subject is thus stated: "In granting a right to occupy a street by a railroad track, a municipal corporation exercises a delegated governmental power, and for the bare exercise of such a power is not liable to abutting owners.

It is evident that the exercise of a governmental power cannot, of itself, subject the municipality to a private action, but if the municipal corporation should join the railroad company in doing an act which would so impair the easement of access or so injure the abutting property as to cause the property owner special damages, then, it may be that the owner could maintain his action for damages. Where, however, no more is done than the enactment of an ordinance granting the privilege of occupancy, it seems quite clear that no private action would lie against the municipality for damages."

In *Dillenbach* v. *Xenia*, 41 Ohio St. 207, it was held that where a city, under the authority given it by statute, granted to a railroad company the right to construct and use its track in a street, the city was not liable to the owner of a lot adjacent to the street for damages to his property resulting from such use of the street by the railroad company.

In *Burkam* v. *Ohio & M. R. Co.* 122 Ind. 344, Elliott, J., speaking for the court, said "We have no doubt that an abutting owner has a proprietary right in the street of which he cannot be deprived without compensation. . . . But it by no means follows from this that a city in granting a right to a railroad company to use a street deprives the abutter of his property. The grant by the municipal corporation transfers no proprietary rights of the abutter, it simply grants the privilege the city has power to grant. In granting such a privilege a city exercises a power delegated to it by the sovereign, and it is not liable for exercising such a power. . . . Notwithstanding the grant by the municipality, the abutting owner has a right to recover such damage as he may have sustained by the additional burden imposed upon his land. . . . But the right of the abutter to compensation is against the railroad company and not against the city." See also *Frith* v. *Dubuque*, 45 Iowa, 406.

The bond of indemnity taken by the city of Richmond from the Richmond & Chesapeake Railroad Company did not operate to impose upon the city a liability which would not have otherwise existed, nor have the effect of making it responsible for any damage done by the railroad company, where the law would not have made it liable in the absence of such bond. The provisions of the bond show that the object of the city in requiring it was to protect itself against any loss it might be subjected to, or any expense it might have to incur, in consequence of the failure of the railroad company to comply with the requirements of the ordinance granting to it permission to construct the tunnel, and also to provide indemnity to any who might sustain injury to his person or property by the negligence or wrongful acts of the railroad company in the construction or use of the tunnel, if he chose to avail himself of it. Taking the bond did not increase the liability of the city.

A number of cases decided by this court, in which the municipality was held responsible, were cited and relied on to support the claim of liability of the city in the case at bar, but they do not support the contention of the plaintiff in error. The liability in those cases rested upon a different ground from that which underlies this case. Its solution depends upon the application of a different principle. The act of the city, which is the subject of the complaint here, was the exercise of a delegated governmental power, but it will be found upon examination that the liability in each and all of the cases referred to was based either upon a tort committed by the city itself through its officers or agents, or upon the neglect of the city to perform some ministerial and absolute corporate duty, such as not giving warning of the dangerous condition of the entrance to its sidewalk from an established walking way (*Orme* v. *Richmond*, 79 Va. 86); or not keeping its sidewalk in a safe condition (*Noble* v. *Richmond*, 31 Gratt. 280, 31 Am. Rep. 726); or for failing, when elevating the grade of its street, to make provision for the escape of surface water, and causing it to flow back upon an adjoining lot (*Smith* v. *Alexandria*, 33 Gratt. 208); or for neglecting to repair a sewer (*Chalkley* v. *Richmond*, 83 Va. 402); or for infringing, in lowering the grade of a street, upon the right of the owner of an adjoining lot to lateral support for his soil (*Stearns* v. *Richmond*, 88 Va. 992); or for allowing obstructions to be in the water adjacent to a wharf owned by the city, and for whose use it charged, or was entitled to charge, wharfage (*Petersburg* v. *Applegarth*, 28 Gratt. 321, 26 Am. Rep. 357). In no one of them was the question involved which is here presented. In no one of them was the claim against the city for damages for a tort committed by an individual or a body corporate in the pursuit of his or its business, and for his or its own benefit and profit.

The duty of a municipal corporation to see that its streets and sidewalks are in a safe con-

dition, and that its sewers and drains are kept in good order, and that its other like municipal obligations are cared for, is a purely ministerial and absolute corporate duty, assumed in consideration of the privileges conferred by its charter; and the law holds the municipality responsible for an injury resulting from the negligent discharge of such duty, or the negligent omission to discharge it, but exempts it from liability for the exercise of governmental or discretionary powers. *Richmond* v. *Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Petersburg* v. *Applegarth*, 28 Gratt. 343, 26 Am. Rep. 357; *Mills* v. *Brooklyn*, 32 N. Y. 489, 497; *Hill* v. *Boston*, 122 Mass. 344, 23 Am. Rep. 332; Elliott, Roads & Streets, pp. 504, 532; 2 Dill. Mun. Corp. §§ 1046–1049; Tiedeman, Mun. Corp. § 349; and Cooley, Torts, 2d ed. pp. 738–743.

The city of Richmond, in licensing the Richmond & Chesapeake Railroad Company, a corporation created and chartered by the sovereign power of the state, to enter and use its streets for its roadway, and to construct a tunnel to that end, having the power, under its charter, to grant such permission, exercised a public or governmental power, and the law exempts it from responsibility for an injury resulting from the negligence or wrongful act of the railroad company, unless such injury was also due to the failure of the city to discharge some ministerial and obligatory duty.

The court below therefore committed no error in refusing to give the instruction asked for by the plaintiff and in giving that asked for by the defendant, nor in refusing to set aside the verdict and award the plaintiff a new trial; and its *judgment must be affirmed.*

TENNESSEE SURREME COURT.

TRADESMEN'S NATIONAL BANK v. R. F. LOONEY *et al.* (UNITED STATES NATIONAL BANK, Impleaded, etc., *Appt.*).

(.....Tenn.....)

1. **Enforcement of a note given as a subscription to the stock of a syndicate** organized to purchase the property of a corporation, and which is used to pay for such property, cannot be defeated for fraudulent overvaluation of the property purchased, if the parties making the representation were representatives of the syndicate and not of the vendor corporation.

2. **A purchase for value in due course of trade, of a note,** is made by a bank which discounts it and applies the proceeds to the payment of a prior note due by the indorser and an over draft by a bank in which the indorser is interested.

3. **A note is not subjected to equities in the hands of a holder for value** by the fact that it is payable to a person, "trustee," if inquiry would have disclosed the fact that the word was merely descriptive, and that the note was made to him for the purpose of enabling him to turn it over in consummation of a subscription to the stock of a syndicate, which was accomplished by his indorsement and transfer.

4. **The liability of the maker of a note to an indorsee is not affected** by a compromise of a suit by the indorsee against the indorser, by which the latter is permitted to substitute securities in lieu of his liability as indorser under the express agreement that the liability of the maker shall not be affected, and that when any money is collected from the maker it shall be applied to release the securites so deposited.

5. **The liability of the indorser of a note** is not affected by the addition of the word "trustee" to his name.

6. **Notice to the indorsee** that an indorser has no interest in the transaction will not relieve the indorser from liability on a note.

(March 22, 1897.)

APPEAL by defendant United States National Bank from a decree of the Chancery Court for Shelby County dismissing its cross bill and disallowing its claim in a suit brought to foreclose a trust deed securing payment of certain notes, one of which was held by the appellant. *Reversed.*

The facts are stated in the opinion.

Messrs **William M. Randolph & Sons,** for appellant, United States National Bank:

A holder coming fairly by a bill or note has nothing to do with the transaction between the original parties, and if negotiable paper is transferred for a valuable consideration, and without notice of any fraud, the right of the holder shall prevail against the true owner.

Van Wyck v. *Norvell*, 2 Humph. 192; *Kimbro* v. *Lytle*, 10 Yerg. 417, 31 Am. Dec. 585; *Coddington* v. *Bay*, 20 Johns. 637; *Nichol* v. *Bate*, 10 Yerg. 429.

In all cases of notes indorsed, where one is fairly received in renewal of another, it discharges the first, and the second is taken in the usual course of trade, and for a good consideration passing at the time.

Nichol v. *Bate*, 10 Yerg. 433; *Wormley* v. *Lowry*, 1 Humph. 463; *Ingham* v. *Vaden*, 3 Humph. 55; *King* v. *Doolittle*, 1 Head, 77; *Rhea* v. *Allison*, 3 Head, 176; *Swift* v. *Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Israel* v. *Gale*, 45 U. S. App. 212, 77 Fed. Rep. 532, 23 C. C. A. 274; 2 Parsons, Notes & Bills, **347, 348; *Lewis* v. *Woodfolk*, 2 Baxt. 25.

A bank is protected as an innocent indorsee or holder, where it took a negotiable note upon the payee's indorsement, before its maturity, and without notice of defense, to hold it as collateral security for another note of like amount, indorsed by the payee and cashed for his benefit, upon the credit of such collateral security.

First Nat. Bank v. *Stockell*, 92 Tenn. 252,

NOTE.—As to the negotiability of a note payable to trustee, see Fox v. Citizens' Bank & T. Co. (Tenn. Ch. App.) 35 L. R. A. 673, and *note.*

See also 43 L. R. A. 831; 45 L. R. A. 822.

20 L. R. A. 605; *Roach* v. *Woodall*, 91 Tenn. 206; *Cherry* v. *Frost*, 7 Lea, 1; *Hill* v. *Bostick*, 10 Yerg. 410; *Kimbro* v. *Lytle*, 10 Yerg. 417, 31 Am. Dec. 585; *Nichol* v. *Bate*, 10 Yerg. 429; *Craighead* v. *Wells*, 8 Baxt. 38, 35 Am. Rep. 685; *Lookout Bank* v. *Aull*, 93 Tenn. 645.

The wife has the power to mortgage her real estate held in her general right, for the payment of the debts of her husband.

Bradford v. *Cherry*, 1 Coldw. 57; *McFerrin* v. *White*, 6 Coldw. 499; *Voorhies* v. *Granberry*, 5 Baxt. 704; *Chadwell* v. *Wheless*, 6 Lea, 312.

The transfer of the note in due course of trade and for value transferred the deed of trust, and the right to enforce it as the security for the payment of the note.

Cleveland v. *Martin*, 2 Head, 128; *Batesville Institute* v. *Kauffman*, 85 U. S. 18 Wall. 154, 21 L. ed. 776; *Ober* v. *Gallagher*, 93 U. S. 206, 23 L. ed. 831; *Nashville Trust Co.* v. *Smythe*, 94 Tenn. 513, 27 L. R. A. 663; *Carpenter* v. *Longan*, 83 U. S. 16 Wall. 271, 21 L. ed. 313; *Kenicott* v. *Wayne County Supers.* 83 U. S. 16 Wall. 452, 21 L. ed. 319.

The contracts between the syndicate and its several members, or between the syndicate and the Sheffield Land Iron & Coal Company made before the organization of the Sheffield City Company, did not become the contracts of that company, except so far as the company adopted and ratified them after its incorporation had been perfected.

Pittsburg & T. Copper Min. Co. v. *Quintrell*, 91 Tenn. 693.

Looney and the other members of the syndicate were the vendors, in substance, of the new company, the Sheffield City Company, with reference to the property they had agreed to buy from the old company, the Sheffield Land, Iron, & Coal Company.

So far from Looney and his coadjutors, members of the syndicate, having the right to complain of the failure to deliver the property, or of the defects in the title to the property, or of the deficiencies in the value of the property, as against the Sheffield City Company, that company had the right to make such complaint against Looney, and the other members, if, in fact, the property was not delivered, or the title to the property was not good, or its value was not such as it was represented to be, prior to the purchase.

Looney does not pretend he has ever returned the stock to the Sheffield City Company, or has ever attempted to do so, or has ever taken any step in the direction of canceling the transaction between him and the Sheffield City Company by which the stock was issued, and his notes were given, except his defense, as presented in the record of this suit, by his answers and his cross bills. That is sufficient to defeat this action.

Coffee v. *Ruffin*, 4 Coldw. 516; *Hill* v. *Harriman*, 95 Tenn. 300; *Farmer's Bank* v. *Groves*, 53 U. S. 12 How. 51, 13 L. ed. 889; *Gay* v. *Alter*, 102 U. S. 79, 26 L. ed. 48.

Col. Looney was on the ground, and had an opportunity of ascertaining or knowing the truth of the statements made by him to Sykes, whether verbal or contained in his letters, or appearing from the schedule furnished, showing the property to be purchased, and the values set upon it.

If he chose to rely upon the information he got, without making the proper and necessary inquiries, it was his own fault, and he cannot now urge his negligence in that respect as a ground for defeating his liability upon the note held by the United States National Bank, an indorsee, who, as already shown, has paid value for it.

Kerr, Fraud & Mistake, pp. 78, 83-85; *Anderson* v. *Hill*, 12 Smedes & M. 679, 51 Am. Dec. 130; *Evans* v. *Bolling*, 5 Ala. 550; *Hall* v. *Thompson*, 1 Smedes & M. 443.

Looney had information enough to charge him with knowledge that the estimates were mere opinions by those who were communicating with him, and they might or might not turn out to be well founded. If he chose to reply upon those opinions, he had the right to do so, and to make the contract he did make upon the faith of them. But, because the opinions have turned out to be ill founded, and cannot be verified, he has no right to repudiate the contracts he made.

Knuckolls v. *Lea*, 10 Humph. 577; *Rucks* v. *Third Nat. Bank*, 94 Tenn. 77; *White* v. *Ewing*, 37 U. S. App. 365, 69 Fed. Rep. 451, 16 C. C. A. 296; *Maney* v. *Porter*, 3 Humph. 347; Kerr, Fraud & Mistake, pp. 82-84; 1 Parsons, Notes & Bills, chap. 6, § 2; *Solomon* v. *Turner*, 1 Stark. 51; *Fleming* v. *Simpson*, 1 Campb. 40, note; *Reed* v. *Prentiss*, 1 N. H. 174, 8 Am. Dec. 50; *Perley* v. *Balch*, 23 Pick. 283, 34 Am. Dec. 56; *Johnson* v. *Titus*, 2 Hill, 606; *Welsh* v. *Carter*, 1 Wend. 185, 19 Am. Dec. 473; *Miller* v. *Tiffany*, 68 U. S. 1 Wall. 298, 17 L. ed. 540.

This suit is now prosecuted, primarily, for the benefit of the United States National Bank to the extent to which its indebtedness as shown by the note has not been paid; and secondarily, for the benefit of the Sheffield City Company to the extent to which that indebtedness has been paid. There can be no objection to such an arrangement.

Ragsdale v. *Gossett*, 2 Lea, 729; *Richardson* v. *McLemore*, 5 Baxt. 586; *Williams* v. *Hitchings*, 10 Lea, 326.

The addition of the word "trustee" to Mr. Sykes's name does not preclude the United States National Bank from holding him as the indorser on the note.

East Tennessee Iron Mfg. Co. v. *Gaskell*, 2 Lea, 742; *Erwin* v. *Carroll*, 1 Yerg. 145; *Patterson* v. *Craig*, 1 Baxt. 293; *Conn* v. *Scruggs*, 5 Baxt. 568; *Supert* v. *Sawyer*, 7 Humph. 414; *Steele* v. *McElroy*, 1 Sneed, 341; *De Bian* v. *Gola* (Md.) 24 Am. L. Reg. N. S. 777; *Harris* v. *Bradley*, 7 Yerg. 310.

The facts must be shown affirmatively by the proof, if there are any such facts, that Sikes was not in a position to be bound by the note, and that the United States National Bank acted in bad faith in ignoring such facts, and taking the note without inquiry with respect to them.

Atlas Nat. Bank v. *Holm*, 34 U. S. App. 472, 71 Fed. Rep. 489, 19 C. C. A. 94.

Accommodation paper is always put in circulation for the purpose of giving credit to the party for whose benefit it is intended. And although such party cannot maintain an action upon it against the accommodation maker or indorser, and would be defeated because of want

of consideration, a purchaser can maintain an action, who acquires it while still current, and gives the credit it was intended to promote, although such purchaser has knowledge of the original character of the paper.

Israel v. *Gale*, 45 U. S. App. 219, 77 Fed. Rep. 533, 23 C. C. A. 274; *Violett* v. *Patton*, 9 U. S. 5 Cranch, 142, 3 L. ed. 61; 1 Dan. Neg. Inst. § 790.

Messrs. **W. D. Ruffin** and **W. B. Glisson** for Tradesmen's National Bank.

Messrs. **Thomas M. Scruggs** and **A. S. Buchanan** for appellees.

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

The complainant, being the owner of a $12,500 note, being one of two notes of like amount executed by R. F. Looney to the order of J. P. Sykes, trustee, and by him and the Sheffield City Company indorsed to complainant, filed this bill, seeking a decree for the amount of this note and interest, and also for a foreclosure of a trust deed made to secure it. The bill alleges that this trust deed was executed by Looney and wife on certain real property belonging to the wife, in or near Memphis, and that this property was already, in part or in whole, covered by two other trust deeds; that J. P. Sykes, the indorser of this note, was also trustee in the trust deed; and that, though complainant's note was long past due, and full power of sale on such contingency was granted to the trustee, yet he declined to execute this power. Sykes, as indorser and as such trustee, Looney and wife, the trustees and beneficiaries in the other two trust deeds, and the United States National Bank, as the alleged holder of the other of these notes, were made parties to this bill. The claim of complainant not being before us, we need not pursue it further.

The United States National Bank filed an answer to the original bill, and made its answer a cross bill, in which it asked affirmative relief. In this answer and cross bill it was averred that the United States National Bank was the holder of the other of these two notes of $12,500, having acquired title thereto bona fide, for a valuable consideration, before maturity, and in due course of trade; that this note was also made payable to J. P. Sykes trustee; that it was by him and the Sheffield City Company indorsed; and that at maturity it was duly protested for nonpayment,—of all of which the indorser had legal notice. The cross bill prayed that the trust deed described in the original bill be foreclosed, and the proceeds of the foreclosure sale be applied to the payment of this note. To this cross bill Looney and wife and J. P. Sykes filed answers. In their answer, Looney and wife denied that the United States National Bank acquired this note in due course of trade, for value, and without notice of the makers' equitable defenses against it, and they averred that the note and trust deed to secure it were procured by fraud, and that no valuable consideration passed to them for the same. The fraud complained of, and as set out in the answer, is as follows: In July, 1892, and for some time before, there existed at Sheffield, Alabama, a corporation called the Sheffield Land, Iron, & Coal Company, which was the owner of various properties, real and personal. The operations of this corporation seem to have become embarrassed by heavy debts, the burden of which was largely carried by some of its stockholders. Certain of these parties about that time conceived the idea of relieving themselves of this burden by organizing a syndicate to purchase the assets of the corporation, and to this end they solicited a subscription from R. F. Looney, and perhaps others; and, in order that the parties so solicited might understand the character of the assets, there was prepared a statement or schedule of the same, together with extensions showing the value. In this paper these assets were set down as worth $1,012,676.81, and it is alleged that representations were made to Looney in this paper and otherwise by these gentlemen, that these values were in no sense speculative, but that they were real. In the answer it is also stated that it was in the same way represented that $300,000 would pay all the debts of the corporation, and that all the assets so scheduled would be turned over to the syndicate unencumbered, save for the burden of a bonded debt of $60,000 resting on the hotel in Sheffield and scheduled as part of these assets, which was to be taken care of by the syndicate, but that it was at the same time stated to him that the rents derived from the hotel property would be sufficient to pay the interest on these bonds. Relying on their statements, the answer avers that R. F. Looney subscribed for a share of $50,000 of and in the syndicate which was organized to purchase these assets at the sum of $300,000. The answer alleges that he was imposed upon greatly as to the value of these properties; that, instead of being worth over $1,000,000, they were worth greatly less, and, instead of being unencumbered save in the single particular referred to, they were in numerous instances, and to their full value, hypothecated to the creditors of this corporation. The answer also alleges that the debts much exceeded $300,000. It is unnecessary to enter further into the details of the misrepresentations of which he alleges he was made the victim, it being sufficient to say that they were numerous and very great. It is further stated in the answer that, by his subscription of $50,000 to the capital of the syndicate, Looney was to be interested in the assets purchased in the proportion that this sum bore to the full amount of $300,000, and that, to pay this subscription, he executed his notes for $50,000, including the two notes of $12,500 each, secured by the trust deed in question. Looney and wife also file a cross bill, in which they seek to have the notes delivered up for cancelation, and to have the trust deed removed as a cloud on Mrs. Looney's title. Sykes also answers the cross bill, and denies his liability as indorser, and avers that the United States National Bank took the note with full knowledge that his purpose in indorsing the note was simply to pass title, and in no respect to bind himself personally on it. The United States National Bank answered the cross bill of Looney and wife, denying its averments so far as they impeached its title to the note sued on, and it reiterated that it was the bona fide holder of this paper. Subsequently amended answers were filed by Looney and Sykes, in which they alleged that since the

filing of their original answer they had ascertained that this note had been paid to the holder, the United States National Bank, and that it had no right to prosecute further its suit upon it; that the debt of the bank was originally a debt due from the Sheffield Land & Iron Company, and that this debt was assumed by the Sheffield City Company when it was organized; that this note, together with the other notes of Looney heretofore described, was obtained by the false representations of the promoters of the Sheffield City Company, and that the note sued on by the United States National Bank was transferred to it in settlement of the debt of the Sheffield Land & Iron Company which it had assumed; and that subsequently the bank had made an arrangement with the Sheffield City Company, as a result of which the note was fully discharged. Upon the hearing, after much proof was taken, the chancellor dismissed the cross bill of the United States National Bank, and, upon the cross bill of Looney, ordered the note to be canceled, as well as the deed of trust securing it. From this portion of the decree the bank has prosecuted its appeal to this court.

The first question that will be considered is, Do the facts disclosed in the record afford a defense against the note in the hands of the bank, even if it be conceded that it does not occupy the position of a bona fide holder for value? That Col. Looney was induced to go into a speculating scheme which will prove disastrous to him if the note in suit is enforced against him, is true. And it may be conceded that the evidence in the case shows that the inducement which operated upon him and led him into this venture was a great overvaluation of the property and of its income, and a serious undervaluation of the encumbrances on this property, made by parties in whom he reposed confidence. And it may be granted further that the record shows that he was informed that his subscription of $50,000 would complete the sum of $300,000 to be raised by the syndicate, and that this amount would be sufficient to discharge the liabilities of the Sheffield Land, Iron, & Coal Company, and that in neither respect was the statement true. But, granting all these as facts clearly made out, yet they are not of themselves sufficient to relieve him from liability on this note. To work this result, these misrepresentations must have been made by the vendor of this property or by someone authorized to act for it. On this point Col. Looney says that J. C. Neely and Napoleon Hill, of Memphis, and E. W. Cole, Lewis Baxter, and others, of Nashville, were stockholders in that company, and creditors of it (the three first named, in very large amounts), and that they induced Charles Sykes, who was then its president, and also a creditor of the company, to form a syndicate for the purpose of purchasing a part of the assets of the company, the object and purpose of the originators of the syndicate being to apply the purchase money they realized to the payment of the debts of the Sheffield Land, Iron, & Coal Company, all of which were a charge upon the entire property of that company, and leave a portion of its property "free of any encumbrance whatever." He further says that these parties solicited subscriptions from persons who were not creditors of the company, but that he knew of no one save himself, not a creditor, who took any interest in the syndicate. He also states in his deposition that he received two letters, one from Charles Sykes, whom he denominates "the promoter and organizer of the syndicate," and the other from J. C. Neely, a member of the syndicate, together with a schedule of assets that the syndicate proposed to buy, and that, relying on the truthfulness of the statements contained in these letters and in the schedule, he was induced to identify himself with the scheme. These letters were exhibited to the court by him. The letter of Sykes did not profess to come from him as the president, or in any other respect as the representative, of the selling company, but distinctly as the agent of the syndicate. He says in reference to the Sheffield Syndicate: "I beg to make the following statement: I was employed by some gentlemen who were interested in the town to go there and make an examination of the property offered, and, in addition, to make a conservative estimate of what could be realized from it. I had no idea of being interested in the company when I went down there. After looking the matter over thoroughly, I have agreed to put my money in it. I feel that, with careful management, I will get $3 out for every dollar I put in. You, in my opinion, need not hesitate to say to your friends that this is an exceptional opportunity to make big money." In his letter Mr. Neely says: "You ask me to say what I know about the Sheffield Syndicate, and will say in reply that I have known the town of Sheffield since it was first surveyed into lots. I have seen a schedule of property offered the syndicate for $300,000, and have seen the property, and know of its value. I think the property worth three times the amount valued above. I have subscribed myself, and would subscribe largely, had I the ready money in hand." The schedule of property referred to in these letters, and the one furnished by Sykes to Col. Looney, show the face or par value of the assets which the syndicate proposed to buy for the sum of $300,000 to be $2,450,023.51, and the estimated value to be $1,012,678.81. Not only this, but Mr. Charles Sykes, the promoter of this scheme, in his deposition taken in the interest of, and read in the bill of, Col. Looney, says: "I was employed by a syndicate to purchase the assets of the said Sheffield Land, Iron, & Coal Company, and the said syndicate purchased the assets and property from the Sheffield Land, Iron & Coal Company for the sum of $300,000, and paid the sum in cash, or the valid subsisting indebtedness of that company." It thus will be seen that whatever misrepresentations were the moving inducement to Col. Looney to enter into this unfortunate speculation came, not from the company selling these assets, but from his associates in the syndicate purchasing them. After a diligent examination of the record, we have not been able to discover a single misleading act or word of the vendor corporation, or anyone authorized to represent it, which induced this sale. It seems to have been the passive recipient of the consideration for its assets, and

whatever of wrong there may have been in the transaction was practised upon Col. Looney by parties interested with him in the speculation. This being so, we know of no rule of law which would place upon the innocent vendor the responsibility of a fraud or misrepresentation practised by one or more of a number of vendees upon others associated with them in a purchase. And, even as to these parties, Col. Looney, in his deposition, repeatedly acquits them of all intention to wrong or defraud him, but says that he is satisfied they thought they would bring him out all right. In addition, however, the record shows that the trade with the Sheffield Land, Iron, & Coal Company was consummated, and that the assets purchased were conveyed by that company to one Cheany, and that he at once conveyed them to a new corporation organized as was contemplated by the parties composing the syndicate, and known as the Sheffield City Company, and that company accepted them at the valuation of $1,000,000, and, upon the basis of this valuation, issued $150,000 of its capital stock to Col. Looney, as representing his interest in the institution. It is true, this stock was not actually turned over to him, but was held as collateral to his notes, yet it was receipted for by him, and was thus recognized by him as the fruit of his investment.

But, independent of the question just considered, this defense cannot be maintained against the United States National Bank. The facts with regard to the ownership of the note sued on by that bank are as follows: In October, 1892, this bank was the owner and holder of a note of the Sheffield Land, Iron, & Coal Company for the sum of $11,391.82, besides interest; and at the same time it held a claim, in the shape of an overdraft, against the Bank of Commerce of Sheffield, Alabama, for $3,790.91. In this latter bank the Sheffield Land, Iron, & Coal Company held a controlling interest. Mr. Sykes, representing a new corporation called the Sheffield City Company, to which the Looney notes had been assigned, proposed to the officers of the United States National Bank that, if they would discount the note of $12,500 here sued on, the proceeds of the discount might be applied to the extinguishment, *pro tanto*, of the two debts just mentioned, and that the excess of indebtedness over the discount would be paid to it in cash. This proposition was accepted by the United States National Bank, and the arrangement suggested was carried out in every respect. The bank thus received this note and the cash necessary to complete the transaction, and at the same time surrendered to the Sheffield City Company, as an extinguished liability, the note of the Sheffield Land, Iron, & Coal Company, and certain collateral attached to it, including its claim against the Bank of Commerce. The note of Col. Looney was indorsed by its payee and by the Sheffield City Company, before its maturity, to this bank, and was taken by it without any notice of the circumstances under which it had been obtained. Pretermitting for the moment the effect on its negotiability of the fact that this note was made payable to "Joseph Sykes, Trustee," and so indorsed by him, there is no question but that the facts just detailed make this bank a bona fide holder for value. The extinguishment of the note of the Sheffield Land, Iron, & Coal Company, and the surrender of the collateral to secure it, and the discharge of the Bank of Commerce from liability on its overdraft, constituted the United States National Bank a purchaser for value, in due course of trade, of this note. This proposition is clearly established in this state. *Nichol* v. *Bate*, 10 Yerg. 429; *Cherry* v. *Frost*, 7 Lea, 1; *Jordan* v. *Jordan*, 10 Lea, 134, 43 Am. Rep. 294, and *Lookout Bank* v. *Aull*, 93 Tenn. 646. But it is said that the fact that this note was payable to "Joseph Sykes, Trustee," and was so indorsed by him, of itself lets in against the bank all equities that would have attached to it in the hands of the original parties; and the cases of *Alexander* v. *Alderson*, 7 Baxt. 403; *Covington* v. *Anderson*, 16 Lea, 310; and *Caulkins* v. *Memphis Gaslight Co.* 85 Tenn. 684, are cited as sustaining this contention. All of these cases involve controversies between the owners of trust funds and parties who set up a title to such funds by transfer from trustees in fraud of their trusts, and where the paper transferred or assigned on its face gave notice of the existence of a trust. *Alexander* v. *Alderson*, 7 Baxt. 403, was a case of a note payable to Alexander, trustee, and by him assigned in payment of an individual liability; and the question there was, Were the indorsees bona fide holders of the note, so as to be able to resist the claim of the beneficiaries? Upon the authority of *Duncan* v. *Jaudon*, 82 U. S. 15 Wall. 175, 21 L. ed. 145, this court held that the word "trustee" gave notice of the existence of a trust, and that the party taking the paper was charged with the duty of ascertaining what, if any, restrictions were imposed on the trustee in the management of the trust. To like effect are *Covington* v. *Anderson*, 16 Lea, 310, and *Caulkins* v. *Memphis Gaslight Co.* 85 Tenn. 684. None of these cases, however, involve the question we have here. Similar to them is the case of *Third Nat. Bank* v. *Lange*, 51 Md. 138, 34 Am. Rep. 304. There a trustee violated his duty by disposing of a note payable to himself as trustee, and it was said by the court: "It [the note] cannot be read understandingly without seeing upon its face that it is connected with a trust and is a part of a trust fund. It was the duty of the bank, before purchasing it, to have made inquiry into the right of the trustee to dispose of it." The correctness of these holdings is now conceded by the courts with practical unanimity. The effect of them is that if the trustee, Sykes, disposed of this paper in violation of his trust, then the word "trustee" would convert any one who so obtained it into a constructive trustee, at the instance of the *cestui que trust*. But it is certainly true, as Mr. Perry says: "The mere fact that the word trustee is on the face of the securities cannot put a purchaser to any inquiry beyond ascertaining whether the trustee has power to vary the securities. If he has such power, a purchaser in good faith will be protected, although the trustee use the money for his private purposes. But if a purchaser takes securities from a trustee, with the word 'trustee' upon their face, in payment of a private debt due from the trustee, the sale may be avoided by the *cestui que trust*, or the

purchaser may be held as a trustee." 1 Perry, Tr. § 225. Here we find an intelligent statement of the rule and its limitations. The rule is that he who takes a security from a trustee, with his fiduciary character displayed upon its face, is bound to inquire as to his right to dispose of it, but if, on inquiry, it is found that there is no restriction upon the trustee's power of disposition, or (it may be added) there is nothing in the nature of the transaction to indicate any abuse of his trust, then the title of a purchaser in good faith, for value and before maturing, will be protected.

In the case at bar an inquiry would have disclosed that the word "trustee," in this connection, was purely descriptive, and without any legal signification, and that the trust deed executed by Col. Looney and wife was in the ordinary form, made to Sykes as trustee, conveying to him certain real estate of Mrs. Looney's, with this recital: "That whereas, R. F. Looney, Sr., has subscribed $50,000 towards the formation of a syndicate for the purchase of the assets of the Sheffield Land, Iron, & Coal Company, and to this end has executed his two several promissory notes for $12,500 each, due in six months from date, payable to the order of Joseph P. Sykes, trustee, which said two notes are a part of the $50,000 subscription: Now, in order to make certain the payment of said two notes," etc., "we hereby bargain and convey unto the said Jos. P. Sykes, trustee," etc. In other words, an examination would have disclosed neither upon the face of this trust deed, nor elsewhere in the transaction, any restriction upon the power of the payee, Sykes, nor any limitation upon his right to indorse and turn over the note in question for the consummation of Col. Looney's subscription to the syndicate, but, on the contrary, that it was made for that purpose and no other. The record showing that the note in suit and the others mentioned were delivered to Mr. Sykes, the constituted representative of the syndicate, to be transferred by him in payment of Col. Looney's subscription thereto, and that they were so used, and that the note sued on passed, under the circumstances already detailed, into the hands of the cross-complainant bank, its title will be protected. This principle or rule was recognized by us in affirming the decree of the court of chancery appeals in *Fox* v. *Citizens' Bank & T. Co.* (Tenn. Ch. App.) 35 L. R. A. 678. And see *Downer* v. *Read*, 17 Minn. 493 (Gil. 470); *Davis* v. *Garr*, 6 N. Y. 124, 55 Am. Dec. 387; *Westmoreland* v. *Foster*, 60 Ala. 448.

But it is insisted that at least a settlement made between the United States National Bank and the Sheffield City Company dated January 31, 1895, extinguished this note, so far as Looney and his accommodation indorser, Sykes, were concerned. It will be remembered that this note was transferred to its present holder by the Sheffield City Company, the last indorser. By the terms of the agreement or settlement, as it is called, the Sheffield City Company was permitted to substitute, with the bank, certain securities it owned in the place and stead of its guaranty or indorsement of this note, and the bank obligated itself not to sue on the guaranty or indorsement, but it was expressly stipulated that this settlement was in no way to affect the liability of the other parties to the note. It was also agreed that, as money was collected from the other parties, it should be credited to the Sheffield City Company, and a like amount of its securities should be returned to it. In other words, this agreement simply substituted certain securities of the Sheffield City Company for its general liability as indorser, and secured for it a dismissal of a suit then pending to enforce this liability, but in no way affected the relations of the other parties to this note. This leaves undetermined alone the question of the extent of the obligation of J. P. Sykes on this note. Did the addition of the word "trustee" to his name limit his responsibility as its indorser? He waived demand and notice of protest by a writing when he indorsed it, so that his liability was fixed on the maturity and nonpayment of the note, unless it be that the addition of the word "trustee" relieves him. This question is settled against the indorser by the great weight of authority. *Taft* v. *Brewster*, 9 Johns. 334, 6 Am. Dec. 280, was a case of parties signing a bond as trustee of the Baptist Society, etc., and the court said: "The bond must be considered as given by the defendants in their individual capacities. It is not the bond of the Baptist church, and if the defendants are not bound, the church certainly is not. . . . The addition of trustees to the names of the defendants is in this case a mere *descriptio personarium*." In *M'Clure* v. *Bennett*, 1 Blackf. 189, 12 Am. Dec. 223, makers of a note appended to their names the words, "Trustees of the First Presbyterian Church of Madison," and yet they were made personally liable. And in *Conner* v. *Clark*, 12 Cal. 168, 73 Am. Dec. 529, the court held that a party signing a note with the word "trustee" added was individually bound, and evidence was inadmissible to show that at the time he affixed his signature there was an agreement that he should not be liable personally, but that the note should be paid out of a trust fund. In this last case the court quoted at length from § 63, Story, Prom. Notes, as follows: "As to trustees, guardians, executors, and administrators, and other persons acting as *en outre droit*, they are by law generally held personally liable on promissory notes, because they have no authority to bind, *ex directo*, the persons for whom, or for whose benefit, or for whose estate, they act; and hence, to give any validity to the note, they must be deemed personally bound as makers. It is true that they may exempt themselves from personal responsibility by using clear and explicit words to show that intention; but, in the absence of such words the law will hold them bound." To the same effect is *Binney* v. *Plumley*, 5 Vt. 500, 26 Am. Dec. 313; *Clap* v. *Day*, 2 Me. 305, 11 Am. Dec. 99. So in this state it has been held that a note signed with the word "administrator" or "guardian" affixed to the name of the maker is the latter's personal note. *Erwin* v. *Carroll*, 1 Yerg. 145; *Mc Whirter* v. *Jackson*, 10 Humph. 209; *Carter* v. *Wolfe*, 1 Heisk. 694. Nor does it affect the liability of the indorser on this paper that the knowledge was communicated to the bank, when this note was deliv-

ered to it, that Mr. Sykes had no interest in the transaction of which it formed a part: for it is clear that notice to a bank discounting accommodation paper that the indorser is lending his credit to the maker does not affect the bank or relieve the indorser. *Philler* v. *Patterson*, 168 Pa. 468.

The result is that *the chancellor's decree*, dismissing the cross bill of the United States National Bank, and sustaining the respective cross bills of Looney and wife and Sykes and Buchanan and others, *is reversed*, and a decree will be entered here, in accordance with the prayer of the first one of these cross bills, in favor of the United States National Bank.

NORTH DAKOTA SUPREME COURT

BANK OF GILBY, *Appt.*,
v.
S. L. FARNSWORTH, *Respt*

(.....N. D.....)

*1. **A draft drawn by defendant to the order of the plaintiff was lost** in transmission by mail from the city where the plaintiff was engaged in business to the city where the drawee resided, to be there presented for payment by the plaintiff's correspondent. Plaintiff failed to discover such loss for nearly six months, although it had in its possession a report from its correspondent which disclosed the fact that the draft had never reached such correspondent. *Held*, that the drawer was discharged from liability.

2. **When a drawer who has been discharged because of the failure to take the necessary steps** to charge him, promises to pay the draft or recognizes his liability thereon, with full knowledge of the facts releasing him from liability, he thereby waives his right to insist that he has been released.

3. **The giving by the drawer of a duplicate of the lost draft** does not necessarily evince a purpose to waive such defense. Such duplicate does not, as a matter of law, import a promise to pay the draft. Therefore it is competent to show by parol evidence that the drawer informed the payee that he did not intend by the giving thereof to waive his rights, but merely to accommodate the payee by putting in his hands a paper which would enable him to collect the money from the drawee.

4. **Such evidence does not contradict or vary the terms** of the written contract between the parties, for there is only one contract between them,—*i. e.*, the original draft,—the duplicate adding nothing to the liability of the drawer, and not constituting a new or additional contract.

(October 21, 1897.)

APPEAL by plaintiff from a judgment of the District Court for Grand Forks County in favor of defendant in an action brought to enforce defendant's alleged liability as drawer of a draft. *Affirmed.*

The facts are stated in the opinion.

*Headnotes by CORLISS, Ch. J.

Messrs. **J. B. Wineman** and **Charles F. Templeton**, for appellant:

The failure of plaintiff to present the original bill was caused by circumstances over which it had no control and judgment should be awarded in its favor.

Rev. Codes, § 4944; *Windham Bank* v. *Norton*, 22 Conn. 213; *Pier* v. *Heinrichsoffen*, 67 Mo. 163, 29 Am. Rep. 501; *Brown* v. *Olmsted*, 50 Cal. 162.

The oral promise of defendant to execute a duplicate of the original bill of exchange, having knowledge of the facts, was a waiver of any laches attributable to plaintiff on account of failure to present the bill to Gagan & Company for acceptance and give notice of its nonpayment to defendant.

The drawing of the duplicate draft, on April 1, 1896, and delivery to plaintiff, was a waiver by defendant of the defense which he now sets up.

Leonard v. *Hastings*, 9 Cal. 236; *Martin* v. *Lennon*, 19 Minn. 74.

Admission of liability or promise to pay, after notice of facts constituting a release waives the defense of laches.

Thornton v. *Wynn*, 25 U. S. 12 Wheat. 183, 6 L. ed. 595; *Sigerson* v. *Mathews*, 61 U. S. 20 How. 496, 15 L. ed. 989; *Yeager* v. *Farwell*, 80 U. S. 13 Wall. 6, 20 L. ed. 476; *Parsons* v. *Dickinson*, 23 Mich. 56; *Ladd* v. *Kenney*, 2 N. H. 340, 9 Am. Dec. 77; *Meyer* v. *Hibsher*, 47 N. Y. 265; *Ross* v. *Hurd*, 71 N. Y. 14, 27 Am. Rep. 1; *Cady* v. *Bradshaw*, 116 N. Y. 188, 5 L. R. A. 557; *Tebbetts* v. *Dowd*, 23 Wend. 379; *Third Nat. Bank* v. *Ashworth*, 105 Mass. 503; *Rindge* v. *Kimball*, 124 Mass. 209; *Hobbs* v. *Straine*, 149 Mass. 212; *Moyer's Appeal*, 87 Pa. 129; *Oxnard* v. *Varnum*, 111 Pa. 193, 56 Am. Rep. 255; *First Nat. Bank* v. *Bonner* (Tex. Civ. App.) 27 S. W. 699; *State Bank* v. *Bartle*, 114 Mo. 276; Dan. Neg. Inst. §§ 1147 *et seq.*; *Curtis* v. *Sprague*, 51 Cal. 239; *Knapp* v. *Runals*, 37 Wis. 135.

No new consideration was necessary to support the waiver.

Sheldon v. *Horton*, 43 N. Y. 93, 3 Am. Rep. 669; *Matthews* v. *Allen*, 16 Gray, 594, 77 Am. Dec. 430; *Lockwood* v. *Bick*, 50 Minn. 142.

The instrument expressed a legal obligation which could not be affected by a contemporaneous parol agreement.

NOTE.—As to the effect of delay in presenting a check to release an indorser, see Kirkpatrick v. Puryear (Tenn.) 22 L. R. A. 785, and *note*.

As to release of drawer, see First Nat. Bank v. Buckhannon Bank (Md.) 27 L. R. A. 332.

As to right of action at law on lost negotiable paper, see Butler v. Joice (D. C.) 16 L. R. A. 295, and *note*; also Kirkwood v. First Nat. Bank (Neb.) 24 L. R. A. 444.

Covel v. *Anderson*, 33 Minn. 374; *Harrison* v. *Morrison*, 39 Minn. 319; *Farwell* v. *St. Paul Trust Co.* 45 Minn. 495; *Youngberg* v. *Nelson*, 51 Minn. 172; *Burke* v. *Ward*, (Tex. Civ. App.) 32 S. W. 1047; *National German American Bank* v. *Lang*, 2 N. D. 66; *Kulenkamp* v. *Groff*, 71 Mich. 675; *Thompson* v. *McKee*, 5 Dak. 172; Revised Codes, § 3888, *Martin* v. *Cole*, 104 U. S. 30, 26 L. ed. 647; *Brown* v. *Spofford*, 95 U. S. 474, 24 L. ed. 508.

A waiver, like any other contract, is to be construed according to the language used.

Lockwood v. *Bock*, 50 Minn. 142.

In this state a written contract cannot be delivered to the obligee conditionally.

Revised Codes, §§ 3889, 3890, and 3517.

Mr. Streit, the cashier of the bank, could not bind the plaintiff by any stipulation that the defendant should not be held according to the legal effect of the writing.

Thompson v. *McKee*, 5 Dak. 172.

Messrs. **Cochrane & Feetham** for respondent.

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

The plaintiff by this action is seeking to hold the defendant liable as drawer of a draft. The plaintiff is the payee named in such draft, and it was drawn on J. M. Gagen & Co., of Grand Forks city, the defendant being a resident of Gilby, North Dakota. Defendant had been engaged in buying wheat for J. M. Gagen & Co. for some time previous to the day when this draft was drawn. It was his custom to advance the money with which to make all purchases of wheat for his principal, and at the close of the day to draw upon them a draft through the plaintiff, a state bank at Gilby, to reimburse him for such advances. On the 26th of September, 1895, the moneys he had that day expended in buying wheat for his principal amounted at the close thereof to the sum of $612, and on that day he drew upon them, through the Gilby bank, for that amount, that bank cashing the draft, as was its custom. The draft was lost in transmission by mail from Gilby to Grand Forks, it being forwarded by plaintiff to the First National Bank of Grand Forks for collection. The fact of such loss was not discovered by plaintiff until the latter part of March, 1896, or nearly, if not quite, six months afterwards. As soon as plaintiff learned that the draft had not been received by its agent, the First National Bank of Grand Forks, it notified the defendant, and requested him to give a duplicate thereof. Defendant refused so to do until he had ascertained whether the draft had in fact not been paid. Subsequently he signed and delivered to plaintiff an exact duplicate of the lost draft, it being dated as of the 26th of September, 1895, the same as the original. Written upon the draft in two places was the word "Duplicate." Defendant testified, and his evidence was confirmed by that of his son, that he distinctly informed the plaintiff that he knew that he had been discharged from liability on the lost draft by reason of the negligence of the plaintiff, and that he did not intend, by the giving of the duplicate, to reinstate such liability. The evidence on this point is somewhat conflicting, but the learned trial judge, having all except one of the witnesses before him, found in favor of the defendant on this point. In a case where the evidence is so evenly balanced, we should not overthrow a finding of fact which necessarily rests in part upon a knowledge of the demeanor and appearance of witnesses which we do not and cannot possess. That the defendant was discharged from liability as drawer does not admit of doubt. Under the statute it was the duty of the plaintiff to present the bill for payment within ten days after the time in which it could, with reasonable diligence, forward it to Grand Forks for such presentation. The draft was payable on demand, and did not draw interest. Our statute declares that, "if a bill of exchange payable at sight or on demand without interest is not duly presented for payment within ten days after the time in which it could with reasonable diligence be transmitted to the proper place for such presentment, the drawer and indorsers are exonerated, unless such presentment is excused." Rev. Codes, § 4941. Nor does the loss of the paper exonerate the plaintiff from the performance of this duty, which it owed the defendant. "The loss of a bill or note is no excuse for want of a demand, protest, or notice, because it does not change the contract of the parties, and the drawer and indorsers will be at once discharged if there be failure in respect of either the demand, protest, or notice. This rule applies whether the bill has been accepted or not, for the loss of the instrument does not relax the duty of the holder to make the demand for acceptance within due season." 2 Dan. Neg. Inst. § 1464. It is possible that the time during which plaintiff remained in ignorance of the fact of such loss, without being chargeable with negligence, was not a part of the time mentioned in the statute. Probably § 4909, Revised Codes, covers such a case. This section reads: "Delay in presentment or in giving notice of dishonor is excused when caused by circumstances which the party delaying could not have avoided by the exercise of reasonable care and diligence." It may be that the holder of a draft is not responsible for the carelessness of public servants in the carrying of the mails, and therefore that he does not take the risk of such carelessness. But the moment the exercise of reasonable diligence requires him to know the fact that the paper has been lost, he must then proceed under the statute to make the demand of payment, and give notice of dishonor. This duty the section referred to clearly recognizes. It is only when the delay is caused by circumstances which the party delaying could not have avoided by the exercise of reasonable care and diligence that he is excused. It is a mild form of expression to speak of the negligence of the plaintiff in failing to discover for six months the fact that this draft had never been paid, and had not even reached its correspondent and agent, the First National Bank of Grand Forks. Nearly six months intervened between the mailing of the draft and the discovery of its loss, during about five months of which time plaintiff's cashier admits that there was in his possession a statement from the First National Bank which would have disclosed the fact that that bank had never received the paper. From the standpoint of the defendant's rights and interest, the plaintiff was guilty of

gross and inexcusable negligence; and defendant was thereby discharged from all liability on the paper. But it is urged that to allow the defendant to prove the oral understanding between him and the plaintiff's cashier at the time of the delivery of the duplicate draft is to contradict by parol evidence the terms of a written instrument. This contention must find support, if at all, in the postulate that the duplicate draft was an independent contract, creating an additional liability. This position is not tenable. All the evidence in the case, the duplicate itself, and the plaintiff's own pleading, speak but one language regarding the paper. It is not a new agreement, but merely a written evidence of the lost instrument executed to take its place. After a contract is duly entered into, the making of a duplicate adds nothing to the liability of any of the parties to the agreement. There is still only one contract, although for convenience of the parties there may be two, or even more, original agreements, each the exact copy of all the others. Burrill defines a duplicate as "an original instrument repeated; a document which is the same as another in all essential particulars, and differing from a mere copy in having all the validity of an original." It is immaterial when a duplicate is executed. If it is in fact a duplicate, it adds no more to the obligations and rights of the parties to the agreement, when it is executed at a subsequent date, than when its execution is contemporaneous with that of the other duplicate. Suppose that the defendant had been properly charged as drawee, and that thereafter the draft had been lost, would it be claimed that the execution by defendant of a duplicate under those circumstances would have added anything to his liability, or that the duplicate would have been a new and distinct contract? Clearly not; otherwise he would then be liable for twice the sum for which he had received consideration. The mere fact that the duplicate was executed after he had been discharged cannot make it a separate and independent agreement, although the execution thereof might, under some circumstances, be cogent evidence that the drawer had intended to admit his liability, and thus, under a familiar rule, waive his discharge. That, however, is another question having no connection whatever with the inquiry whether the defendant, by signing and delivering this duplicate as a duplicate, and as a duplicate only, has nevertheless entered into a new contract creating a distinct liability. That no new agreement was made by the execution of this duplicate cannot admit of doubt. All that was done was to furnish the plaintiff with a copy of the lost paper; a copy, however, which has all the force (and no more) of the original, because signed by the defendant, the same as this old draft. Therefore the defendant's evidence, that he stated before signing the duplicate that he did not thereby intend to add anything to his liability, was in harmony with the very nature of the act of executing a duplicate, and not in conflict therewith. His evidence was not incompetent on the ground that it tended to contradict or vary the terms of a written agreement. Clearly, his evidence, that he informed the plaintiff before the delivery of the duplicate that he knew that he had been released from liability, and did not intend to yield his vantage ground by the execution of such duplicate, was not evidence which in any manner varied or contradicted the terms of the only contract between the parties. That contract was the original draft. By signing the duplicate, the defendant, as we have before stated, did not make a new agreement or add anything to the old. He merely gave another written evidence thereof. Therefore the contract between the parties whose terms can be varied by the oral evidence in the case is the draft drawn September 26, 1895. But defendant does not seek to add to or take from this agreement one iota. He concedes that it is a fair contract, and that it means just what the law says it means. But he asserts that the condition on which the liability thereunder was to become absolute has not been fulfilled, and that, therefore, he has been released as drawer of the draft. What he sought to prove was, not that the original draft was delivered on condition, or did not represent the real intent of the parties thereto, but that, by giving a duplicate, he did not intend to waive his right to insist that he had been exonerated from liability by the laches of the plaintiff.

Counsel for plaintiff treats the duplicate as a new contract, and then reasons that it imports an absolute liability on the part of the defendant, provided the proper steps were taken to charge him as drawer. Here is the fallacy of his reasoning. The postulate is false. It is no more a distinct contract than it would have been had it been executed at the same time that the lost paper was executed. As a new contract, it would have no consideration to support it. It is undisputed that no money was paid for the duplicate by the plaintiff. Nor was defendant under any moral, much less any legal, obligation to give it. He had been discharged through the gross carelessness of plaintiff; and the circumstances of the case show that, if the bank had acted with ordinary diligence, the loss of the draft would have been discovered in ample time to insure the collection of the money from J. M. Gagen & Co., as it is uncontradicted that between the time it was given and their suspension of business through insolvency they paid seventy-four drafts drawn on them by defendant. There might have rested upon defendant a certain business obligation to accommodate the bank by giving to it some written evidence that the bank was entitled to $612 of the funds of the defendant in the hands of J. M. Gagen & Co. But neither legally nor morally was defendant bound to pay a dollar, or in any manner help the plaintiff, by again becoming responsible, out of the dilemma in which it had placed itself by its own inexcusable negligence. If, therefore, we could treat this duplicate as an independent contract, it would be void as between the parties for want of a consideration to support it. But it is idle to talk of its being a new contract. The whole trend of the evidence, the writing of the word "Duplicate" on the paper itself, and the solemn averments of the plaintiff's own pleading, all point to one conclusion: *i. e.*, that all that the parties intended was to make a duplicate of a draft which had theretofore been executed, and de-

livered by defendant to plaintiff. Plaintiff, in its complaint, avers "that on the 1st day of April, A. D. 1892, the defendant executed and delivered to the plaintiff a duplicate of said bill of exchange for the purpose of presenting the same to said J. M. Gagen & Co., and collecting from said J. M. Gagen & Co. the said sum of $612." We must, if we are not to lose ourselves in a labyrinth, take this duplicate, and assume it to have been executed as of the date of the lost draft, in considering the question whether there has been an attempt on the part of the defendant to contradict or vary by parol evidence the terms of a written agreement. But what effect the execution of this paper has to restore the liability of the defendant as drawer is another question, which must be discussed entirely separate from the question of parol evidence. On this branch of the case the time when the duplicate was executed is very important. If it had been signed when the lost draft was signed, no one would contend that it was any evidence of waiver. But, as it appears to have been executed at a time when the defendant knew that he had been released as drawer, there is a possibility of claiming that he thereby intended to admit his liability despite the fact that he had been discharged. If the paper were a note, and the defendant were an indorser thereon, his indorsing of a duplicate would be strong, perhaps conclusive, evidence that he intended thereby to admit his liability, although he had been discharged. In such a case there would be no other plausible explanation of his conduct. But in the case at bar there was a sufficient reason why the plaintiff should desire, and the defendant be willing to give, a duplicate, aside from a purpose to re-establish an extinguished liability. It was necessary that plaintiff should have some written authority from defendant to enable it to collect from J. M. Gagen & Co. $612 of the funds of defendant in their hands. For this purpose a duplicate was a very natural paper to give, for it would keep the records of all the parties in proper business shape. An order or an assignment would have been sufficient to enable the plaintiff to collect from J. M. Gagen & Co. the $612, but a duplicate of the original draft was the most natural document for the parties to select to effectuate this object. It was entirely competent for the defendant, at the time of giving it, to notify the plaintiff that he did not intend by the giving of such duplicate to waive his rights, but that his sole object was to put the plaintiff in shape to secure its money from J. M. Gagen & Co. According to his evidence, it was solely for this purpose that the plaintiff asked for the duplicate. It is possible that in this case the inference might be drawn from the bare fact of giving a duplicate under the circumstances of this case that defendant intended to abandon his defense that he had been released. But this would not be on account of the terms of the paper, or of its legal effect. Nor would it follow as a legal conclusion from the giving of a duplicate. That would be merely a circumstance having certain probative force, and evidence to overthrow the inference would be competent. Such evidence would only go to show that what on the face of the transaction was presumably the intention of the defendant was not in fact his intention, and that the plaintiff knew that it was not. Unless a duplicate draft, as a matter of law, constitutes a promise to pay despite the release of the drawer, —unless this is the legal effect of such an instrument,—the parol evidence did not in any manner contradict or vary its terms. Now, it is obvious that a draft does not contain any promise by the drawer to be bound despite a prior discharge, for at the time it is given the drawer is never released. And the duplicate draft is not a new contract, but another copy of the original, signed like the original by the drawer. As a contract it imports nothing more than the original draft. As evidence of a purpose to waive a discharge it will have such force as other evidence and other circumstances in the case permit, and no other or different force. And proof of other facts bearing upon the question of waiver in no manner affects the terms or legal effect of the only contract between the parties, *i. e.*, the original draft which has been lost. The decision of the New York court of appeals in *Benton* v. *Martin*, 40 N. Y. 345, 52 N. Y. 570, is a direct authority in support of our decision. It is true that, when the case was before the court of appeals the last time (52 N. Y. 570), Judge Folger appears to have thought that the doctrine that it is competent to prove that a written instrument was delivered conditionally has some bearing on the case, and it may be doubtful, in view of our statutes, whether that doctrine prevails in this state. See Rev. Codes, §§ 3517, 3889, 3890. But no such foundation for the decision was stated by the court in the decision in 40 N. Y. 345. Nor can we perceive how it is possible to talk about the conditional delivery of a mere duplicate of an actually delivered and perfectly valid contract, one which had previously taken effect without condition. The delivery in that case was not conditional in the sense of the doctrine referred to, or, indeed, in any sense whatsoever. The drawer of the draft in that case merely asserted that, while he recognized the fact that he had once been liable on a draft issued by him, and which had theretofore been delivered unconditionally, and while he was willing to give the payee a duplicate to enable it to obtain its money from the drawee, yet he wished it understood that he did not intend to have his act of accommodation construed as a recognition of the very liability from which he had been, by the payee's carelessness, released. Here was no condition, but merely a refusal to have his act, which was not necessarily an admission of liability, construed as such an admission. The duplicate was not delivered as a contract. The delivery of the contract had already taken place months before. How, then, can it be said that any question of conditional delivery is involved in a case of this kind? What was done in that case and in this was not the delivering of a contract, thus for the first time making it effectual, but the furnishing of a duplicate of a contract which had been unconditionally delivered some time before. Such a thing as the conditional delivery of a duplicate, the contract already having taken effect by an unqualified delivery, is an utter impossibility. The defendant attached no condition to the delivery of the duplicate.

He merely guarded against the possibility of having his act in so doing construed as a recognition of liability, and hence, under the authorities, as a waiver of his discharge. Certainly, the furnishing of a duplicate of a lost draft is an act susceptible of two different constructions. It may indicate a purpose to reinstate an extinguished liability, or it may be an act of accommodation to the payee to enable him to obtain the funds of the drawee in the hands of the drawer from such drawee, the payee being equitably entitled thereto. Surely, evidence which throws light on this ambiguous transaction should not be excluded, nor is there any rule of law requiring this to be done. Had the defendant in express terms promised in writing to pay the draft, then it might be claimed that parol evidence tending to show that he did not mean what he said would fall within the rule excluding parol evidence to contradict a written instrument. But no such promise is found on the face of the duplicate, nor is one necessarily implied by the law. Whether such a promise was intended to be made,—whether it has, in fact, been made,—is to be gathered from all the circumstances of the case; and no act indecisive in character can control to the exclusion of other equally good, or rather of more satisfactory and explicit, evidence. It is unjustifiable to force upon the defendant an intention to yield up his defense merely because he gave the plaintiff a copy of the original draft, when such act could be and was in fact an act of pure accommodation to the plaintiff. It must be kept in mind that it does not take a contract to reinstate an extinguished liability of this character. No new consideration is necessary. No agreement on the part of the other party (the creditor) is essential. All that is needed is that the drawer should manifest a purpose to be bound notwithstanding the fact that the holder has failed to charge him as drawer. 2 Dan. Neg. Inst. §§ 1147, 1147*a*, and cases cited. How, then, has the doctrine relating to parol evidence any bearing on the question whether the drawer has in fact evinced a purpose to surrender his impregnable position? It is urged that the cashier of the bank had no power to bind it by agreeing that the delivery of the duplicate should not constitute a waiver of the drawer's defense. It is certainly remarkable if a principal can in this way force upon a party an agreement or waiver he never intended. Want of power in the agent will entitle the principal to claim that he is not bound. But it has remained for council for the plaintiff to discover that it likewise enables the principal to insist that another who has dealt with the agent has made a contract to which he (such other party) has never assented, or has in law agreed to a waiver which he has expressly guarded against. When defendant and plaintiff's cashier came together, defendant had been relieved from all liability to the plaintiff; and whatever rights the plaintiff has obtained have accrued to it through the dealing of the defendant with such cashier. It can take only such rights as the defendant has seen fit to confer upon it. Claiming the benefit of this arrangement, it must take with it all its conditions. As the defendant declared to the cashier that he would not waive his discharge, the plaintiff cannot, on account of any want of power in the agent, transmute this refusal to waive into a waiver in fact.

As the defendant was discharged from liability, and as he has not waived his right to rely on such discharge, the judgment of the district court in his favor must be *affirmed*.

All concur.

IOWA SUPREME COURT.

J. W. NEASHAM, *Appt.*,
v.
Anna L. McNAIR.

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

A diamond shirt stud procured for personal use and actually used and worn by a husband, is a family expense within the meaning of Code, § 2214, charging family expenses upon the property of both husband and wife or either of them.

(*Robinson, J., dissents.*)

(October 30, 1897.)

APPEAL by plaintiff from a judgment of the District Court for Wapello County in favor of defendant in an action brought to recover the purchase price of jewelry sold by plaintiff to defendant's husband. *Reversed.*

NOTE.—As to liability of wife for family expenses, see Dodd v. St. John (Or.) 15 L. R. A. 717, and *note*.

Statement by **Ladd, J.**

The petition alleges that the defendants are husband and wife, a family of large fortune, high social rank, and luxurious habits; that O. E. McNair purchased an article of jewelry for his personal use and adornment, and used the same for such purpose; that he afterwards executed a note therefor, no part of which has been paid. It was admitted that the article referred to is a diamond shirt stud. Anna L. McNair demurred on the ground that such stud is not an expense for the payment of which she is liable. The plaintiff elected to stand on the ruling by which the demurrer was sustained, and appeals from the judgment dismissing the petition.

Messrs. **Work & Lewis,** for appellant:

Jewelry is a family expense chargeable to both husband and wife.

Marquardt v. *Faugher*, 60 Iowa, 148.

This court has held in *Smedley* v. *Felt*, 41 Iowa, 584, that a piano and spread which cost $389.80 was a family expense.

In *Frost* v. *Parker*, 65 Iowa, 178, this court holds that an organ is a family expense.

In *Schrader* v. *Hoover*, 80 Iowa, 243, a case for medical services for the wife ordered by the husband, the court made the right to recover to depend upon whether the "wife's condition was such that it was necessary and proper for her to have such attendance and service." This court holds that, thus limited, the instruction was erroneous and says: "The only question under the statute is, Was the claim of plaintiff a family expense? That it was a family expense seems to be conceded by the instruction, and there can be no doubt that thus far the instruction is correct.

Mr. **W. S. Coen** for appellee.

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

Is a diamond shirt stud, worn by the husband for personal use and adornment, an expense of the family, for which the wife may be liable? Section 2214 of the Code of 1873 provides that "the expense of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." At common law the husband was liable for any expense incurred in the clothing and maintenance of the wife and children, suitable to his situation in life. The term "necessaries" was not confined to food and clothing, but was construed to include articles of utility and ornament ordinarily enjoyed by families of persons of estate and station similar to that of the husband. The wife, however, was not chargeable for necessaries, and there was no remedy for articles purchased by her and used in the family, when not included in that term. The statute obviates determining the vexatious question of what are necessaries, and affords an inadequate remedy against both husband and wife. *Smedley* v. *Felt*, 41 Iowa, 588; *Schrader* v. *Hoover*, 80 Iowa, 243; *Blachley* v. *Laba*, 63 Iowa, 22, 50 Am. Rep. 724; *Derendorf* v. *Emerson*, 66 Iowa, 698. The expense, however, is limited to that of the family, and must have been incurred for something used therein or kept for use or beneficial thereto, and may include articles which enhance domestic comfort and increase social enjoyment. *Fitzgerald* v. *McCarthy*, 55 Iowa, 702; *Smedley* v. *Felt*, 41 Iowa, 588. In the latter case a piano was adjudged a family expense. "Family" is defined as a collective body of persons who live in one home under one head or manager. *Menefee* v. *Chesley*, 98 Iowa, 55, and authorities cited. That husband and wife, when living together, as they are presumed to do, are both members of the family, and included in this definition, will not be questioned. Necessaries for which the husband was liable will certainly now be conceded to be a part of the family expense. Clothing seems to have been treated as such. *Finn* v. *Rose*, 12 Iowa, 565; *Derendorf* v. *Emerson*, 66 Iowa, 698; *Smedley* v. *Felt*, 41 Iowa, 588. It is said that this is beneficial to each member only, and not to the entire household. The clothing of every member is a source of comfort and enjoyment to all. It is as essential as the food placed on the table. Indeed, the services of a physican to one member of the family have been deemed a family expense; and so a watch and chain used by the wife and daughter only. *Schrader* v. *Hoover*, 80 Iowa, 243; *Marquardt* v. *Flaugher*, 60 Iowa, 148. Wearing apparel is not confined in its meaning to clothing, but includes the idea of ornamentation as well. A watch and chain have been adjudged such. *Brown* v. *Edmonds*, 8 S. D. 271; *Stewart* v. *McClung*, 12 Or. 431, 53 Am. Rep. 374; *Bumpus* v. *Maynard*, 38 Barb. 626. *Contra*, see *Smith* v. *Rogers*, 16 Ga. 480; *Rothschild* v. *Boelter*, 18 Minn. 361 (Gil. 331); *Gooch* v. *Gooch*, 33 Me. 535; *Sawyer* v. *Sawyer*, 28 Vt. 252. See 29 Am. & Eng. Enc. Law, p. 38. In *Sawyer* v. *Sawyer*, 28 Vt. 252, a breastpin is held to be a part of the wearing apparel of a deceased husband, which, under the Vermont statute, goes to the widow. But the supreme court of New Hampshire adjudged a breastpin not to be "wearing apparel necessary for the debtor and his family." *Towns* v. *Pratt* [33 N. H. 345], 66 Am. Dec. 726. The question of value and necessity is somewhat controlling in some of the cases referred to. By "wearing apparel" is usually meant clothing and garments protecting the person from exposure and not articles of ornament merely. Originally it included, not only the vesture, but all the ornaments and decorations worn with it. That jewelry, when of no purpose other than that of ornament, as a ring, will not be so classified, may be conceded. But if it serves the double purpose of being an article of use, in fastening the garments, or otherwise, and also of adornment to the person there appears no good reason for not adjudging it a part of the wearing apparel; else much that is pleasing in dress must be excluded from the meaning of the word, as generally accepted. The ornamentation of a lady's wardrobe is of little utility, yet it is always included in the term. If an article of jewelry is used with and as a part of the clothing, it may well be deemed a portion of the wearing apparel. It may thus serve as necessary and useful a purpose as the garments themselves. Articles of jewelry were of ten adjudged necessaries for which the husband was liable at common law. *Raynes* v. *Bennett*, 114 Mass. 424; *Porter* v. *Briggs*, 38 Iowa, 166, 18 Am. Rep. 27. These are quite as commonly worn by many people as the clothing that covers them. The make of a shirt or the taste of the wearer may be such as to require some kind of a button or stud. If the inexpensive pearl were used, no one would question the propriety of making it a family charge. But it might be as much out of place in the shirt front of a person of fashion or fortune as a diamond in that of one who earns his bread by the sweat of his face. If the cost, the utility, or the necessity is to be the criterion, then the line must be drawn on many articles of furniture, clothing, and food. What shall be the delicacies of the table, the adornments of the person, and the character of the furnishings, must be left to the better judgment and discretion of each family, which is presumed to, and ordinarily does, act as a unit in such matters. Many families would have no use for terrapin, silks and satins, or Smyrna rugs, or costly jewelry, and in such cases neither husband nor wife

would be liable for indebtedness incurred by the other therefor. But, if these are purchased for and used in the family, it is not perceived on what ground they may not be deemed a family charge. Under our statute, there is no occasion for inquiry as to the cost or necessity. Nor is there better reason to investigate the character or value of a button or stud worn, in determining whether it is a family expense, than that of a costly dress, an artistically trimmed bonnet, or a silk tile. The article may be unnecessary, or such as the family ought to have dispensed with, or of no actual utility; still, if purchased for and used in the family, the liability of the wife cannot be avoided. *Dodd v. St. John*, 22 Or. 250, 15 L. R. A. 717. If the diamond stud was worn by the defendant's husband, as is alleged, for personal use, as well as adornment, it is an expense such as is contemplated by the statute. Nor does such a holding involve necessary hardship. It is said in the petition that the McNairs are a family of large fortune, high social rank, and luxurious habits. If this be true, the jewelry may well be deemed appropriate to their situation in life, and a source of no considerable outlay in maintaining the family according to their station, and in harmony with their associations. The price of a diamond shirt stud will not in all cases be a family expense, but where procured for personal use, and actually used and worn by the husband, it becomes such. The same rule must be applied to the diamond and the pearl, to the rich and the poor.

Reversed.

Robinson, J., dissenting:

I do not agree to what is said in support of the conclusion of the majority.

ILLINOIS SUPREME COURT.

City of CHICAGO, *Plf. in Err.*,
v.
A. Montgomery WARD *et al.*

(169 Ill. 392.)

1. Leaving land unsubdivided upon a plat with an express dedication as public ground not to be occupied by buildings of any description, or marking it as a street and holding it out as open ground, no buildings, to purchasers, is equivalent to a dedication for public use, and creates a restriction against the erection of buildings thereon.

2. The submergence of lands dedicated as a public park with the express condition that no buildings shall be erected thereon, as the result of heavy storms, and the subsequent rec-

NOTE.—*Effect of sudden submergence upon title to land.*

The statement from Hale, De Jure Maris, which is quoted in the opinion, that "if a subject hath land adjoining the sea and the violence of the sea swallow it up, the subject will not lose his property if there are reasonable marks to continue the notice of it, or if its extent can be ascertained."—has been generally recognized as the true rule in cases in which it was applicable.

The statement that "if the sea overflow my land for forty years and afterwards reflow again, I shall have my land and not the King," is also found in 2 Rolle, Abr. 168.

In Mulry v. Norton, 100 N. Y. 424, 53 Am. Rep. 206, it is said that it is undoubtedly true that the title of a landowner may be lost by submergence, but to effect that result the submergence must be followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. But ordinarily lands lost by submergence may be regained by reliction. Affirming Mulry v. Norton, 29 Hun, 660, which in turn affirmed Murphy v. Norton, 61 How. Pr. 197.

Though the surface of a part of an island is destroyed by the force of winds and waves, yet the owner does not lose the propriety of the remaining land covered by the water if it is regained by either natural or artificial means, and if another island is deposited on it the title is in the owner of the land previously thereon. Morris v. Brooke (Del.) 25 Alb. L. J. 90.

The sudden and perceptible loss of land by the action of the water of a river does not deprive the owner of the submerged land over which the water flows of his title. And if an island subsequently forms on the place where the land formerly was situated, it will belong to the former owner. St. Louis v. Rutz, 138 U. S. 226, 34 L. ed. 941; Rutz v. Seeger, 35 Fed. Rep. 188.

In Bates v. Illinois C. R. Co. 66 U. S. 1 Black, 204, 17 L. ed. 158, the court says that it will not decide what are the rights of lake-shore proprietors whose fronts are swept away by the currents, nor to what extent they still own the lands covered by water, except in the case of one who proves that he owned the land before the decretion took place.

Where after a railroad company had appropriated land along a river bank for its use, and a suit to recover the damages had been brought, the land caved into the river, it was held that as to so much of the land as was washed into the river no action could be maintained against the railroad to enforce a claim for its use, or to enjoin its use until compensation was made. Organ v. Memphis & L. R. R. Co. 51 Ark. 235.

If after the survey of swamp lands and before the issuance of a patent therefor to a private citizen, one boundary is cut away by a river so that the bed of the river is changed one quarter of a mile, the title of the patentee will not include the bed of the river, but will go only to high-water mark, and an island formed between the old and new beds will belong to the state. Heckman v. Swett, 99 Cal. 303.

The person who claims the title to the land under the water has the burden of showing that the land caved off suddenly, and also the extent to which the former boundary went. Wallace v. Driver, 61 Ark. 429, 31 L. R. A. 317.

In Missouri there appears to have been some departure from the rule as above stated. This appears to have been caused by the adoption of the rule applicable in case of boundaries as shown by the authorities cited in the next subdivision.

In Cooley v. Golden, 117 Mo. 33, 21 L. R. A. 300, it is said that the ownership of land in Missouri is subject to such changes as may be wrought by the natural action of the waters of navigable rivers upon it. So that if a river leaves its bed and makes a new one on the land of a private person, the bed immediately becomes subject to public use.

See also 48 L. R. A. 54.

lamation by the city of such land, do not destroy the restrictions.

3. The vested right of owners abutting upon a public park, dedicated with the restriction that no buildings shall be erected upon it, fixed by the acts of dedication, the acceptance of the city, and the acquiescence of the public and abutting owners, cannot be changed by the legislature granting the city the right to convey such land for railroad purposes, as such action would be an unconstitutional impairment of such rights.

4. A restriction against the erection of buildings upon land dedicated as a park is not removed by the change of the use of the buildings abutting thereon from residence to business purposes.

5. A city acting as trustee of a public park bounded upon a lake by filling in submerged land adjacent thereto as a part of the park is estopped from claiming title to the same free from the park trust, and from restrictions thereof against the erection of buildings upon the park.

6. The owners of lots abutting on ground dedicated for a public park with restrictions against the erection of buildings thereon have a right to maintain a suit to enjoin the erection of buildings.

7. Consent of owners abutting upon a park dedicated under restrictions against the erection of buildings to the erection of one or more buildings upon such park will not estop them from bringing suit to enjoin the erection of other buildings.

(November 8, 1897).

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1 In Naylor v. Cox, 114 Mo. 232, it is said that if a portion of a fractional section of land was washed away by a river, and the main channel of the river covered the place where it originally stood for any considerable length of time, and accretions afterwards grew from an island in the river until the land came within the former lines of the fractional section, the owner of the section would have no title to the accretions.

In Cox v. Arnold, 129 Mo. 337, it is said that when a riparian owner acquires his land, he acquires, as incident thereto, whatever may be added to it by gradual and imperceptible accretion, while at the same time he assumes the risk of losing it all by its being gradually washed away by the waters of the river, but his line always remains at the water's edge. The only way that plaintiff could have regained what land he lost by its being washed away and its situs submerged by the waters of the river was by gradual and imperceptible accretion beginning at his line at the water's edge. So that if a section of his land is washed away, and an island subsequently forms within what were formerly his boundary lines, he has no title to it.

But in another case it is said that if land after being washed away reforms gradually the owner of the upland may have title to the new formation by right of accretion. These were the facts in Minton v. Steele, 125 Mo. 181, and the court says whether the claim to the new land should properly rest upon the force of the original title, or be referred to the general law of accretion, we are not required to investigate.

Change of boundary.

In the above cases the question has been considered as between subject and sovereign, and the rule is that the sovereign gains no right to the subject's land by its being suddenly submerged by the waters if the former boundaries of the land can be ascertained. But where the question is as to a watercourse forming a boundary between states or private persons a somewhat different rule has been established for the sake of convenience.

In the case of the Arcifinious Boundaries, 8 Ops. Atty. Gen. 175, it is said that in case of a river, the middle thread of which forms the boundary between two nations, the convenience of allowing it to retain its previous function, notwithstanding insensible changes in its channel by accretion or erosion, outweighs the inconvenience even to the injured party involved in a detriment, which happens gradually and inappreciably in the successive moments of its progression.

So, in Nebraska v. Iowa, 143 U. S. 369, 36 L. ed. 190, the court says that by reason of the character of the soil through which the Missouri river runs, and the swiftness of the river at times of high water, the washing causes an instantaneous fall of quite the length and breadth of the superstratum of soil into the river, so that it may in one sense of the term be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible. And the court says that while the disappearance, by reason of this process, of a mass of bank may be sudden and obvious, there is no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible creation of a bank on that shore. The only thing which distinguishes this river from other streams in the matter of accretion is in the rapidity of the change created by the velocity of the current; and this in the very nature of things works no change in the principle underlying the rule of law in respect thereto. The law of accretion continues, and that even in case of the boundary line of states.

And the principle of that case was followed in Bouvier v. Stricklett, 40 Neb. 792.

In Willey v. Lewis, 28 Ohio L. J. 104, it is said that if a running stream changes its channel by a gradual and progressive washing away of one of its banks the boundary follows the thread of the stream, although the change is caused by instantaneous and obvious dropping into the stream of quite large portions of the bank when such portions are not carried away in compact masses, but disintegrate and are borne away in small particles.

It will be seen from the reasoning in those cases that the question of the stream as a boundary between opposite owners, and not the question of the loss of the subject's land to the sovereign by sudden submergence, was involved. The two classes of cases are governed by distinct but well-defined rules, the only doubt being whether or not the rule in reference to gradual change applies in case the change is perceptible and covers considerable distance at one time; yet in the Missouri cases above cited, this rule, and not the correct one, appears to have been applied in cases between subject and sovereign.

The rule as to gradual change does not apply in case the river leaves its former channel and cuts a new one. That class of cases is not within the scope of this note, although attention is called to the fact that in *Re* Hull & S. R. Co. 5 Mees. & W. 327, Lord Abinger states that in case a river suddenly leaves its course and is transferred to another person's land the owner of the bed of the river does not lose his title to the soil.

So, if a river suddenly moves sideways so as to leave a strip of the bank which had been on one side, upon the other side of it, the title will not be changed, but the former owner will still have title to such strip. McKay v. Hugran, 24 N. S. 514.

So the ownership of land will not be changed by the sudden change of the course of a stream so as to leave a portion of the land of one riparian owner upon the other side of the channel. Sweatman v. Holbrook, 18 Ky. L. Rep. 870, and 872. H. P. F.

ERROR to the Superior Court for Cook County to review a decree enjoining defendant from erecting certain buildings on Lake Park. *Affirmed.*

The facts are stated in the opinion.

Mr. **Jesse B. Barton,** for plaintiff in error:

The fee of all lands covered at ordinary stages of water in lakes, and at hightide in tide waters, is in the state.

Seaman v. *Smith*, 24 Ill. 521; *Trustees of Schools* v. *Schroll*, 120 Ill. 509, 60 Am. Rep. 575; *Fuller* v. *Shedd*, 161 Ill. 462, 33 L. R. A. 146; *People, Moloney,* v. *Kirk*, 162 Ill. 138; *Illinois R. Co.* v. *Illinois*, 146 U. S. 387, 36 L. ed. 1018; *Ruge* v. *Apalachicola Oyster Canning & Fish Co.* 25 Fla. 656; *American Dock & Improv. Co.* v. *Public Schools*, 39 N. J. Eq. 409; *Stevens* v. *Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; *Hoboken* v. *Pennsylvania R. Co.* 16 Fed. Rep. 816, 124 U. S. 688, 31 L. ed. 551; *Bowlby* v. *Shively*, 22 Or. 410; *Shively* v. *Bowlby*, 152 U. S. 9, 38 L. ed. 335; *Weber* v. *State Harbor Comrs.* 85 U. S. 18 Wall. 57, 21 L. ed. 798; *Coburn* v. *Ames*, 52 Cal. 385, 28 Am. Rep. 634; *Eisenbach* v. *Hatfield*, 2 Wash. 236, 12 L. R. A. 632; *Austin* v. *Rutland R. Co.* 45 Vt. 242; *Diedrich* v. *Northwestern U. R. Co.* 42 Wis. 248, 24 Am. Rep. 399; *Mutual L. Ins. Co.* v. *Voorhis*, 71 Hun, 117.

The city is not estopped by its own acts or those of the state from using these lands otherwise than as a park.

Chicago v. *Union Bldg. Asso.* 102 Ill. 379, 40 Am. Rep. 598; *Warren County Supers.* v. *Patterson*, 56 Ill. 111.

The acts of 1861 and 1863 were repealed by the act of 1869 by necessary implication.

Union Trust Co. v. *Trumbull*, 137 Ill. 146; *Springfield Water Comrs.* v. *People, Springfield*, 137 Ill. 660; *Pavey* v. *Utter*, 132 Ill. 489.

A bill in equity will not lie to enjoin the vacation of a street or park by a city.

Parker v. *Catholic Bishop of Chicago*, 146 Ill. 158; *Chicago* v. *Union Bldg. Asso.* 102 Ill. 379, 40 Am. Rep. 598.

The legislature can authorize a city to sell property dedicated to public use.

Hebert v. *Lavalle*, 27 Ill. 448; *Chicago, R. I. & P. R. Co.* v. *Joliet*, 79 Ill. 26; *Van Ness* v. *Washington*, 29 U. S. 4 Pet. 232, 7 L. ed. 842.

Verbal statements of individual canal commissioners made to induce purchasers to buy are of no binding force.

Lennig v. *Ocean City Asso.* 41 N. J. Eq. 24.

Where restrictions on the sale of real estate have been imposed to effect a particular purpose, and the character of the property has so changed that that particular purpose cannot be effected, even with the restrictions, a violation of the restrictions will not be enjoined, and one complaining will be remitted to his remedy at law, if any he has.

Jackson v. *Stevenson*, 156 Mass. 496; *Columbia College* v. *Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Amerman* v. *Deane*, 132 N. Y. 355.

A bill to enjoin a breach of a negative covenant is in the nature of a bill for specific performance.

High. Inj. 2d ed. § 1134.

Under a bill for specific performance, a court will deny relief where it would be inequitable to grant it.

Willard v. *Tayloe*, 75 U. S. 8 Wall. 557, 19 L. ed. 501.

Covenants in restraint of the use of real estate will be strictly construed, and will not be enlarged by construction; and the courts will not enjoin the breach of a negative covenant unless it is express and injury will result to the complainant from its breach.

Postal Teleg. Cable Co. v. *Western U. Teleg. Co.* 155 Ill. 335; *Hawes* v. *Favor*, 161 Ill. 440.

The defendants in error have no standing in a court of equity to obtain the relief sought by their bill and amended bill.

The acts of 1861 and 1863 giving owners of property abutting on Michigan avenue a right to enjoin encroachments on the Lake Front park were unconstitutional.

People, Longenecker, v. *Nelson*, 133 Ill. 578; *People, Graff,* v. *Institution of Protestant Deaconesses*, 71 Ill. 229; *Snell* v. *Chicago*, 133 Ill. 413, 8 L. R. A. 858; *Dolese* v. *Pierce*, 124 Ill. 140.

The acts of 1861 and 1863 were abrogated by the Constitution of 1870.

Mitchell v. *People*, 70 Ill. 138

They were repealed by the present city charter, chap. 24, Rev. Stat.

Cairo v. *Bross*, 9 Ill. App. 406, 111 Ill. 475.

The city took the lands in Fort Dearborn addition in fee.

United States v. *Illinois C. R. Co.* 154 U. S. 225, 38 L. ed. 971.

Defendants in error have no interest in the lands in fractional section 15, except as citizens and taxpayers, and as such have no standing in court.

Kerfoot v. *People, Clingman*, 51 Ill. App. 409.

Equity will not do that which will be of no benefit to the party asking it, and only hardship on the party concerned.

Joliet & C. R. Co. v. *Healy*, 94 Ill. 416; *Green* v. *Green*, 34 Ill. 327.

A writ of injunction will not issue to gratify the spite or malice of a complainant, nor to be used at his discretion.

Seeger v. *Mueller*, 28 Ill. App. 31; *McCormick* v. *Jerome*, 3 Blatchf. 486.

A court of equity will not aid one who has long acquiesced in the wrong complained of.

Roper v. *Williams*, Turn. & R. 18; *Peck* v. *Matthews*, L. R. 3 Eq. 515.

Mr. **George P. Merrick,** for defendants in error:

Defendants in error, by virtue of their ownership of property abutting on a public square or park, may maintain a bill against the municipality to enjoin the destruction or curtailment of an easement thereover.

High, Inj. §§ 824, 855; *Newell* v. *Sass*, 142 Ill. 104; *Cibak* v. *Klekr*, 107 Ill. 643; *Earll* v. *Chicago*, 136 Ill. 277; *United States* v. *Illinois C. R. Co.* 154 U. S. 225, 38 L. ed. 971.

The dedication by the owners and acceptance by the city of Chicago, of the Lake park property, constituted the city a trustee of said property, and impressed said property with a trust in favor of the public, and of abutting lot-owners.

Zearing v. *Raber*, 74 Ill. 412; *Maywood Co.* v. *Maywood*, 118 Ill. 61; *Earll* v. *Chicago*, 136 Ill. 279; *Field* v. *Barling*, 149 Ill. 572, 24 L. R. A. 406.

The erection by the city of Chicago of any buildings upon the Lake Front park is repugnant to the words of dedication and to the use of the property in question for the purpose for which it was dedicated.

Godfrey v. *Alton*, 12 Ill. 35, 52 Am. Dec. 476; *Princeville* v. *Auten*, 77 Ill. 325; *Davis* v. *Nichols*, 39 Ill. App. 610; *Jacksonville* v. *Jacksonville R. Co.* 67 Ill. 544; *Church* v. *Portland*, 18 Or. 73, 6 L. R. A. 259; *Warren* v. *Lyons City*, 22 Iowa, 357; *Franklin County Comrs.* v. *Lathrop*, 9 Kan. 453; *Leclercq* v. *Gallipolis*, 7 Ohio, pt. 1, p. 218, 28 Am. Dec. 641.

Accretions to a strip of land in a city along a shore, which is reserved for public purposes, partake of the same nature as the original reservations, and the city holds title to it, subject to the same uses and conditions.

1 Am. & Eng. Enc. Law, p. 138; *Godfrey* v. *Alton*, 12 Ill. 29, 52 Am. Dec. 476; *Brooklyn* v. *Smith*, 104 Ill. 429, 44 Am. Rep. 90.

The dedication of the plats and acceptance of them make the dedication complete, and constitute an estoppel *in pais* if not by deed, to revoke the dedication.

First Evangelical Church Trustees v. *Walsh*, 57 Ill. 363, 369, 11 Am. Rep. 21, and cases cited.

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

This was a bill for an injunction, filed in the superior court of Cook county, October 16, 1890, by A. Montgomery Ward and George R. Thorne, to enjoin the city of Chicago from erecting any buildings on what is known as "Lake Park," or "Lake Front Park." The bill alleges that they are the owners of the south 43 feet of lot 3, and all of lots 4 and 5, in block 15 in Ft. Dearborn addition to the city of Chicago, known as "Nos. 111–116 Michigan Avenue;" that valuable buildings are erected on said lots and occupied by them in their business of importers, manufacturers, and jobbers of general merchandise; that when said addition was platted an open space was reserved for public grounds east of Michigan avenue, and between Randolph and Madison streets, fronting on Lake Michigan, subject to the prohibition that the grounds should be kept free from buildings; that the lots owned by them are worth more on account of such vacant grounds than they would be otherwise; that they have an easement in such grounds; that it was the duty of the city to prevent encroachments on such grounds, but that it has permitted the erection of certain structures thereon, contrary to the vested rights of complainants, etc. And it prays for an injunction restraining the city from violating the terms of the dedication, and against the erection of buildings, etc., thereon. The Illinois Central Railroad Company and a number of other parties were made defendants. A temporary injunction was granted, and the city answered the bill, denying that it had committed the acts complained of, or intended to erect any structures. On May 6, 1893, the bill was amended. The amended bill alleges that that part of Lake Park south of Madison street has been for many years public grounds and park property, and the lots in Ft. Dearborn addition were sold with the understanding that all of Lake Park should be and remain clear of all buildings; that the city had suffered the Illinois Central Railroad Company and others to occupy portions of the park, and had suffered circuses, shows, etc., upon said premises; that it is using it as a dumping ground for garbage, rubbish, etc., and has constructed a scaffold and floor for that purpose, the filth and rubbish to be carried away by the railroad company, causing a great public nuisance; that the American Express Company has built a shed thereon; that there are seven or more railroad tracks upon it, upon which cars are permitted to stand; that the city has issued a permit to the Forepaugh shows to occupy part of the same. And it prays for a temporary injunction, and for a mandatory injunction, to remove all buildings, sheds, cars, tracks, and material of every kind from the park. The city answered the amended bill, denying the alleged restrictions on the use of the park; alleging that the character of the buildings in Ft. Dearborn addition, and purposes for which they were used, has been entirely changed, for more than twenty-five years, from residence to business purposes, and that the use for which the public grounds were conveyed has long since ceased to attach thereto; denying that the property of complainants is enhanced in value by reason of its situation relatively to the park, and that the owners have any easement of light, air, or view over the same; denying that the grounds were dedicated for any specific public purpose; and alleging ownership by the city in fee simple absolute. On June 8, 1896, complainants again amended their bill, with the stipulation that the answer of the city should stand as the answer to such secondly amended bill. This amendment sets out the history of the platting and dedication of the two additions to the city of Chicago, of which Lake Park is a part, at length, and alleges that the city accepted the dedication by a resolution of April 29, 1844, which resolution ordered what is now called "Lake Park" to be inclosed as a public park, at the expense of the subscribers of such inclosure; that the city council, by ordinance of August 10, 1847, designated the public ground so fenced in as "Lake Park;" that the abutting property owners on Michigan avenue had, prior thereto, erected a fence at their own expense, around said park, and ornamented the same, etc. It recites § 64 of the act of February 18, 1861, in reference to the charter of the city of Chicago, and refers to the act of 1863 on the same subject, and alleges that the construction of buildings on Lake park, and its occupancy by railroad tracks, or for other private purposes, and the licensing of the same for circus purposes, etc., and the employment of the same as a dumping ground for filth, etc., will constitute a public nuisance and will divert the park from the purposes for which it was dedicated, and will constitute a private nuisance, and inflict irreparable damages on the property of complainants, special to the same, and distinct from that suffered by the public at large. The final decree that was entered by the court recites that all the material allegations in the various bills and amendments are true. It decrees that the injunction of May 25, 1890, be made perpetual; that the Illinois

Central Railroad Company and the city and its officers desist and refrain from occupying any buildings or structures, except such as described in the ordinance of October 21, 1895, upon the tract of land known as "Lake Park;" that they refrain from placing or causing to be placed thereon anything, except for park purposes, and from using, or permitting the use of, any portion thereof for railroad tracks, or such circuses or exhibitions to which the public will not be admitted free; that nothing in the decree shall be held to impair or diminish the rights, etc., of the Illinois Central Railroad Company under the ordinance of October 21, 1895; that the Art Institute, and all necessary improvements thereon, so long as it shall be used in accordance with the terms of the ordinance authorizing its construction, shall be excluded from the operation of the decree, and likewise the temporary postoffice building, until a new, permanent postoffice shall be completed and occupied, and also, for a period of three months, the armory buildings. To reverse this decree, the city of Chicago alone has sued out a writ of error from this court.

The evidence showed that the abutting property owners expended considerable sums of money, from time to time, as also did the city of Chicago, in protecting said park from the ravages of Lake Michigan, and in fencing and beautifying the grounds. It was declared by the government plat of the Ft. Dearborn addition that "the public ground between Randolph and Madison streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description." By a resolution adopted April 29, 1844, the city declared that all that part of Michigan avenue lying east of a line 90 feet east of the east line of the tier of lots in § 15, fronting said avenue on the west, shall be inclosed as a public park: and the same resolution declared, in substance, that the public ground in the Ft. Dearborn addition should be inclosed as a public park, at the expense of subscribers to such inclosure. And in 1847, by an ordinance of the city, it was ordained: "The public ground east of the fence erected on the east side of Michigan avenue from the north side of Randolph street to the south side of lot 8 in block 21, fractional section 15, addition to Chicago [which was coincident with the south line of Park row], shall hereafter be known and designated as Lake Park." The city council passed another ordinance to the same effect, August 25, 1851, which declared that the public ground on the east of Michigan avenue from the north line of Randolph street to the south line of Park row should be designated as "Lake Park." Another ordinance to the same effect was passed by the city council in 1856; and in the ordinance granting a right of way to the Illinois Central Railroad Company passed June 14, 1852, it was provided that said company should not, in any manner or for any purpose, occupy or intrude upon the open ground known as "Lake Park," belonging to the city of Chicago, lying between Michigan avenue and the western or inner line before mentioned, which was a line not less than 400 feet east of the west line of Michigan avenue, and parallel thereto. And similar inhibitions were imposed in subsequent ordinances. The existence of this park was recognized by legislation of that state, by the acts passed in 1861 and 1863, in which the act incorporating the city of Chicago and the several amendments thereto were reduced to a single act, and in which, in § 64, were the following provisions: "No encroachments shall be made upon the land or water west of the line mentioned in the 2d section of an ordinance concerning the Illinois Central Railroad (which line is not less than 400 feet east from the west side of Michigan avenue, and parallel thereto) by any railroad company, nor shall any cars, locomotives, engines, machines, or other things belonging to any railroad or transportation company be permitted to occupy the same, nor shall any cars or machinery be left standing upon said track fronting any part of Michigan avenue, nor shall the city council ever allow any encroachments west of the line above described. Any person being the owner of or being interested in any lot, or part of a lot, fronting on Michigan avenue, shall have the right to enjoin said company, and all other persons and corporations, from any violation of the provisions of this section, or of said ordinance, and by bill or petition in chancery, in his or their own name or otherwise, enforce the provisions of said ordinance and of this section, and recover such damages for any such encroachment or violation as the court shall deem just. The state of Illinois, by its canal commissioners, having declared that the public grounds east of said lots should forever remain open and vacant, neither the common council of the city of Chicago, nor any other authority, shall ever have the power to permit encroachments thereon, without the assent of all the persons owning lots or land on said street or avenue."

The main question involved in this litigation is, Has the city of Chicago a right to erect, or permit to be erected, any buildings on the track of land known as "Lake Park?" Lake park is a tract of land extending from Randolph street, on the north, to Park row, on the south, and from the west line of Michigan avenue, on the west, a distance of 400 feet, to the west line of the right of way of the Illinois Central Railroad Company. Leaving out Michigan avenue, which has a width of 90 feet, the park would be 310 feet wide, and over a mile long. In order properly to determine this question, it will be necessary to advert to the history of Lake Park. In 1836 the commissioners of the Illinois & Michigan Canal, under the authority conferred upon them by the general assembly of the state, caused fractional section 15, lying along the shore of Lake Michigan, and adjoining or cornering with the original town of Chicago, to be subdivided into lots, blocks, and streets; and a plat thereof was made, acknowledged, and recorded on July 20, 1836. This subdivision consists of two tiers of blocks, of 11 blocks each, bounded on the west by State street, on the north by the center line of Madison street, and on the south by the center line of twelfth street. The lots in the east half of the eastern tier of blocks all fronted to the east, and there was an open space between such east line and the lake, excepting at the southwest corner, in which block 23 was laid off, beginning 120 feet east of the

east line of the eastern tier of blocks, and running thence east 500 feet, of a uniform depth, towards the north, of 200 feet, leaving a small space, the width of which was not marked on the map,—about 80 feet,—between the easternmost lot of block 23 and the lake. The street north of this block 23 is now known as "Park Row." The distance from the eastern tier of blocks to the lake shore was therefore about 700 feet at Park row. The distance at the north line of the section from the lake shore to the east line of the eastern tier of blocks was not marked on the plat, but appears to have been about 500 feet. All the space north of block 23 and east of the eastern tier of blocks to the lake was left unsubdivided and vacant, except that the words "Michigan Avenue" appear on the same, next to the line of subdivided blocks. J. Y. Scammon testified that he measured the width of the ground east of Michigan avenue in 1836, when the canal commissioners made their subdivisions, and it was then about 700 feet wide at the south end, and between 500 and 600 feet at the north end, and that the ground was a little wider at some places then others. Fernando Jones testified that he was employed in the office of the canal commissioners in 1836; that it was stated by and on behalf of the commissioners, to all persons purchasing lots in the subdivision, as an inducement to such purchases, that there would be no buildings to obstruct the view of the lake, and that the commissioners used a sketch to sell from, and to point out the position of lots to purchasers, and on the sketch was marked: "Open ground. No building;" that the land fronting on Michigan avenue, as well as that fronting on Wabash avenue, the next street west, sold at a higher price on account of the eastern exposure of the lake. The land north of section 15, running to the Chicago river, being the southwest fractional quarter of section 10, was used by the United States as the military post of Ft. Dearborn, as early as 1804. Under authority from the secretary of war, this fractional quarter was subdivided into blocks, lots, streets, and public grounds, and called "Ft. Dearborn Addition," and a plat of the addition was acknowledged and recorded on June 7, 1839. Michigan avenue was continued north in this plat almost up to the river, but its width is not marked on the plat. The ground between Michigan avenue and the lake was also laid off into blocks and lots from the river down to Randolph street, but from the north line of that street to the south line of the section (being the center of Madison street) the space between the west line of Michigan avenue and the lake was left vacant and unsubdivided, as was also the east half of the block just south of Randolph street, between Wabash avenue on the west, and Michigan avenue on the east; and on this blank space on the plat was written: "Public ground. Forever to remain vacant of buildings." The certificate of the Secretary of War, written on the margin of the plat, contains these words: "The public ground between Randolph and Madison streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description." The plat shows that the southernmost lot of block 11, which lies between Michigan avenue and the lake, and on the north side of Randolph street, and is thus the northern boundary of the unsubdivided space, had a frontage of 73 feet on Randolph street. There are no figures at the south line of the addition to indicate the distance between the west line of Michigan avenue and the lake, but measuring on the plat according to its scale, it was 200 feet. Michigan avenue is 90 feet wide.

It will thus be seen that the land lying east of the west line of Michigan avenue, from Randolph street on the north, to Park row on the south, was by its original owners left unsubdivided; that that portion in fractional section 10 was expressly dedicated as "public ground," "not to be occupied with buildings of any description," and that that portion in fractional section 15 was marked near one edge "Michigan Avenue," and was held out to purchasers as: "Open ground. No buildings." That this was equivalent to a dedication for such use and purpose has been repeatedly announced by this court. *Godfrey* v. *Alton*, 12 Ill. 29, 52 Am. Dec. 476; *Marcy* v. *Taylor*, 19 Ill. 634; *Smith* v. *Flora*, 64 Ill. 93; *Maywood Co.* v. *Maywood*, 118 Ill. 61. And, where nothing appears to indicate for what particular use a grant or donation of land is made to the public, parol evidence is admissible to show the object to which it was to be devoted. *Princeville* v. *Auten*, 77 Ill. 325. That the city of Chicago accepted the ground thus dedicated is undisputed. The statute provides that such dedicated lands shall be held in trust to and for the uses and purposes expressed or intended; and even in a common-law dedication, which leaves the fee on the original owner, it is charged with the same rights and interests in the public which it would have if the fee were in the municipality. *Chicago, R. I. & P. R. Co.* v. *Joliet*, 79 Ill. 25. That the land was so dedicated and accepted subject to the restrictions imposed, of being forever unoccupied by buildings, and that this restriction extended to and included all the land between the west line of Michigan avenue and the shore of the lake, as it was when these lands were platted, we entertain no doubt. But it is contended by plaintiff in error that only such land as existed between Michigan avenue and the shore of the lake as it was in 1852, when the encroachments of the lake on the land were stopped by the building of breakwaters, etc., was subject to such restrictions; that, the remainder having been carried away by the waters of Lake Michigan, the boundaries of the public land were restricted to the shore of the lake; and that all the made or reclaimed land between the shore line of 1852 and the west line of the Illinois Central Railroad Company's right of way is free from such restrictions. A consideration of this question will necessitate a further retrospect into the history of Lake park.

Referring again to the testimony of J. Y. Scammon, we find that the building of the piers of the Chicago river by the government eastward into Lake Michigan had the effect of throwing a strong current of water against the shore of section 10, and that when the piers were still further extended the current was thrown further south, against the shore of section 15; that this current would gradually undermine the bank, and then a storm would

come, and the bank would fall, sometimes 5, 10, and 30 feet in width at a time; that sometimes there would be washed away 100 feet in a single storm, and then the wind would change, and there would be a deposit of sand again; that in 1835 there were 200 or 300 feet between Michigan avenue and the shore of Randolph street, but two thirds had been washed away before the platting of Ft. Dearborn addition in 1839. Fernando Jones testified that prior to 1839 the waves cut away mostly between Randolph and Madison streets, and what was cut away there was deposited more or less south of Madison street, but after 1839 the big storms that came would wash away the banks as far down as Park row; that the "shore went off in chunks" during the storms; that sometimes after a storm there would be some accretions. The testimony of R. B. Mason shows that in 1852 the shore of Lake Michigan was distant from the west line of Michigan avenue at Park row a little over 400 feet, and thence the trend of the shore was to the west, till it was only 90 feet at Monroe street, which is the street next south after Madison; that it was the same width at Madison street, and gradually receding again to the east, it was 112½ feet at Washington street, the next street north, and the same width at Randolph street, the next street north, Michigan avenue being 90 feet wide. It will thus be seen that from the north line, at Randolph street, with a width of 22½ feet, the park extended down to about Madison street, a distance of two blocks, where the waters of Lake Michigan lapped the east side of Michigan avenue, and then the park recommenced at about Monroe street, and gradually widened out to 310 feet at Park row. In 1852 the Illinois Central Railroad Company, by an ordinance of the city of Chicago, was granted the right of way, of the width of 300 feet, from the southern boundary of the public ground near Twelfth street to the northern line of Randolph street; the inner or west line of the ground to be used by the company to be not less than 400 feet east from the west line of Michigan avenue. It was also required by the ordinance to erect, and forever after to maintain, a continuous wall or structure of stone masonry, of regular and sightly appearance, and not to exceed in height the general level of Michigan avenue opposite thereto, from the north side of Randolph street to the southern boundary of Lake park, at a distance of not more than 300 feet east from the above-mentioned west or inner line, which structure was to be of sufficient strength and magnitude to protect the entire front from further damage or injury from the action of the waters of Lake Michigan. It was further provided that the company should not in any manner, nor for any purpose whatever, occupy, use, or intrude upon the open ground known as "Lake Park," belonging to the city, and that it should erect no buildings between the north line of Randolph street and the south line of Lake park, nor place upon any part of their works between these points any obstructions to the view of the lake from the shore, and that it should make and keep open through its works such culverts or ways as would afford room for the uninterrupted flow of water from the open lake to the space inside of the inner or west line above mentioned. In pursuance of the rights thereby granted, the railroad company placed piling in the waters of the lake from Twelfth street northward, and built its tracks thereon, and built a breakwater east of its roadway. The water space between the shore and the right of way was gradually filled up by the citizens, although at the time of the great fire of 1871 there was still a basin there, used for rowboats and sailboats. After the fire the counsel passed an ordinance permitting the dumping of *débris* resulting from the fire into this space, and the railroad having filled it under its tracks, soon there was no more water left west of the east line of its right of way. That the city made ineffectual efforts to stay the destroying power of the waters of Lake Michigan prior to the building of the railroad breakwater is not disputed. As we have seen before, the width of the open space at Park row in 1836, when it was dedicated, was about 700 feet, and at Madison street about 500 feet. The width of Lake park, including Michigan avenue, is 400 feet. There was therefore in 1836 more than enough ground lying along the lake shore between these points for this park. From Madison street to the north line of the park, when this space was dedicated, in 1839 (three years later), there was an open space between the shore and the east line of blocks of only 200 feet at Madison street, narrowing down to 163 feet at Randolph street, thus lacking from 237 feet to 200 feet of being 400 feet wide.

Did the city lose its title and right to the portions of this park submerged by the waters of the lake after its dedication, or did its subsequent reclamation restore the city to its rights? Did the temporary submergence of such portions destroy the restrictions imposed by the dedication, so that the reclaimed portion would not be subject to the same? The destruction of the shore line was not gradual and imperceptible, but was sudden, and plainly discernible after every storm, and the city made unavailing efforts to protect the shore from this destruction. In a conveyance calling for a lake as a line, the line at which the water usually stands when free from disturbing causes is the boundary of the land. *Seaman* v. *Smith*, 24 Ill. 521; *Trustees of Schools* v. *Schroll*, 120 Ill. 509, 60 Am. Rep. 575; *Fuller* v. *Shield*, 161 Ill. 462, 33 L. R. A. 146; *People* v. *Kirk*, 162 Ill. 138. In Harg. Law Tracts (Sir Matthew Hale, De Jure Maris) 36, 37, it is said: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet, if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject does not lose his property; and accordingly it was held by Cooke and Foster, though the inundation continued forty years. . . . But, if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make it out where and what it was; for he cannot lose his propriety of the soil, though it be for a time become part of the sea, and within the admiral jurisdiction while it so continues." In *Morris* v. *Brooke*, an unreported case arising in 1815 in Delaware

[25 Alb. L. J. 91], quoted in *Mulry* v. *Norton*, 100 N. Y. 426, 53 Am. Rep. 206, Judge Wilson said: "Though the surface of the lower part of that island [Little Tinicum] was destroyed by the force of the winds and waves, and it was consequently overflowed by the water of the river, yet the owner did not lose the propriety of the remaining soil covered by the water; if it was regained either by natural or artificial means, it continued to belong to the original proprietor. He might embank it and thereby again exclude the waters if circumstances permitted." And in *Mulry* v. *Norton*, 100 N. Y. 426, 53 Am. Rep. 206, it is said: "When portions of the main land have been gradually encroached upon by the ocean so that navigable channels have been extended thereover, the people, by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners. . . . Neither does the lapse of time during which the submergence continues bar the right of such owner to enter upon the land reclaimed, and assert his proprietorship." Angell, Tide Waters, 77–80. "Where considerable quantities of soil are, by a sudden action of the water, taken from the land of one, this is called 'avulsion;' but the ownership is not lost, though the surface earth is thus transported elsewhere, and it may be reclaimed, and the ownership reasserted." Angell, Watercourses, § 60; 3 Washb. Real Prop. 453; *Gale* v. *Kinzie*, 80 Ill. 132.

Under the authorities, and according to all reasonable deductions from legal principles, we must hold that the title to these lands submerged by the action of Lake Michigan was not lost, and that by their subsequent reclamation the city has completely reasserted its title thereto, as such title stood at the time of the dedication of the respective plats thereof. The trust impressed upon them was that they should forever remain free from buildings, and it cannot be said that while they were submerged they were subject to be built upon. We do not see that the submergence and subsequent reclamation altered or destroyed the trust upon and for which they were held. As the city had, as we have seen, the fee in this park, impressed with the trust declared by the dedicators, the legislation of 1861 and 1863 added nothing to its trust, and can only be looked upon as confirmatory of the same. Section 64 of the act of 1861 identical with § 43 of the act of 1863 (both acts being acts relative to the charter of the city of Chicago), provided that no encroachments should be made upon the land or water west of the railroad right of way by any railroad company, nor allowed thereon by the city council; that any property owner on Michigan avenue should have the right to enjoin any such attempted encroachments, and recover damages therefor; and it recited that "the state of Illinois, by its canal commissioners, having declared that the public grounds east of said lots should forever remain open and vacant, neither the common council of the city of Chicago, nor any other authority, shall ever have the power to permit encroachments thereon, without the assent of all the persons owning lots or land on said street or avenue." No new trust was created by these statutes. They merely ordained as law what was already the law in reference to Lake park. A point is made by counsel for plaintiff in error on the use of the word "encroachment;" it being contended that buildings would not be an encroachment, as that word is defined by Webster. Wood, Nuisance, 2d ed. § 77, says: "A purpresture is any encroachment upon real property, or rights and easements incident thereto, belonging to the public, by an inclosure or erection thereon, which, if made upon the property of an individual, would be a trespass." In 1869 the legislature passed the act known as the "Lake Front Act." By § 1 of this act the general assembly purported to grant to the city of Chicago, in fee, with full power and authority to sell and convey in such manner and upon such terms as the council might by ordinance provide, all right, title, and interest of the state of Illinois in and to so much of fractional § 15 as is situated east of Michigan avenue, and north of Park row, and south of the south line of Monroe street, and west of the railroad right of way (being a strip 400 feet in width, including said avenue, along the shore of Lake Michigan, and partially submerged by the waters of the lake); reserving, however, the 90-foot avenue from the right to sell. By § 4 all right and title of the state of Illinois in and to the lands, submerged, or otherwise lying north of the south line of Monroe street, and south of the south line of Randolph street, and between the east line of Michigan avenue and the railroad right of way, were granted in fee to the Illinois Central Railroad Company, the Chicago, Burlington, & Quincy Railroad Company, and the Michigan Central Railroad Company, for the erection thereon of a passenger depot, and for other railroad business. Section 5 required these railroad companies, in consideration of this grant, to pay the city of Chicago $800,000, to be paid in quarterly instalments. By section 6 the city council was authorized to quitclaim and release to said companies all the city's claim and interest in this tract which it might have by virtue of any expenditures and improvements thereon or otherwise; and, in case it neglected or refused to do so within four months after the passage of the act, then the companies should be discharged from paying the unpaid balance to the city. By §§ 2 and 5, all these moneys arising from the sale of Lake park were to be placed in a park fund of the city of Chicago, to be equitably distributed between the three divisions of the city. Section 3 confirmed to the Illinois Central Railroad Company certain rights to the lands east of Lake park covered by its railroad tracks, and granted to it in fee all the right and title of the state of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of its tracks and breakwater, for the distance of 1 mile, and between the south line of the south pier extended eastwardly and a line extended east-

ward from the south line of lot 21, south of and near its roundhouse and machine shops, on the payment of the same percentage of the gross receipts from its use as it was bound to pay to the state, by its charter, on its gross receipts, which tract of submerged land so granted exceeded 1,000 acres. This act was passed, over the governor's veto, April 16, 1869. About July 1, 1869, the three railroad companies tendered to Walter Kimball, then city controller, the first instalment, of $200,000, which he refused to accept in his official capacity, but gave his individual receipt therefor, and reported the fact to the city council. The matter was referred to the judiciary committee, which on December 20, 1869, reported back to the council, reciting the several dedications above described, together with the facts regarding the washing away of the shore, and the attempts made to prevent the same, and the expenditure of money therefor, and that the city had been for years engaged in reclaiming that part of the land so dedicated, and had succeeded in reclaiming all that portion north of Monroe street; that, so far as the citizens of Chicago and the owners of the property fronting said public grounds are concerned, the city stands in the position of a trustee; that it would be a most flagrant and unjustifiable breach of trust upon the part of the city to sell the property, or in any manner to consent that this land shall be appropriated to other than public uses,—and recommended the passage of a resolution declaring that the city will not receive any money from the railroad companies under the said act of the general assembly until forced to do so by the courts. The resolution was subsequently passed, and the money was afterwards returned to the railroad companies, at their request.

It is plain that the city repudiated the privilege granted it by the legislature, and never accepted the act as binding on it. It may be said, in passing, that the Supreme Court of the United States, in *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 36 L. ed. 1018, denied the right of the legislature to make this extensive grant of the submerged lands in the harbor of Chicago, and held the grant to the railroad company to be ineffective, with certain exceptions. As we have already seen, all the rights in regard to Lake park had long previously been fixed by the acts of dedication by the original owners, the acceptance of the city, and the acquiescence and acts of the public and abutting property owners. It was beyond the power of the legislature to change the legal result of these acts, as it would be an impairment of vested rights, which are protected by the Constitution. In *Jacksonville* v. *Jacksonville R. Co.* 67 Ill. 540, 543, this court said: "A dedication must always be construed with reference to the object with which it was made. . . . The power of the legislature to repeal the charters of municipal corporations cannot be extended to the right to divert property given to the public for one use to a wholly different and inconsistent use. The power cannot exist to divert property from the purpose for which it was donated. This plat was a solemn dedication of the ground to the corporation, to be held in trust for the use of the public. The donation was made for a certain specific and defined purpose. . . . It must be preserved, or the land must revert to the original proprietors." The court cite, as fully sustaining the view it has taken, *Cincinnati* v. *White*, 31 U. S. 6 Pet. 431, 8 L. ed. 452; *Watertown* v. *Cowen*, 4 Paige, 510, 27 Am. Dec. 80; *Le Clercq* v. *Gallipolis*, 7 Ohio, pt. 1, p. 217, 28 Am. Dec. 641; *Carter* v. *Chicago*, 57 Ill. 283; *Price* v. *Thompson*, 48 Mo. 361; *Warren* v. *Lyons City*, 22 Iowa, 351. In *Princeville* v. *Auten*, 77 Ill. 325, it is said: "Had this intention [that a certain square should forever remain an open space] been expressed on the plat, or even in the contemporaneous certificates, it is clear, on principle and authority, the village trustees could not lawfully appropriate it to any other public use. It would have been an abuse of the trust reposed in them, that the courts would not hesitate to control, that the property might be preserved for the uses intended by the donors." It is only where the dedication of the property as public ground is an unrestricted dedication to public use that the city or legislature may designate the uses to which it shall be put. *Chicago, R. I. & P. R. Co.* v. *Joliet*, 79 Ill. 25. As the legislature was powerless to take away any vested rights that abutting property holders had in Lake park, it is unnecessary to discuss the effect of the repeal of the act of 1869 by the legislature in 1873. The same authorities and course of reasoning also negative the proposition put forth by plaintiff in error, that where the restrictions placed on the use of real property have become useless by the change of the character of the surrounding property and neighborhood, they may be disregarded. It is assumed by plaintiff in error that these open spaces were dedicated for a park, to remain free from buildings, because Michigan avenue was then a residence street, and that because of the gradual disappearance of residences from the upper end of this street, and their replacement by business houses, therefore the open space, clear of buildings, was not needed any more. That this reasoning is fallacious need hardly be demonstrated. It is a matter of common knowledge that nearly all of our larger cities have open squares in the business portions of the city, and that these open squares are deemed and considered of great advantage, not only to the public generally, but especially to the abutting property owners. In this case it is a vested right attaching to the abutting property by virtue of the original dedications. The cases cited in support of the position of plaintiff in error are not applicable to the facts of this case. They were cases relating to the restrictive covenants in deeds, where the original owner had devised a scheme for improving the neighborhood by controlling the erection of buildings in a particular way. They have no relevancy to the case of an open park. No change in the use of the buildings abutting on a park could make the park any less a park, or deprive the abutting owners of their vested rights.

But there is a strip of land within said park, as claimed by complainants, lying along fractional section 10, which cannot be said to have been reclaimed by the city after having been submerged by the lake after its dedication, in

1839. Neither was this strip formed by the slow and imperceptible process of accretion, but it is made or filled land, and is 237 feet wide at the north line of Randolph street, and about 200 feet wide at the center of Madison street, as stated above. And the question remains whether or not this strip is held by the city subject to the restrictions placed upon that part of Ft. Dearborn addition adjoining it. If this strip had been formed by gradual accretion caused by the action of the waters, it would have become a part of the shore lands. In *Godfrey* v. *Alton*, 12 Ill. 29, 52 Am. Dec. 476, this court held that "all accretions to a public landing must necessarily attach to and form a part of it, otherwise we should have the novel spectacle, of a public landing separated from the water." In *Lombard* v. *Kinzie*, 73 Ill. 446, the question arose whether the widow of a riparian owner was entitled to dower in the accretions to land which had accrued after the husband had parted with the land, and it was there held that she was entitled to dower in such accretions; that when formed such accretions become subject, as an incident to the fee, to the same conditions, rights, and burdens as the principal to which it is an incident. In *Cobb* v. *Laralle*, 89 Ill. 331, 31 Am. Rep. 91, it was held that the lessee of a property fronting upon a river is entitled to hold accretions as a part and parcel of the property leased. In *Chicago Dock & Canal Co.* v. *Kinzie*, 93 Ill. 415, the lot in question was bounded on the east by Lake Michigan, and this court said (p. 429): "To ascertain its eastern boundary, it would be necessary to ascertain where was the line between the land and the lake; and, since the accretions became a part of the land to which they were attached, it would necessarily follow that that line would follow the receding lake to the east. The accretions do not pass as appurtenant to water lot 36, but as a part of that lot." But the strip in question is filled land, and not formed by accretions. It is admitted that the title to this strip is also in the city, but such admission does not cover the question whether the city owns it in trust, as public ground, or as a part of said public park, or holds absolute title thereto in its own right, with the right to use or dispose of the property as it may see proper. Counsel for plaintiff in error says in his argument that it does not appear from the record how the city acquired title to the submerged lands north of Monroe street, which include this strip, but claims that, between the city and the state, that question has been adjudicated. *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 36 L. ed. 1018. The question here, however, is one between these abutting property owners and the city; and if the strip last mentioned is subject to the same trust as the remainder of said park, or that part of it which became submerged after its dedication, and was thereafter reclaimed, then, so far as this case is concerned, it must be regarded as a part of said public park, and the right of the city to authorize the construction of buildings upon it must be denied, if such right is denied as to the rest of the park, whatever the rights of the state might appear to be in a case where that question might be at issue. These open lands fronting on Lake Michigan, as we have seen, had been dedicated as public ground, to be kept free from buildings; and both the city and the state, by their respective legislative bodies, had declared them to be a public park, to be kept open and vacant, and free from encroachments. These lands declared to be a public park extended to the waters of Lake Michigan, and the title thereto carried with it riparian rights incident to its location upon the banks of the lake. These riparian rights were property rights which the city of Chicago held in trust in the same manner that it held title to these public grounds; and whether, under any circumstances, it could, by obtaining title to the lands under the shoal waters adjacent to the park, and by filling in, destroy such riparian rights, and hold the title to such filled lands free from such trust, it is not necessary here to decide, for we are satisfied from the evidence in the case showing the acts and declarations of the city authorities in dealing with these lands that the abutting property owners had the right to assume, and rest in the belief, that the city was not acting in antagonism to its trust, and with the purpose of destroying such riparian rights which attached to the public grounds, and of thereby acquiring an independent title to itself, but was, as such trustee, maintaining and preserving the property rights which it held in trust, and was improving said park, and extending its boundaries into shallow waters of the lake. The city was a trustee, and, besides, it had the power, by its charter, to lay out, establish, open, extend, and improve parks and public grounds; and so far as it made any addition, if it did make any, to Lake park, by filling in said strip of submerged lands, it must, upon the record before us, be presumed that it was acting under its charter powers, in the preservation of the trust imposed upon it by the dedication, and its acceptance thereof, of these public grounds, and we are of the opinion that the city is estopped from claiming title to the same free from such trust. We have been referred to *Ruge* v. *Apalachicola Oyster Canning & F. Co.* 25 Fla. 656, and other cases, as announcing a different doctrine. But the facts in those cases were different from those disclosed by this record, and we cannot see that the reasoning employed, if adopted, would, on a record of this character, lead to a different conclusion.

The next point of plaintiff in error is that defendants in error have no standing in a court of equity to obtain the relief sought by their bill. In *Jacksonville* v. *Jacksonville R. Co.* 67 Ill. 540, we said: "A court of equity has the right to enforce the execution of the plainly declared trust, either upon the application of the owners of lots abutting upon the square, or upon the application of the city, the trustee. . . . The square is valuable property, intended for the use of the public, and appurtenant to the estates of the abutting lotowners." See also cases cited above, in connection with that case. In *Princeville* v. *Auten*, 77 Ill. 325, the village trustees were enjoined from putting a town hall on the public square, at the suit of Auten and others, and this court affirmed the decree. In *Earll* v. *Chicago*, 136 Ill. 277, where there was a cross petition for

an injunction, the court said, "Where there is a special trust in favor of an adjoining property holder, or a special injury, a bill or suit may be maintained by an individual in respect to a public street or highway;" and the decree granting the injunction was affirmed. In *Maywood Co.* v. *Maywood*, 118 Ill. 61, it was contended that there was a misjoinder of complainants. The court said: "Small and Hubbard, as residents of the village, have a common interest with each other, and with the village itself, in preventing any obstruction to the use of the public square for the purposes of a park. . . . They are therefore properly joined with the village, as complainants." In *United States* v. *Illinois C. R. Co.* 154 U. S. 225, 38 L. ed. 971, the Supreme Court of the United States, in speaking of that part of Lake park dedicated by the Secretary of War, said: "The only parties interested in the public use for which the ground was dedicated are the owners of lots abutting on the ground dedicated, and the public in general. The owners of the abutting lots may be presumed to have purchased in part consideration of the enhanced value of the property from the dedication, and it may be conceded they have a right to invoke, through the proper public authorities, the protection of the property in the use for which it was dedicated." Defendants in error are the owners of the south 43 feet of lot 3, and all of lots 4 and 5, in block 15 of Ft. Dearborn addition, and have a frontage on Lake park of 139 feet. They are clearly abutting owners, and as such have a right to maintain this action. Nor does it make any difference that Lake park was dedicated by two different owners at different times. The canal commissioners dedicated that part in fractional section 15 first, and, in selling the abutting lots, held out to purchasers the fact that such space should be clear of buildings, as an inducement. The Secretary of War, who dedicated the remainder of the park in fractional section 10 three years later, it is evident, did this in order to make one continuous open space, and expressly certified that such space should remain clear from buildings; thus following and continuing the practice of the canal commissioners. Besides, this open space has always been treated by the city and the public as one park.

But it is further urged against the contentions of defendants in error that they are estopped by consenting to repeated violations of the injunction, and of their rights in the park, and that, by discriminating in favor of certain violators, they have waived their right to restrain others committing similar violations. The proceedings and decrees in quite a number of suits were introduced in evidence, showing that since the lake front act of 1869 there has been a great deal of litigation in the state and Federal courts over the use of the park. The first was a suit in the Federal court to prevent the railroads from taking possession of that part of the park north of Madison street, under the act of 1869, instituted by one Starkweather against the Illinois Central Railroad Company, and afterwards consolidated with a similar suit by the United States against the same company, brought on behalf of the abutting property owners in fractional section 15 by the United States district attorney, in which the injunction, as prayed for, was granted in both cases. In the summer of 1871 the first structure of any kind was built upon Lake park, the ground between Randolph and Madison streets having been fenced in and used as a ball ground; and again, between 1877 and 1884, the same ground was fenced up and used by the Chicago Baseball Club. But in the latter year a bill was filed in the Federal court, on behalf of the abutting property owners of Ft. Dearborn addition, by the United States, against the club of that city, to enjoin the maintenance of fences, buildings, etc., and compel their removal. The injunction was granted against the club and the city, absolutely prohibiting the maintenance of any building or structure on that part of the park described in the bill, and the baseball club removed their structures, in compliance with the order. In 1882 the property owners procured a suit to be started in the United States circuit court to enjoin the Baltimore & Ohio Railroad Company from laying tracks in Lake park, which is still pending. In March, 1883, the property owners procured one Stafford to file a bill in the circuit court of Cook county against the city, the Trades and Labor Assembly, and a number of other corporations, railroad companies, etc., to enjoin them from occupying and encumbering with buildings or otherwise any part of Lake park, and the injunction was granted, enjoining the erection of any building on fractional section 15; and in May, 1883, another injunction writ was issued against the city to the same effect. In 1883 a suit was begun in the state court by the attorney general against the Illinois Central Railroad Company and the city of Chicago, which was afterwards removed to the Federal court, to determine the title and rights of the several parties to the lands lying east of Michigan avenue, to which bill the city of Chicago filed a cross bill; and in which suit a decree was entered September 24, 1888, finding, among other things, that the city had title in fee to Lake park, which decree was afterwards (December 5, 1892) affirmed by the Supreme Court of the United States, 33 Fed. Rep. 730, 146 U. S. 387, 36 L. ed. 1018. The city has also at various times assumed the right to grant permission to erect structures on Lake park, or to use the same for various purposes. The first was April 23, 1873, when it authorized the erection of what was termed the "Exposition Building" between Monroe and Van Buren streets, on Lake park; but such building was not to remain longer than May 1, 1877. The time was afterwards extended. In 1889 W. T. Leland, an abutting property owner, procured an injunction from the circuit court of Cook county restraining the city and the Exposition Association from erecting any structure on that part of the park in section 15. The city then, on December 29, 1890, ordered the removal of all buildings from the park, except the two armories, and finally, on February 9, 1891, ordered the removal of the Exposition Building within the ninety days, and it was torn down. On March 20, 1891, an ordinance was passed giving the right of the World's Columbian Exposition to construct and maintain the building known as the "Art Institute" on the lake front, the title of the building to vest in the

city, but the right to use and occupy the same to vest in the Art Institute as long as it should comply with the terms and conditions in the ordinance, which required free admission to the public on Wednesdays, Saturdays, and Sundays, with the right to charge admission at other times, though professors and teachers in the public schools and other institutions of learning in Chicago should be admitted free at all times. It was then sought to have the above injunction in the *Leland Case* modified to permit the erection of this building, and, such modification having been assented to in writing by all the property owners, it was accordingly modified, notwithstanding the objection of Mrs. Sarah A. Daggett, whose husband had signed her assent to the proposed modification. In pursuance of the permission thus granted, the Art Institute Building was subsequently erected, with a frontage of about 300 feet. In 1892 permission was given to erect a frame wigwam for the accommodation of the Democratic National Convention on the lake front, which was accordingly erected, and afterwards torn down, as required by the city. In the same year the use of the lake front north of Madison street for the construction of a temporary postoffice was tendered to the United States, and a temporary postoffice building erected in pursuance of such resolution, the same to be removed as soon as a permanent postoffice is built. In 1881 the city granted permission to Battery D to occupy 125 feet of Lake park north of Monroe street for an armory building, and also permission to the 1st regiment of cavalry to erect a similar building just north of the former. Both buildings were erected, of 125 feet front, one story high, extending nearly back to the railroad. In 1886 the city council granted a place of burial to the family of the late Gen. John A. Logan in Lake park, on the recommendation of the corporation counsel that such use would not be inconsistent with its use as a park. During all this time there were numerous orders and resolutions of the city council directing the removal of tracks, platforms, express buildings, sheds, and other obstructions, nearly all of which have been removed from time to time. The defendants in error acquired the property they own on Michigan avenue in 1887 and 1889, and the original bill in this cause was filed by them in 1890. That the abutting property owners have been diligently striving to protect their rights in the park cannot be gainsaid by anyone familiar with the litigation that has been carried on in relation thereto, and with the repeated enunciations of the courts enforcing their rights. That they have quietly assented to repeated violations of these rights is not borne out by the facts in the case. Whether the city had the power to authorize the erection of the temporary buildings mentioned, it is not necessary here to inquire, but we cannot agree with counsel for plaintiff in error that the defendants in error have waived all their rights in the premises, because they may have chosen to waive some of them. The only permanent building, perhaps, that is excepted from the injunction is the Art Institute, and all the property owners gave their consent to its erection. It cannot be said that the erection of the Art Institute has so impaired the benefits to be derived from Lake park that thereby the whole easement is gone. The defendants in error paid $40,000 more for their property because of its location on the park, and would be seriously damaged by the erection of large and high permanent buildings, such as the city hall building and others.

The decree is affirmed.

WYOMING SUPREME COURT.

Re Estate of George L. BEARD, Deceased.

(.....Wyo.....)

The assets of an insolvent stockholder in an insolvent national bank, whether living or dead, are not, as against his other creditors, subject to a preferential lien for the payment of his liability, under U. S. Rev. Stat. § 5152, for the debts of the bank for an amount equal to the par value of his stock.

(September 27, 1897.)

QUESTIONS reserved by the District Court for Laramie County for the opinion of the Supreme Court which arose upon an application by Joel Ware Foster, receiver of the Cheyenne National Bank, for preferential payment out of assets of the estate of George L. Beard, deceased. *Preference disallowed.*

The facts are stated in the opinion.

Messrs. **Burke & Fowler** and **Edmund J. Churchill** for receiver of Cheyenne National Bank.

Messrs. **Clark & Breckons** for administrator of George L. Beard.

Mr. **John W. Lacey** for creditors of George L. Beard's estate.

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

The intestate left an estate insufficient to pay his debts in full. He was a stockholder in the Cheyenne National Bank, an insolvent corporation, now in the hands of Joel Ware Foster as receiver. Intestate was liable, under the laws of the United States upon the subject of banking, for the debts of the corporation to an amount equal to the par value of his stock in the corporation. This liability survives against his estate. The amount is fixed by the judgment and decree of the United States circuit court for the district of Wyoming at $6,139.93, and this amount is not in dispute. But Foster, as receiver of the Cheyenne National Bank, claims that this liability constitutes a preferred claim against the estate. He filed his motion in the district court for Laramie county—a court of probate jurisdiction, and having jurisdiction of this estate—that the administrator pay to him this claim in full, without regard to the assets

NOTE.—The above case is the first to decide the question of the right of a preferential lien to secure liability of a stockholder in a national bank.

and other liabilities of the estate, "for the reason," as stated in the motion, "that said claim aforesaid is a trust fund, and no part of the general assets of said estate." In the brief filed on behalf of the receiver, this proposition is stated in somewhat different language. It is claimed that the statute establishing the stockholder's liability "creates from his estate a trust fund for the payment of the debts of the bank," and, further, that the decree of the United States circuit court was based upon the ground that the statutory liability of the stockholder "created and carved from his assets a trust fund for the payment of the debts of the bank, and that, therefore, the assets of the decedent, to the amount of this guaranty or fund, constituted in fact no part of the general assets of the decedent's estate, but are trust funds, dedicated to the payment of this liability."

Upon the hearing of this cause in the district court, upon the motion of the receiver for preference in payment, that court found that important and difficult questions arose in the cause, and upon its own motion, and with consent of all parties, reserved and sent to this court for decision such questions. They are three in number: (1) Does the statutory liability of a stockholder of a national bank to pay towards its debts a sum equal to the face value of his stock create from his assets a trust fund for the payment of the debts of the bank? (2) Is the liability created by the statute mentioned in the last question entitled to preferential payment out of the funds of the insolvent debtor? (3) Where a stockholder of a national bank dies subsequent to the insolvency of the bank, but before any assessment is made on his stock on account of such insolvency, and after his death an assessment equal to the full value of his stock is made upon the administrator of his estate, and where his estate is insolvent, should such assessment be given a preference over the claims of general creditors?

It is not questioned that the entire assets of the intestate are held by the administrator in trust for the payment of the debts of the intestate. But this, of itself, does not give to any particular debt preference in payment over any other debt. The claim urged on behalf of the receiver is that the liability of intestate upon his bank stock is entitled to preference. Under U. S. Rev. Stat. § 5152, the administrator is not personally liable on account of this stock, but the estate and funds of intestate in his hands are liable in like manner, and to the same extent, as the intestate would be if living. It is not questioned that the principles involved are the same as if the liability of intestate had been for unpaid subscription upon his capital stock. One authority states the "trust fund" doctrine in such cases as follows: "It is a favorite doctrine of the American courts that the capital stock, and other property, of a corporation is to be deemed a trust fund for the payment of the debts of the corporation, so that the creditors have a lien or right of priority of payment on it, in preference to any of the stockholders of the corporation." Thompson, Liability of Stockholders, § 10. It is apparent that the doctrine must have a much more extensive application than this to sustain the claim of the receiver in the case at bar. In a note to the section quoted, the learned author says: "I have not found a similar statement of doctrine in any English book of reports. The idea appears to have been first formulated by the fertile brain of Mr. Justice Story in *Wood* v. *Dummer*, 3 Mason, 308 (decided in 1824)." But the case of *Wood* v. *Dummer* has been extensively followed by both Federal and state courts, and the doctrine of that case is perhaps now too firmly established in America to be denied. The case was a bill in equity brought by some of the creditors against some of the stockholders of the Hallowell & Augusta Bank, and sustained on the ground of the impossibility of bringing into the suit all the parties interested. There was a recovery against the stockholders, the trust fund doctrine being announced, as it appears, for the first time. No question of priority of payment arose. A good statement of the result of the cases upon this branch of the law of the liability of stockholders is given in 23 Am & Eng. Enc. Law, at page 855, in these words: "The liability of members of a corporation is founded on statute. But in the modern stock corporation, where membership is usually acquired by entering into the contract of subscription, each member may be said to assume the obligation to pay to the company the full amount named in his contract, *i. e.*, he agrees to pay the corporation only, and the satisfaction of its claims, in any manner acceptable to it, discharges him from further liability. But the American courts of equity have evolved the doctrine that by the act of subscription one becomes liable for the full amount thereof to corporate creditors as well as to the corporation; that all who deal with the latter have a right to rely upon the total amount subscribed as a security for their claims,—in a word, and in the language of the courts themselves, that unpaid subscriptions are a 'trust fund' for the payment of creditors. While in its origin this doctrine is distinctively American, and does not obtain in England, yet by statute, a limited application of similar principles is there allowed. The more recent applications of the doctrine have been subjected to considerable criticism in this country." This statement of the law is sustained by numerous citation of cases, and is followed by a discussion of the applications of the doctrine; but nothing appears to indicate that it has ever been applied to give to the stockholder's liability for unpaid subscriptions for stock a preference in payment over other debts of the stockholder. Neither have counsel cited a case in which such application of the trust fund doctrine has been made. Neither has such a case fallen otherwise under our observation.

In the case of *Thompson* v. *Reno Sav. Bank*, 19 Nev. 242, it was held that it was not necessary to present to the executor or administrator of a deceased stockholder a claim for unpaid subscription to the capital stock of the bank before bringing an action thereon, although the statute provided that no holder of any claim against the estate of a decedent should maintain an action, unless such presentation had first been made. The following reason is given in the opinion of the court: "The stockholders are trustees of the creditors, and suits to establish and enforce the trust are maintained against the representatives of deceased persons, upon the theory that the decedent held money equal to the amount of his unpaid subscription,

in trust for the creditors, and that the fund, although incapable of identification, has passed into the hands of the executor or administrator. Such a fund is properly no part of the estate of a deceased person. The deceased stockholders were trustees, and not debtors, of the bank's creditors."

The doctrine of this case fully sustains the contention of the receiver. If the administrator has taken possession of any money or property that did not belong to the intestate, and did belong either to the bank or its creditors, he should deliver such money or property to the receiver, who represents both the bank and its creditors. But no trust fund in money and no trust property ever passed into the hands of intestate from any source. The trust is purely constructive; the fund is purely constructive. It may have no existence in fact. The stockholder may have neither property nor money, but his debt to the corporation for unpaid subscription for stock is held to be a trust fund. The corporation, according to the American doctrine, may not release the debt to the prejudice of its creditors without payment in full. If the corporation does release the stockholder without full payment, the creditors of the corporation may resort to the stockholder for payment to the extent of the stockholder's liability for unpaid subscriptions. To this extent the cases go, and some seem to go further; but I do not find any case that goes to the extent of charging the property of a stockholder with a trust or lien on account of his unpaid subscriptions for stock.

The doctrine of the Nevada case, however, would lead to that result. It was a suit in equity by a judgment creditor of an insolvent corporation to subject unpaid subscriptions for stock to the payment of his debt. Two of the defendants were representatives of deceased stockholders. Of the conclusion that the statute requiring claims to be presented to the executors or administrators of deceased persons before suit did not apply in that case, one commentator says: "It is believed that this conclusion cannot be upheld upon principle. The rule which allows a trust fund to be followed from hand to hand, and recovered, is believed to apply only in cases where the fund is earmarked or separated from the remainder of the estate of the trustee in such a manner that it can be identified." 3 Thomp. Corp. § 3328. And this suggests the question which must arise in every case under the doctrine of the Nevada court, what portion of the property of the stockholder constitutes the trust fund, which is properly no part of his estate? Does the trust attach to all of his property? Does anyone purchasing his property with knowledge of his indebtedness to a corporation for unpaid subscription for stock take the property subject to the trust? No court has answered these questions directly, because no court has made the application of the trust-fund doctrine urged on behalf of the receiver in the case at bar; and, on the other hand, it must be said that no court has ruled directly against this application of the doctrine. It seems that none of the courts have been called upon to rule directly upon the exact question presented here. The application of the trust-fund doctrine claimed here is evidently a new application of that doctrine.

The case of *Peters* v. *Bain*, 133 U. S. 670, 33 L. ed. 696, cited by counsel, has, however, a direct bearing upon the question under consideration. Bain & Bro. were directors and stockholders to a large amount in the Exchange National Bank of Norfolk. The bank was insolvent; Bain & Bro. were insolvent. They made an assignment of all of their property for the benefit of their creditors. Peters, receiver of the Exchange National Bank of Norfolk, brought the action by bill in equity to set aside the assignment, and subject the assigned property to the payment of debts due the bank. The liability of the Bains on account of their stock is considered, beginning at page 691, 133 U. S., and page 704, 33 L. ed. (opinion of Chief Justice Fuller). The validity of the deed of assignment and the trust fund doctrine are disposed of in the following language: "Counsel contends that the deed was in contravention of §§ 5151 and 5234 of the Revised Statutes of the United States, which provide that the shareholders of every national banking association shall be held individually responsible for its debts to the extent of the amount of their stock, and additional thereto, and that the controller may enforce that individual liability. It is insisted that the capital stock is a trust fund of which the directors are the trustees, and that the creditors have a lien upon it in equity; that this applies to the liability upon the stock of a national bank; and that no general assignment of his property for the payment of his debts can lawfully be made by a shareholder, certainly not when he is a director. Undoubtedly unpaid subscriptions to stock are assets, and have frequently been treated by courts of equity as if impressed with a trust *sub modo*, in the sense that neither the stockholders nor the corporation can misappropriate such subscriptions so far as creditors are concerned. *Washburn* v. *Green* (*Richardson* v. *Green*), 133 U. S. 30, 44, 33 L. ed. 516, 522. Creditors have the same right to look to them as to anything else, and the same right to insist upon their payment as upon the payment of any other debt due to the corporation. The shareholder cannot transfer his shares when the corporation is failing, or manipulate a release therefrom, for the purpose of escaping his liability. And the principle is the same where the shares are paid up, but the shareholder is responsible in respect thereof to an equal additional amount. There was, however, no attempt here to avoid this liability, and the fact of its existence did not operate to fetter these assignors in the otherwise lawful disposition of their property for the benefit of their creditors." This needs no comment. It appears to leave no room for the application of the trust fund doctrine to the extent of giving to the receiver or to the creditors of an insolvent corporation preference in payment from the estate of an insolvent stockholder as against the general creditors of such stockholder, whether he be living or dead. The trust, evidently, can have no greater effect on the property in the hands of an administrator than in the hands of the assignee.

Of the three questions submitted, the first is answered "Yes" to the extent indicated in this opinion. The second and third are answered in the negative.

Potter and **Corn**, JJ., concur.

OREGON SUPREME COURT.

Malinda F. McLENNAN, *Appt.*,
v.
Charles McLENNAN, *Respt.*

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

A marriage contracted in another state by a resident of Oregon who has been divorced in that state by a decree from which there is yet time to take an appeal is absolutely void under 1 Hill's Anno. Laws, § 503, providing that a divorce decree shall terminate the marriage, "except that neither party shall be capable of contracting marriage with a third person" until the expiration of the period allowed for an appeal.

(November 8, 1897.

APPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County in favor of defendant in an action brought to obtain a decree to declare void a marriage which had been contracted in alleged contravention to the provisions of the statute. *Reversed.*

The facts are stated in the opinion.

Mr. **S. R. Harrington,** for appellant:

A decree of divorce does not absolutely terminate the marriage relation, nor entirely free the parties from its obligation and liabilities until the expiration of the time allowed in which to take an appeal. A marriage before the expiration of six months from the rendition of the decree is absolutely void.

Conn v. *Conn*, 2 Kan. App. 419; *Wilhite* v. *Wilhite*, 41 Kan. 154; *Re Smith*, 4 Wash. 702, 17 L. R. A. 573; 1 Bishop, Mar. Div. & Sep. § 436; 2 Bishop, Mar. Div. & Sep. § 1616; Nelson, Divorce & Separation, §§ 135, 568, 582a; *Thompson* v. *Thompson*, 114 Mass. 566; *Cook* v. *Cook*, 144 Mass. 163; *Pratt* v. *Pratt*, 157 Mass. 503, 21 L. R. A. 97.

A decree of divorce fixes the status of the parties—their "legal position in regard to the rest of the community"—and that status cannot be confined to the state in which the decree is rendered, but goes with the parties to any state or country to which they may temporarily or permanently remove.

Nelson, Divorce & Separation, §§ 27 *et seq.*

Messrs. **Charles F. Lord** and **Thad. S. Potter,** for the State:

The decree of divorce terminates the marriage relation.

Hill's Code, § 503.

The disqualification for marriage imposed by § 503, Hill's Code, upon the parties to a suit for divorce, has no extraterritorial effect.

Van Voorhis v. *Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Thorp* v. *Thorp*, 90 N. Y. 605, 43 Am. Rep. 189; *Com.* v. *Lane*, 113 Mass. 458, 18 Am. Rep. 509; *West Cambridge* v. *Lexington*, 1 Pick. 506, 11 Am. Dec. 231; *Putnam* v. *Putnam*, 8 Pick. 433; *Medway* v. *Needham*, 16 Mass. 157, 8 Am. Dec. 131.

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

On September 3, 1889, the plaintiff was divorced by the circuit court of Multnomah county, from her husband, and in twenty two days thereafter, while still a resident of and domiciled in this state, was married in Vancouver, Washington, to the present defendant, who was at the time also a resident and domiciled here. The plaintiff, being advised that the latter marriage was premature and unlawful, brought this suit to declare it void; which being decided adversely to her, she brings the cause here by appeal. The sole question presented on the appeal is as to the validity of the Vancouver marriage, and its determination depends upon the construction of § 503 of our statute (1 Hill's Anno. Laws), and its effect upon marriages solemnized in a neighboring state. By this section it is provided that "a decree declaring a marriage void or dissolved at the suit or claim of either party shall have the effect to terminate such a marriage as to both parties, except that neither party shall be capable of contracting marriage with a third person, and if he or she does so contract, shall be liable therefor as if such decree had not been given, until the suit has been heard and determined on appeal, and if no appeal be taken, the expiration of the period allowed by this Code to take such appeal." It is clear that a marriage in this state in violation of this section would be null and void, because, by its provisions, the parties are incapable of entering into such a relation within the time specified, for the reason that the decree does not to that extent terminate the former marriage. The statute in effect declares that such marriage shall, for that purpose, continue during the time in which an appeal may be taken from the decree, or, in case of an appeal, during the pendency thereof. Until the expiration of such time, the status of the parties, so far as the right to remarry is concerned, remains the same as if no decree had been rendered. For all other purposes the decree is full and complete, but, on grounds of public policy, the legislature has provided that pending an appeal from such decree, if one be taken, and, if not, during the time in which it may be taken, the parties shall be incapable of contracting marriage with a third person, and under this provision of the law, neither of them has any more right to do so than if the decree had not been given. During that time the decree is suspended or inoperative to that extent, and both parties, without regard to their guilt, are utterly powerless to make a valid contract of marriage with a third person. It will be observed that the statute declares that neither party to the decree shall be capable of contracting marriage with a third person during the time such decree is subject to review by an appellate tribunal, and not merely that it shall not be lawful for them to do so. It goes directly to their ability or capacity to contract, and there is a distinction made in the books between the

NOTE.—As to the effect of a right of appeal from divorce decree on the right to remarry, see *Re* Smith (Wash.) 17 L. R. A. 573, and *note*.

As to the effect of statutes prohibiting remarriage after divorce, see Hernandez's Succession (La.) 24 L. R. A. 831, and *note*; also Ovitt v. Smith (Vt.) 35 L. R. A. 223, and Crawford v. State (Miss.) 35 L. R. A. 224.

marriage of divorced parties declared by law incapable of remarrying and a marriage in violation of some statutory prohibition penal in its nature. In the one case the marriage is absolutely void, and in the other it is often held to be valid, although the party may be punished criminally for violating the prohibitory statute. This distinction is very clearly pointed out by Judge Clark in *Conn* v. *Conn*, 2 Kan. App. 419. The obvious purpose and object of the statute is to enable either party aggrieved by a decree of divorce to have the same reviewed in an appellate court, and to that end it is provided that pending such right neither party shall be capable of doing an act which would render a reversal nugatory. A construction of the statute which would permit a marriage within the time limited would be, not only contrary to its plain wording and evident intent, but would produce, in case of a reversal of the decree, the anomalous result of one person having two legal husbands or wives, as the case may be, at the same time, and polygamy be thus sanctioned by law. It was to prevent the confusion and uncertainty resulting from such a condition of affairs that the statute was enacted, and it must be given force and effect.

The supreme court of the state of Kansas had occasion, in *Wilhite* v. *Wilhite*, 41 Kan. 154, to construe this statute; and it was there held that a marriage contracted in that state within six months after one of the parties had been divorced from her former husband by a decree of one of the courts of the state was absolutely null and void. The opinion of Mr. Justice Johnston in that case contains a very lucid and satisfactory discussion of this question. The same construction has been given to a similar statute in the state of Washington by the supreme court of that state, in *Re Smith*, 4 Wash. 702, 17 L. R. A. 573. Indeed, it is not seriously contended that a marriage contracted in this state within the prohibited time would be valid; but the contention is that, as the marriage in question was solemnized in the state of Washington, the plaintiff was freed from the restraint imposed upon her by the decree of divorce. The general rule is unquestioned that a marriage between persons *sui juris*, valid where solemnized, is valid everywhere; but this plaintiff, having been previously married, and her former husband being alive, could not contract a second valid marriage anywhere unless the incapacity arising from her previous marriage had been at the time effectively and completely removed by a decree of divorce, and this was not the case at the time of the solemnization of the marriage between plaintiff and defendant, because the statute under which the decree was obtained provided that the divorce did not completely sever the tie of marriage, so as to enable either to become a party to a new one, until the lapse of a specified time after the decree, and her marriage was contracted in violation of this statute. This provision of the law is an integral part of the decree, by which alone both of the parties to a divorce proceeding can be relieved from the incapacity to marry, and the marriage by a person divorced in this state, and domiciled here, in violation of its provisions, is a mere nullity when called in question in the courts of the state, although such marriage may have been contracted in another state. 1 Nelson, Divorce & Separation, § 135; 1 Bishop, Mar. & Div. § 436; *Warter* v. *Warter*, L. R. 15 Prob. Div. 152; *Chichester* v. *Mure*, 3 Swab. & T. 223. The rule announced in the cases of *Com.* v. *Lane*, 113 Mass. 458, 18 Am. Rep. 509, and *Van Voorhis* v. *Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505, and other cases cited of similar import, is relied upon by the defense. The doctrine of these cases is that a statute prohibiting a marriage of the guilty party in a divorce proceeding, during the lifetime of the other, or except under certain conditions, does not render void the marriage of such person out of the jurisdiction of the state in which the decree was obtained. Upon this question there is some conflict in the authorities (*Pennegar* v. *State*, 87 Tenn. 244, 2 L. R. A. 703; 5 Am. & Eng. Enc. Law, p. 841); but the obvious distinction between the question presented in the cases referred to and in the case at bar is that there the incapacity to remarry attached only to the guilty party. The decree of divorce absolutely terminated the marriage relation between the parties as effectually as if it had been dissolved by death. The innocent party was perfectly free to remarry at any time, and the restraint upon the other was imposed as a punishment, and was therefore penal in its nature, and, as such, held inoperative out of the jurisdiction where it was inflicted. The provision of our statute is not imposed as a punishment, nor is it penal in its character, but it implies to the innocent as well as the guilty. It goes to the capacity of either party to remarry within the prescribed time, and therefore the cases cited and the doctrine contended for have no application to the question in hand.

We are clear, therefore, that the plaintiff's marriage, having been contracted before the expiration of the time allowed by law in which to appeal from a decree of divorce, is absolutely void, and *the decree of the court below must be reversed;* and it is so ordered.

END OF CASES IN BOOK 38.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Second Quarter of the Judicial Year Beginning with October 1, 1897, Classified as Follows:

I. Public, Official, and Statutory Matters.
II. Contractual and Commercial Relations.
III. Corporations and Associations.
IV. Domestic Relations.
V. Fiduciaries.
VI. Torts; Negligence; Injuries.
VII. Property Rights; Wills; Liens.
VIII. Civil Remedies.
IX. Criminal Law and Practice.

I. Public, Official, and Statutory Matters.

International law.

A very unusual question of international law is presented in a Federal case, which denies a private right of action by a citizen of the United States against a military commander of revolutionary forces in Venezuela for assault and false imprisonment, at least since the United States has recognized the revolutionary government. (C. C. App. 2d C.) 405.

Equality.

A statute prohibiting citizens from other counties from fishing in the waters of two specified counties without a license, but not prohibiting citizens of those counties from fishing in other counties, is held to violate the constitutional provision for equal protection of the laws. (S. C.) 561.

A statute requiring a license for peddling is held to make an arbitrary distinction constituting partial class legislation when it exempts farmers, nurserymen, mechanics, manufacturers, and butchers who sell their own manufactures or products. (Minn.) 677.

Taking or impairing private property.

The Ohio act adopting the Torrens system of land registration is held unconstitutional as depriving adverse claimants of title without due process of law, attempting to take property for uses not public, and also as attempting to confer judicial power on the county recorder. (Ohio) 519.

A statute authorizing administration on the estate of a person who has left home and has not been heard from in seven years is held to be unconstitutional, since the administration of the estate of a living person deprives him of property without due process of law. (R. I.) 294.

A statute limiting the liability of a railroad company for fires to the difference between the amount of loss and the insurance on the property is held not to deprive the insurer of the equal protection of the laws, nor to impair the obligation of their pre existing contracts. (Me.) 152.

The constitutionality of an ordinance fixing water rates is discussed at much length in a case holding it invalid because it did not produce just compensation to the owner of the water plant. In this case it gave a net income of about 3½ per cent. (Cal.) 460.

The right of a city to take water for its inhabitants from a great pond belonging to the state is held to be within the power of the legislature to grant without any compensation to those who want the power for mill purposes. (Me.) 188.

Police power; as to nuisances.

A statute requiring all railroad and transportation companies to turn over to storage companies or public warehousemen all property not called for within twenty days after notice to the consignee is held unconstitutional and void because not a proper exercise of the police power. (Minn.) 672.

A statute authorizing a board of aldermen to order any privy vault to be filled up and destroyed is sustained as constitutional although it does not provide for any notice to the owner of the premises before making and enforcing the order. (R. I.) 305.

The business of a scavenger, or the removal of night soil, is held to be within the control of a city having power to make all ordinances for the protection of health. (Minn.) 675.

An ordinance making it unlawful to keep any hog within the corporate limits of a town is held to be not subject to attack for unreasonableness, where the statutes give power to define nuisances and to regulate and control the keeping of animals. (S. C.) 326.

The attempt of a municipal corporation by ordinance to declare that any partially destroyed building which is permitted to remain in that condition after notice to remove, repair, or rebuild it, shall constitute a nuisance, is held to be void on the ground that a municipality cannot declare that to be a nuisance which in fact is not, although it has authority to declare what shall constitute a nuisance. (Ind.) 161.

Jurisdiction.

Jurisdiction of a state court to direct as to the payment of wages by a receiver for operating a railroad within the state is held not to

be prevented by the fact that the employees in the course of their services crossed the state boundary and incidentally performed some services in another state, where the receivership was first created. (Conn.) 804.

Judges.

The constitutional power of the governor to appoint judges of an inferior court is protected against a statute which attempts to deprive him thereof by changing the name of the court and providing for the election of the judge. (N. J.) 373.

Officers.

The eligibility of a woman to be a county clerk in Missouri is sustained under a constitutional provision which requires an officer to be a "citizen of the United States" and a resident of the state "one year next preceding his election." The use of the masculine pronoun in that provision in the statutes is held not to exclude women, since there are express constitutional provisions limiting eligibility to men in respect to some other offices, and the word "male," which formerly was found in the statutes respecting county clerks, has been dropped. (Mo.) 208.

Enacting statutes.

The constitutional provision as to the enactment of bills by aye and nay vote and after three several readings, etc., are held mandatory, and the journals of both houses must affirmatively show compliance with the constitutional provisions. (Id.) 74.

Tolls.

Tolls for the use of a road by persons riding bicycles are held not to be authorized by a statute providing for the payment of tolls for carriages or vehicles drawn by animals, also for a horse and rider or led horse. (Mich.) 198.

Voters.

Ability to read the Constitution of the state, which is required of a voter by the Wyoming Constitution, is held to mean the Constitution in the English language, and not in a translation. (Wyo.) 773.

Streets.

The caving of an excavation under a street, negligently made for an underground railroad, is held not to make the city liable. (Va.) 834.

A charter authorizing a street-railroad company to use any power which the mayor and city council may sanction, or which any other company is authorized to use, is held to give the right to use the trolley system without the sanction of the mayor and counsel, when other companies have been authorized by statute to use it. (Md.) 509.

The liability of a city to an action for delay in providing a fund by assessment to pay for a street improvement is denied,—at least so long as there can be any remedy by enforcing the plan of assessments. (Wash.) 259.

Lighting city.

The right of a municipality to own an electric-light plant to furnish lights to its citizens as well as for public uses is sustained in Michigan. (Mich.) 157.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

An employee who has learned trade secrets from his employer under an agreement, express or implied, that he will not make use of them for his own benefit, or communicate them to strangers, is held subject to injunction against breaking such agreement. (Mich.) 200

The rule that one person cannot be compelled to enter into business relations with another is applied to the refusal of undertakers to furnish materials or render services at a funeral for a person who has refused or failed to pay for similar services in the past. (Ky.) 505.

The illegality of a transfer of stock to the president of a company for use in corrupting public officers is held not to prevent the owner from recovering it when it has not been used for the illegal purpose but has been converted by the president to his own use, since the right of action does not depend upon the illegal contract. (Cal.) 176.

Breach of contract.

In case of the refusal of a vendee in an executory contract to stand by his agreement, it is held that the other party, having an option to deliver between two subsequent dates, if he wishes to have the damages fixed on any day before the last day for performance, must give notice of such intention, although his offer to perform is waived by the other party's repudiation of the agreement. His mere executory contract to sell the same property to another person before the time for delivery is held not to constitute a breach of the contract on his part, even if an actual sale of it would be. (N. D.) 760

Innkeepers.

The right of an innholder who has no license to recover for board and lodging at his inn is denied under a statute which prohibits the keeping of an inn without a license. (Me.) 143.

Lease.

An assignment of a lease with covenant against encumbrances, except the agreements of the lessee, is held not to import a personal liability of the assignee to perform them. (Ill.) 624.

Negotiable paper.

Payments indorsed on the back of a note before its transfer by the payee are held not to destroy its negotiability. (Pa.) 823.

The addition of the word "trustee" to the name of an indorser on a note is held not to affect his liability, and the same is held as to the addition of that word to the name of the payee. (Tenn.) 837.

A statute requiring the words "peddler's note" to be written across every note given for an article sold by a peddler or itinerant person is held valid as applied to the sale of a patent right. (Ky.) 503.

The drawer of a draft which is lost in the mails during transmission from the payee to a correspondent at the place where the payee is located is held to be discharged by the failure to present the draft or discover its loss for

nearly six months, although the payee had means of knowledge of the loss in a report from the correspondent. It is also held that a duplicate draft given to enable the payee to collect from the drawee did not constitute a new contract or a promise to pay, or a waiver of a defense on the original contract. (N. D.) 843.

Carriers.

A railroad employee working on a bridge is held to become a passenger when he rides home on a train after his work for the day is done, under a contract giving him the right to free transportation. (Pa.) 876.

The ejection from a train of a woman who has paid fare for herself, but refuses to pay for a child in her custody, is held lawful on condition that her fare is returned or tendered to her, less the amount of fare for herself and the child for the distance already traveled. (Ohio) 140.

A contract by an express company with a railroad company, exempting the latter from all liability for injuries to a messenger who authorizes the contract, is held binding on him, since the railroad in this matter is acting as a private carrier. (Ind.) 933.

Delivery of goods to a consignee without his production of the bill of lading is held sufficient to relieve the carrier, where it had no notice that the bill had been forwarded with a draft attached for collection. (Ark.) 358.

An exemption of "accidents to boilers and machinery" in a bill of lading is held insufficient to exempt a railroad company from liability for injuries caused by the breaking of the axle of a car, as this is not "machinery" within the meaning of that phrase. (C. C. App. 6th C.) 271.

Insurance.

Certificates in mutual aid societies are held not to constitute insurance within the meaning of a question in an application blank of an insurance company as to "existing insurance." (C. C. App. 6th C.) 33.

An assignable interest of a person to whom an endowment certificate in a benefit society is payable on the death of the assured within the endowment period does not exist during that period, and while the assured is living, if the latter has a right to change the beneficiary. (Iowa) 128.

Statements by an applicant for insurance which the terms of the policy warrant to be strictly true and agree to be a part of the contract are to be deemed warranties, and not mere representations. (R. I.) 297.

A contract by which a railroad employee is given his election to take benefits from a relief fund or to sue his employer for damages, but making an acceptance of the benefit operate to release his employer, is not contrary to public policy. (Ill.) 750.

A variety of important questions respecting the settlement of an insolvent insurance company are decided in a Maryland case. Among them is the decision that insurance of a carrier against liability for injury to passengers is not against public policy. (Md.) 97.

The construction of the provision as to total disability to transact any and every kind of business pertaining to one's occupation is made by holding that trivial acts do not constitute transacting of business if one is unable to transact it substantially or to some material extent. (Minn.) 537.

Another case holds that the fact that one went to his office every day, where he carried on the business of loaning money on personal security, did not show that he was not totally disabled, if he did no work or business at the office during the time for which he claimed indemnity. (Mich.) 529.

A reinsurer in case of the insolvency of a prior insurer is held liable for the whole amount of loss to which it had indemnified the other insurer, and not merely for such part thereof as the insolvent company actually paid. (N. H.) 514.

A mortgage, although in the form of an absolute deed, is held not to constitute any change in the title, interest, or possession of the property of the insured within the policy providing that it shall be void in case of such change. (Ohio) 562.

Change of title by deed from mortgagor to mortgagee pending an application for insurance is held not fatal to the insurance after the policy is delivered, if the application states the existence of the mortgage and the pendency of foreclosure proceedings. (Wash.) 397.

III. CORPORATIONS AND ASSOCIATIONS.

A receiver of a corporation because of dissentions between the two persons who constitute its officers and are equal owners of its entire stock is denied, especially when their dissentions relate chiefly to the management of another corporation some of the shares of which are owned by the former. (Iowa) 122.

See also *infra*, V.

Duration; reversion of property.

A conveyance to a corporation which has an existence for a limited period is held not to be limited to the life of the corporation, or to give the grantor a resulting trust which will take effect when the corporation ceases to exist. (N. C.) 240.

Abuse of franchise.

A plumbers' supply association organized under a provision for charitable, educational, and social companies, which assumes to notify its members of the failure of a dealer to pay any of them, and to prevent them from giving any credit thereafter to the delinquent, is held to be officiously interfering with matters outside its proper business, and subject to attack by an information in the nature of a quo warranto. (Mass.) 194.

Nonuser of franchise.

The forfeiture of the franchise, and also of the road, of a street-railway company is enforced under a clause of the ordinance granting the franchise, to the effect that it should be forfeited for failure to operate the road for one year. (Minn.) 541.

The forfeiture of the franchise of a street-railway company granted by ordinance is held to be made by nonuser of the tracks for sev-

eral years, although the city may have agreed that nonuser should not constitute a forfeiture, and the ouster of the company from the franchise is held to be properly made in quo warranto proceedings by the state on relation of the city. (Mo.) 218.

Lease of franchise.

A constitutional provision against the lease of any franchise so as to relieve it or the property held under it from the liability of the lessor or lessee is construed to make a leased railroad liable to the enforcement of a judgment against the lessee for injuries to an employee, but not to make the lessor, by a fiction, the employer of such person. (Cal.) 71.

Lien for stockholder's liability.

The assets of an insolvent stockholder in an insolvent national bank are held not to be subject to any preferential lien for the payment of the stockholder's liability. (Wyo.) 860.

Preference to employees.

A person employed by a mowing machine company to sell machines, as well as to set them up and unpack and repack them when necessary, is held to be an employee, within the meaning of a statute giving a preference to claims of employees, operators, and laborers of corporations. (N. Y.) 102.

Stock.

The right of a married woman to hold stock in a national bank of another state is held to depend on the law of her domicil. (Md.) 119.

One holding stock as an attorney or trustee of an infant without anything to show that fact on the books of the corporation is held liable as a stockholder. *Id.*

Increase of stock.

The increase of the capital stock of a corporation by an amendment of its by-laws is held valid, where the Constitution of the company provides that the amount of capital may be fixed by the by-laws. (C. C. App. 6th C.) 616.

A contract between proposed shareholders of a corporation which has not yet come into existence, to the effect that they will not transfer their shares without giving the company an option to purchase them, is held to be ineffectual in favor of the corporation, and not to be ratified by its mere issue of stock to such persons. (R. I.) 299.

Bonus stock.

Corporate stock issued as a bonus to third persons to induce them to advance money to the corporation on mortgage security is held valid as against existing creditors of the company. (Mich.) 490.

Charities.

An incorporated institution for the blind largely supported by state appropriations is held to be a charitable institution so far as it supports indigent pupils, and therefore subject to that extent to the visitation and rules of the board of charities, although as to paying pupils it may be only an educational institution. (N. Y.) 591.

In a case which reviews the authorities quite extensively, it is held that a bequest to an incorporated charitable institution in excess of the amount which general laws permit such corporations to take is merely voidable, and can be avoided only by the state itself, and not by the relatives of the deceased. (Me.) 339.

Foreign corporations.

A contract of an unauthorized foreign corporation is held valid in a Rhode Island case under statutes which do not expressly declare it void. (R. I.) 545.

The right of a foreign corporation to purchase or solicit wool by an agent is upheld as a transaction in interstate commerce, although the corporation had not complied with the conditions imposed by a statute on the right to do business in the state. (Mont.) 367.

The court refuses to interfere with the internal management of a foreign electric light company at the suit of a resident stockholder, although the tangible property of the company consisting of conduits in the streets, is within the state. (Pa.) 638.

Loan association.

Notice of withdrawals given before the appointment of a receiver of a loan association are held to give no priority after insolvency where the by-laws provide that not more than 30 per cent of the receipts of the loan fund should be applied on withdrawals. (Iowa) 183.

Seceding members—name taken.

The members who withdrew from the Knights of Pythias and formed a new order because the old order would not permit them to have the ritual in the German language are held entitled to take for the new organization the name "Improved Order, Knights of Pythias." (Mich.) 658.

Limited partnership.

For the purpose of an action against a Pennsylvania limited partnership in Massachusetts, it is held that it is to be regarded as an association or partnership, and can be sued in its company name. (Mass.) 791.

The formation of a limited partnership is held not to make the members liable as general partners merely for technical irregularities. (Mich.) 798.

Payment of subscriptions to the capital stock of a limited partnership is held sufficiently made by promissory note, where that was immediately turned into money. (Mich.) 794.

Religious society.

The call of a Presbyterian society to a pastor is held, under the rules of that church, to be ineffective until formally sanctioned by the presbytery, and the refusal thereof to be fatal to the contract. (Okla.) 687.

IV. DOMESTIC RELATIONS.

The rule that the welfare of the child is the determining consideration in awarding its custody is applied to a contest between a guardian appointed where the child has actually resided for several years and a guardian appointed in another state on the father's application at his technical domicil. (Conn.) 471.

The provision in a statute that divorce ter-

minates marriage, except that neither party shall be capable of contracting marriage with a third person until the time for an appeal has expired, renders a marriage within that time, though contracted in another state, utterly void. (Or.) 863.

The common-law right of a husband to a right of action for the loss of consortium through an injury to his wife caused by negligence is not taken away by the Massachusetts statutes giving married women the control of their time and actions. (Mass.) 631.

The right of a married woman abandoned by her husband to an action in her own name without joining him against one who caused the abandonment is sustained, where the statutes give her the right to contract and also to set up as a counterclaim when sued for tort any damages arising out of the same transaction. (N. C.) 242.

A diamond shirt stud worn by a husband is held to be a family expense within the meaning of a statute charging such expenses upon the property of both husband and wife or either of them. (Iowa) 847.

The liability of a wife to support her husband out of her separate estate in the exceptional case provided for by the California statute is held to be enforceable by an order of court in an equity proceeding because of the want of an adequate remedy at law. (Cal.) 175.

For improvements made by a husband's earnings on his wife's land it is held that she is liable to his creditors up to the amount of the enhancement of the value of her property thereby, and that the husband cannot be charged with any rent for the use of the premises by the family,—at least in the absence of any agreement therefor. (Me.) 190.

V. Fiduciaries.

The attempt of a receiver to enforce the individual liability of stockholders for debts of the corporation is denied in the absence of a statute authorizing it. (Minn.) 415.

See also *supra*, III.

VI. Torts; Negligence; Injuries.

The actual use of force is held not to be necessary to constitute intimidation by strikers who make a display of force. (Pa.) 382.

An action against a hospital for an unauthorized autopsy on the body of a child is held maintainable by the father who placed the child there for treatment. (Mass.) 413.

Negligence.

For damages done by drifting logs which had broken from a raft in a violent storm without fault of the owner, and had been left floating until a later violent storm arose, it is held that the owner is not liable, although he has not definitely abandoned them, if he is proceeding to recover them as fast as he can without unreasonable expense. (La.) 134.

A bystander injured by the bolting of a vicious horse from a race track is denied a right of action where no negligence on the part of the fair association is shown, and the owner of the horse is not shown to have known that he was vicious, while the bystander negligently remained where he had been warned against standing. (N. C.) 156.

As to premises.

A defective railing on a platform of a grain elevator is held not to make the owner liable to a person who is injured by its fall while he is leaning against it, as this is putting it to a use for which it is not intended. (Mich.) 665.

A landlord is held not to be liable for injury to a person delivering goods to a tenant by falling into an elevator well which was dangerously defective because of a large opening between the elevator and the well, where the tenant had covenanted to repair and the landlord was not in possession or control of the elevator. (R. I.) 716.

An excavation on railroad premises, so near a path to a station platform as to be dangerous, is held to be insufficient to make the railroad company liable for the death of a child who falls into it while playing along the path. (Tex.) 573.

Injured passengers.

It is held to be negligence, as a matter of law, to jump from an electric street car running 4 or 5 miles an hour. (Pa.) 786.

A passenger on a railway train stopped by tanks of burning oil upon the track is not allowed to recover against the carrier for injuries caused by an explosion of the oil when he had unnecessarily exposed himself by going too close to it. (Wis.) 419.

Injury to a passenger on an excursion boat by the careless discharge of a loaded gun in the hands of another passenger is held to make the carrier liable if it failed to exercise reasonable care after there was reason to expect or anticipate danger. (Tenn.) 427.

The authority of a brakeman on a freight train to eject a passenger so as to make the master liable for his acts in so doing is held not to be implied from rules prohibiting such trains to carry passengers, and requiring the brakeman to know the rules, where it is also provided that such brakemen are subject to the orders of the conductors. (Mich.) 666.

Others injured by cars.

The negligence of a boy in standing so near a passing train as to be drawn under it by a current of air is held to be a question for the jury, and not of law for the court. (Mo.) 633

Operating a dummy line of cars in a street at slow rate with occasional stops is held not to be negligence so as to create a liability for injury to a child which gets on the car and falls or is thrown off, although precautions were not taken to keep children from getting on. (Ala.) 458.

The rule that persons crossing a railroad must look and listen is held applicable to those operating an electric street car at a crossing, but the failure of the railroad company to give

the statutory signals is held to preclude an action by it against the electric company for damages resulting from a collision. (N. J.) 516.

The rule that one must stop, look, and listen before attempting to cross a railway track is held applicable to an electric railway in a street, by the supreme court of Louisiana. (La.) 708.

Running a tank car along an electric street railway with black coats hanging and waving from it so as to frighten horses is held to make the street railway company liable unless reasonable care to prevent such result is exercised, and this is held to be a question for the jury. (N. J.) 236.

The fact that a statute requiring signals at railroad crossings does not apply to farm crossings is held not to exempt the railroad company from liability to give signals, when required in the exercise of reasonable care, at peculiarly dangerous farm crossings, when a train is running at great speed. (Minn.) 302.

VII. PROPERTY RIGHTS; WILLS; LIENS.

A remarkable case as to the effect of a consent decree in partition giving one party a life estate only with remainder at her death to children then living or issue of such as may be dead holds that the remainder is contingent, and the fee during such contingency is not in abeyance but continues to abide in the life tenant, and upon her death without children or their issue surviving becomes absolute again, subject to disposal by her will. (Tenn.) 679.

Expectancy.

A written instrument to transfer a share of a mere expectancy is held not to be valid, where there was no consideration or any controversy or dispute to be settled thereby. (Pa.) 378.

Coal.

Adverse possession of the surface of land is held not to affect the title to underlying coal. (Pa.) 826.

Oil.

A life tenant who is also a tenant in common of the reversion is held liable to account for oil which he extracts from the land under a supposed right to do so, believing himself to be the sole owner. (W. Va.) 694.

Fixtures.

A striking case of the removal of fixtures from a mortgaged building is one in which what is called the standing finish, including window and door sashes, jambs and trimmings, wainscoting, baseboards, mantel piece, and doors were removed in default of payment, in accordance with a contract between the contractor and the mortgagor to the effect that the title should remain in the contractor until payment was made. (Wash.) 267.

Easement to use elevator.

The right to use an elevator to convey goods from a sidewalk to a basement or *vice versa* is held not to be appurtenant to a lease of the basement, where such use was not originally intended to accompany the use of the basement, and the connection between them was through another room which was not a common passageway. (Mass.) 149.

Waters; riparian rights.

Although a city may have wrongfully taken considerable part of the waters of a stream to the damage of a riparian owner he cannot require the sewage into which the waters have gone to be returned to the stream above his mill, but the disposal thereof must be left to the control of the city. (Conn.) 474.

A riparian proprietor upon navigable water is held not to be entitled to any compensation for cutting off his access to the water by municipal improvement of the water front for the benefit of navigation, as his riparian rights are subordinate to navigation. (N. Y.) 606.

A diversion of water from a stream to nonriparian lands by one to whom the riparian owner has assumed to grant such right is held unlawful as against a lower riparian proprietor. (Cal.) 181.

The submergence of lands dedicated for a public park with the express condition that no buildings shall be erected thereon does not free it from the restrictions on the subsequent reclamation of the lands. (Ill.) 849.

The right to go in boats and hunt wild fowl on a marsh surrounding an island in a river where the water is 10 or 12 inches deep, but where the land is at other times dry and covered with rushes, is denied to those who do not get the consent of the owner of the land, as such water is not navigable. (Mich.) 205.

Deed.

An attempt by the grantor to prevent the passing of title by a deed to his natural son which he had delivered to a deputy clerk with instructions to have it proved by the subscribing witness and registered, which was not done at the time because of the clerk's absence, was held ineffectual, although he obtained the deed again before it was actually proved, and destroyed it, and the grantee knew nothing of the delivery or the recall of the deed. (N. C.) 238.

Railroad fence.

Inclosed lands through which a railroad right of way must be fenced are held to be those which have such line of obstacle of any sort between them and other land as to set them off as private property, although the fence is not at all times maintained as a lawful fence which will prevent cattle from passing through at any point. (Va.) 570.

Trust for charity.

A devise in trust for a local branch of the Salvation Army is held invalid for want of an ascertained beneficiary unless the society becomes incorporated. (Minn.) 669.

A bequest in trust for a chapel is held to have failed altogether, and not to be, under the *cy près* doctrine, applicable to general parish purposes when the purpose of the testatrix fails because the people have become too few and too poor to support the chapel. (Mass.) 629.

Liens.

The fact that the materials in a building were furnished under a contract made outside the state is held insufficient to prevent a lien

therefor under a statute providing for a lien in favor of any person who has furnished materials for a building in the state. (N. Y.) 410.

The sale of a narrow strip from the front of property for the sole purpose of avoiding a street improvement assessment for which the city has made a contract, but before the lien of the assessment attaches, is held void as against such assessment. (Iowa) 480.

Judgment; priority.

A mortgage for an antecedent consideration filed the same day and a little before the entry of a judgment is held to have no priority, but to stand on a footing of equality with the judgment. (Wash.) 257.

The statutory provision that a judgment shall be a lien from the first day of the term is held to give it priority over a mortgage made during the term and before the judgment. (Neb.) 243

Will.

Proof of a lost will by declarations of the testator is held insufficient, and testimony of a witness as to such contents, if based entirely on the reading of the will to him by the testator, amounts only to evidence of such declarations. (Neb.) 433.

A will executed jointly by husband and wife, although it cannot be probated as their joint will while one of them is living, is held entitled to probate as the will of the husband during the wife's life, subject to be again probated as her will upon her subsequent death. (N. C.) 289.

VIII. CIVIL REMEDIES.

Comity.

The right to maintain an action in a Federal court between citizens of different states for negligence occurring in Mexico is sustained against objections growing out of the dissimilarity between the laws of Mexico and of the state in which the action is brought. (C. C. App. 5th C.) 387.

Transitory action.

An action by a mortgagor for wrongful sale of the premises by the mortgagee under a power in the mortgage when there had been no default is held to be transitory, and to entitle him to full damages if he elects to affirm the sale, even if the sale is void and he might redeem the premises. (Mass.) 145.

Action for mistake in telegram.

A banker cashing a draft on the faith of a telegram is held to have no right of action against the telegraph company for a mistake in the amount where the message was not sent to him and the banker owed him no duty. (C. C. App. 8th C.) 684.

Process.

Service on the insurance commissioner of process against a foreign insurance company is held to give no jurisdiction where he has not been appointed by the company as required by statute, although it was doing business in the state, if these facts appear on plaintiff's own showing and the company has not appeared to contest the jurisdiction, and is not shown to have received any notice, either actual or constructive. (R. I.) 546.

Service on a nonresident joint stock association engaged in the business of a common carrier is held to be properly made upon a local agent where it appears that there is no officer or superior agent in the state. (Minn.) 225

An attorney while going to his own county from the supreme court is held exempt from service of process. (Mich.) 663.

Injunction.

An injunction against the diversion of water from a mill dam is allowed notwithstanding the fact that the injury from the diversion would be trivial compared with that which may be suffered by those who are restrained from making it. (Mich.) 355.

Mandatory injunction.

A mandatory injunction to compel the specific performance of a railroad lease by requiring the operation of the road by the lessee is granted against the contention that the lease was too indefinite to be enforced, and that it was a continuing contract requiring the exercise of skill and supervision. (Ky.) 809.

Mandamus.

Mandamus to compel a township trustee to meet with others who have met and because they could not get a quorum have adjourned from day to day can be granted when the law requires the trustees to meet at that time to appoint a county superintendent. (Ind.) 829.

Payment into court.

Taking from the court money paid in as full payment is held to amount to a discharge of the obligation, although the plaintiff takes it protesting that more is due, if the defendant does not waive the condition on which he paid it into court, and no rule of court is made modifying the conditions. (Tenn.) 549.

Mortgagee's liability in receivership.

A novel question in the law of receiverships is that of the liability of a railroad mortgagee who obtains the appointment of a receiver on foreclosure for the wages of the receiver's employees when the trust fund is insufficient to pay them. The court holds that there is no such liability unless it is imposed by the court as a condition of appointing or continuing the receiver. (Or.) 424.

Property subject to creditors.

A perpetual scholarship in a college, granted in consideration of a donation thereto and entitling the donor to keep one pupil in the college free of charge, is held not to be such property as can be taken by his creditors. (Tenn.) 758.

Time.

Including Sunday preceding a term of court which begins on Monday in the computation of the twenty days for which an action must be filed in order to be triable at the term is held correct,—especially where this is in accordance with the long practice of the court, since nothing is to be done on that day. (Ga.) 749.

Damages.

The right to recover damages for fright or nervous shock is denied in an action for negligence, even if physical injuries result there-

from, if these result solely from the mental disturbance. (Mass.) 512.

The owner of land left in a cul de sac by vacating another portion of the street on which it abuts is held to be within a statute giving damages for injuries to land caused by vacating a street. (Pa.) 275.

Presumption.

A presumption of negligence from the escape of electricity from a street railway, causing shock to a horse in the street, is held to be a proper application of the maxim *Res ipsa loquitur*. (N. J.) 637.

Opinions of witnesses.

On a question of sanity or insanity, nonexperts are held competent to testify, where they show sufficient reasons for the foundation of their opinions. (Ga.) 721.

Unanimous decision.

A unanimous decision to appeal, from which leave is necessary, is held to be made when one of the judges is absent, but the remaining four, who constitute a quorum, all agree. (N. Y.) 615.

IX. CRIMINAL LAW AND PRACTICE.

Jurisdiction.

A statute attempting to give police courts jurisdiction of offenses where the fine does not exceed $200 and the term of imprisonment does not exceed one year is held unconstitutional because it denies the right to a jury except on appeal, and also the right to an information before prosecution. (N. H.) 228.

Fraudulent banking.

A banker who fails to repudiate the act of his son in receiving a deposit after the insolvency of the bank is known, and who does not return the money but makes an assignment, including that money among the assets, within four days, is held guilty of receiving the deposit in violation of statute. (Iowa) 485.

Betting.

Putting up a sum of money as a forfeit on an agreement to put up within a certain time a larger sum equal to that which the other party has put up is held not to constitute a bet. (Tex.) 719.

Sending money to another state to be wagered on a horse race in a third state is held punishable by the state from which it is sent, although such wagers were lawful in the state where the wager was made. (Va.) 640.

Insane convict.

The right of a convict to have a jury trial on an issue of insanity which is alleged to have supervened after conviction is denied, and is held not to be necessary to due process of law. (Ga.) 577.

Contempt.

Newspaper articles charging a judge, who is a candidate for re-election, with corruption and partiality in actions already ended, are held to be beyond the power of the judge to punish as a criminal contempt, and an affidavit alleging their truth, filed in response to an order to show cause, does not constitute a contempt if the original publication did not. (Wis.) 554.

Pardon.

The forfeiture of a bail bond is held to be unaffected by a subsequent pardon. (Ky.) 808.

Extradition.

The waiver of requisition papers by a fugitive, and his submission to arrest upon a warrant, are held to be a voluntary return into the jurisdiction which authorizes his prosecution for any other crime than that named in the warrant. (Kan.) 756.

The right of the governor to revoke his warrant for the surrender of a fugitive from justice at any time before his removal from the state is sustained, and the power of the court to inquire into the cause of such revocation is denied. (Minn.) 224.

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2. A banker who fails to repudiate the act of his son in receiving a deposit contrary to his instructions, an hour or two before the bank finally closed and when its insolvency was known, and who fails to return the money, but within four days after its receipt includes it in a general assignment for the benefit of creditors, is guilty of accepting and receiving the deposit knowing himself to be insolvent, in violation of the Iowa statute. *State* v. *Eifart* (Iowa) 485

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2. A note is not subjected to equities in the hands of a holder for value by the fact that it is payable to a person, "trustee," if inquiry would have disclosed the fact that the word was merely descriptive, and that the note was made to him for the purpose of enabling him to turn it over in consummation of a subscription to the stock of a syndicate, which was accomplished by his indorsement and transfer. *Tradesmen's Nat. Bank* v. *Looney* (Tenn.) 837

3. The liability of the indorser of a note is not affected by the addition of the word "trustee" to his name. *Id.*

4. The drawer of a draft which is lost in course of transmission through the mails from the payee to his correspondent in another city where the drawee is located is relieved from liability, where the payee fails to present the draft or to discover the loss for nearly six months, although the fact of the loss appeared by report from the correspondent showing that the draft had never been received. *Bank of Gilby* v. *Farnsworth* (N. D.) 843

5. A duplicate draft given by the drawer of one which has been lost does not, as a matter of law, import a promise to pay the draft or waive a defense to liability thereon, where it was done to accommodate the payee and enable him to collect the money from the drawee. *Id.*

6. A drawer's promise to pay a draft, or his recognition of liability thereon, with full knowledge of the facts releasing him from liability, is a waiver of his right to insist that he has been released by failure to take the necessary steps to charge him. *Id.*

7. Notice to the indorsee that an indorser has no interest in the transaction will not relieve the indorser from liability on the note. *Tradesmen's Nat. Bank* v. *Looney* (Tenn.) 837

8. The liability of the maker of a note to an indorsee is not affected by a compromise of a suit by the indorsee against the indorser by which the latter is permitted to substitute securities in lieu of his liability as indorser, under the express agreement that the liability of the maker shall not be affected, and that when any money is collected from the maker it shall be applied to release the securities so deposited. *Id.*

9. A purchase for value in due course of trade, of a note, is made by a bank which discounts it and applies the proceeds to the payment of a prior note due by the indorser and an overdraft in a bank in which the indorser is interested. *Id.*

10. Enforcement of a note given as a subscription to the stock of a syndicate organized to purchase the property of a corporation, and which is used to pay for such property, cannot be defeated for fraudulent overvaluation of the property purchased, if the parties making the representation were representatives of the syndicate, and not of the vendor corporation. *Id.*

11. The rights of the owner of a patent under laws of the United States are not infringed by a state statute applicable to the sale of patent rights requiring the words "peddler's note" to be written across the face of all notes executed for articles sold by a peddler or itinerant person. *Union Nat. Bank* v. *Brown* (Ky.) 503

NOTES AND BRIEFS.

Failure to present draft. 843

Rights of bona fide holder; addition of word "trustee." 837

Payments indorsed on note as affecting negotiability. 823

BLIND.

See CHARITIES, 3.

BOARDS.

See COUNTIES.

BONDHOLDERS.

See ACTION OR SUIT, 1.

BONUS.

See CORPORATIONS, 12, 13.

BONUS STOCK.

See CORPORATIONS, NOTES AND BRIEFS.

BOUNDARIES.

See also WATERS, 7.

1. The title to lands described in a deed as bounded by a navigable river where the tide ebbs and flows ends at high-water mark. *Sage* v. *New York* (N. Y.) 606

2. Meadows, pastures, and marshes below high-water mark did not pass as appurtenant to the grant by Governor Nichols October 11, 1667, to the village of New Harlem, of lands bounded on one side by the Harlem river, together with all the soils, creeks, quarries, woods, meadows, pastures, marshes, waters, and other profits, commodities, emoluments, and hereditaments belonging to the lands "within the said bounds and limits set forth." *Sage* v. *New York* (N. Y.) 206

NOTES AND BRIEFS.

Boundaries; by river. 208

Change of, by sudden submergence of land. 850

BUILDING AND LOAN ASSOCIATIONS.

Notice of withdrawal before the appointment of a receiver of a building and savings association does not give priority to a shareholder of an insolvent association under by-laws providing for the payment of withdrawals "according to the priority of notice," but also providing that no more shall be paid in any month than 30 per cent of the cash receipts of the loan fund during that month, as these by-laws contemplate a going concern. *Ralfitt* v. *Wilcoxen* (Iowa) 183

NOTES AND BRIEFS.

Building and loan associations; rights as to withdrawal. 184

BUILDINGS. See also MUNICIPAL CORPORATIONS, 4; DEDICATION; INJUNCTION, 1.

1. A restriction against the erection of buildings upon land dedicated as a park is not removed by the change of the use of the buildings abutting thereon from residence to business purposes. *Chicago* v. *Ward* (Ill.) 849

2. The submergence of lands dedicated as a public park with the express condition that no buildings shall be erected thereon, as the result of heavy storms, and the subsequent reclamation by the city of such land, does not destroy the restrictions. *Id.*

NOTES AND BRIEFS.

Buildings; as nuisances, see NUISANCES.

BY-LAWS. See CORPORATIONS, 8, 9.

CARRIERS. See also MASTER AND SERVANT, 1; TRIAL, 13.

Of passengers.

1. A railroad employee engaged in working upon a bridge is a passenger while riding on a railroad train to his home after his day's work is done, where his contract entitles him to free transportation and he is not under any obligation to ride, or engaged in any service for the company while so riding. *McNulty* v. *Pennsylvania R. Co.* (Pa.) 376

2. The relation of carrier and passenger exists between a railroad company and a passenger on a train which is temporarily stopped by a burning tank of oil on the track, during which time passengers on the train are taken to a place some distance from the tank, while waiting for a train to receive them on the other side of the obstruction. *Conroy* v. *Chicago, St. P. M. & O. R. Co.* (Wis.) 419

3. A person taking passage on a railroad with a child in his charge of sufficient age to require payment of fare becomes liable for the payment of the child's fare, and upon refusal to pay the same both may be ejected from the train at the next station. *Lake Shore & M. S. R. Co.* v. *Orndorff* (Ohio) 140

4. In ejecting a person who has paid fare or presented a ticket, taken up, for failure to pay the fare of a child in his charge, the conductor must first return or offer to return the unused value of such ticket or fare over and above the fares of both for the distance already traveled; but if the ticket is such that a stop over may be had thereon the conductor may tender a stop-over check instead of money. *Id.*

5. A railroad company cannot enforce a contract between a messenger and an express company, that the railroad company will not be held liable for accidental injuries to the messenger, of the making of which the railroad company has no knowledge. *Louisville, N. A. & C. R. Co.* v. *Keefer* (Ind.) 93

6. A contract by an express company authorized by a messenger in its employ, that, in consideration that the express company be permitted to do business on a railroad, the railroad company will be exempted from all liability for injuries to the messenger, is binding on the messenger, since the railroad company in making it acts, not as a public, but as a private, carrier. *Id.*

7. The lawfulness of the act of a passenger on an excursion boat in using his gun with a loaded shell will not excuse the owners of the boat from liability for an injury resulting in such passenger's negligence or lack of caution, provided his action is such as to excite apprehension in a reasonably prudent person. *West Memphis Packet Co.* v. *White* (Tenn.) 427

8. The owner of a steamboat is required to exercise the utmost vigilance and diligence in protecting its passengers from injuries by the negligent and careless use of a loaded gun exhibited by another passenger where under all the circumstances such owner or his officers and agents might reasonably expect or anticipate the injury. *Id.*

9. A railway company is required to exercise only ordinary care and prudence towards a passenger who is temporarily prevented from continuing his journey by a burning tank of oil on the track, while he is waiting for a train to come from the other side of the tank to receive him. *Conroy* v. *Chicago, St. P. M. & O. R. Co.* (Wis.) 419

10. A railroad company is not required to restrain by physical force a passenger on a railway train which is temporarily stopped by a burning tank of oil on the track, from unnecessarily exposing himself to danger from an explosion of the tank by approaching too close to it. *Id.*

11. A burning tank of oil on a railroad track, the flames from which ascend several feet into the air, is sufficient notice of the danger of an explosion to a passenger on a train

temporarily stopped by the fire, to render unnecessary any caution to him from the company not to approach too near the tank *Id.*

12. A passenger on a railway train which is stopped for some time by tanks of burning oil upon the track, who from motives of curiosity and pleasure leaves a place fixed as a temporary station at a safe distance from the burning oil, and goes within 85 feet of the same and remains there for several minutes, is guilty of such contributory negligence as will prevent recovery for injuries caused by an explosion of a tank by which burning oil is thrown upon him. *Id.*

13. Jumping from an electric car moving at the rate of from 4 to 5 miles an hour is contributory negligence as matter of law. *Jagger* v. *People's Street R. Co.* (Pa.) 786

Of goods.

14. Exemptions in favor of a common carrier in bills of lading are to be strictly construed against the carrier, and any doubt or ambiguity therein is to be resolved in favor of the shipper. *N. K. Fairbank & Co.* v. *Cincinnati, N. O. & T. P. R. Co.* (C. C. App. 6th C.) 271

15. General and comprehensive words of exemption following an enumeration of particular dangers or risks in a bill of lading are to be construed to embrace only particular occurrences *ejusdem generis* with those enumerated, unless there is a clear intent to the contrary. *Id.*

16. Those devices and parts of a car which have no physical operation and connection with the locomotive, except by means of the cars of the train and the couplers between them, such as the axles of the car, are not within the term "machinery" in the phrase "accidents to boilers and machinery," as used in the exemption clause in a bill of lading, evidently intended to apply either to water or rail transportation. *Id.*

17. A railroad company is not liable for delivery to the consignee, to whom goods are billed, without notice to it that the bill of lading has been forwarded to a bank with a draft attached for collection, although the bill of lading is not produced. *Nebraska Meat Mills* v. *St. Louis S. W. R. Co.* (Ark.) 358

18. The right of a carrier to deliver to the consignee is not affected by the Arkansas statute declaring bills of lading negotiable, and that any person to whom the same are transferred shall be held the owner so far as to give validity to any pledge, lien, or transfer upon the faith thereof, and that no property specified therein shall be delivered except on the surrender and cancelation of the bill of lading,—except in cases where the bill of lading has been transferred. *Id.*

NOTES AND BRIEFS.

Carriers; ejection of custodian for nonpayment of child's fare. 140

Protection of one passenger against another. 428

Employee as passenger. 376

Negligence in getting on or off a moving street car:—Carrier must have been negligent; passenger takes the risk; how far negligence a question of law; how far act is due care as matter of law; question for jury; negligence dependent upon circumstances; particular classes of cases; to avoid danger; negligence after knowing peril; summary. 786

Scope of duty of employee of. 666

Contract against liability. 752

To whom may delivery be made under bill of lading:—Goods deliverable to order; must deliver to holder of bill of lading; necessity of production of bill of lading; shipper's rights; duplicate bills; shipping receipts; indorsement required; wrongful holder; effect of order to notify certain person; rights of true owner; delivery on carrier's copy; incidents of delivery; exceptions in bill of lading; instructions for collections; conflicting claims; acts of third persons; consignment to consignor's agent. 358

Exemptions in bills of lading; as to machinery. 272

CARRYING WEAPONS.

NOTES AND BRIEFS.

Constitutional right as to. 429

CASES CERTIFIED.

The question, "What judgment should be rendered in this action?"—is not a proper one for reservation under the Wyoming statute which authorizes questions, not cases, to be certified by the supreme court. *Rasmussen* v. *Baker* (Wyo.) 773

CHARITIES. See also CORPORATIONS, 2.

1. An institution which is educational to some extent may be also a charitable institution within the meaning and intent of the Constitution and statutes respecting charitable institutions. *People, New York Inst. for the Blind,* v. *Fitch* (N. Y.) 591

2. The fact that an institution is subject to the visitation of the superintendent of public instruction is not conclusive against regarding it as a charitable institution subject to the visitation of a board of charities. *Id.*

3. An incorporated institution for the blind, which has been supported and its property purchased and maintained mainly by appropriations from the state, although it may be only an educational institution so far as it educates paying pupils, is to be regarded, so far as it clothes, educates, and maintains indigent pupils at public expense or by donations from individuals, as a charitable institution subject to the visitation and the rules of the board of charities, under N. Y. Laws 1895, chap. 771, and also to the restriction under N. Y. Const. art. 8, § 14, against payments by municipalities for any inmate not received and retained pursuant to rules established by the state board of charities. *Id.*

4. A devise of property to be used in aiding the cause of home and foreign missions, made to an incorporated church which is authorized to acquire property for such purposes, is not a devise in trust for which there must be an ascertained beneficiary, but is an

absolute gift to the church. *Lane* v. *Eaton* (Minn.) 669

5. Incorporation within a reasonable time may make a local branch of the Salvation Army competent to become the beneficiary of a charitable trust by virtue of Minn. Gen. Stat. § 3048, providing that on the incorporation of a religious society any estate devised in trust for it shall vest in the corporation as fully as if it had been legally incorporated from the date of its religious organization. *Id.*

6. An unincorporated, voluntary association constituting a branch of the Salvation Army cannot be the beneficiary of a trust under Minn. Gen. Stat. 1894, chap. 43, requiring the beneficiary to be certain, or capable of being rendered certain. *Id.*

7. A bequest in trust to purchase a lot and build a chapel to be used forever for public worship under the auspices of the Roman Catholic church is for a public charitable use. *Teele* v. *Bishop of Derry* (Mass.) 629

8. The failure of the purpose of the testatrix in a bequest for the building of a chapel in her native place, which results because the people there are diminishing in number and are too poor to support the chapel, will not justify a diversion of the fund by the *cy près* doctrine to the repair of a neighboring parish church, or for a parish house, or the enlargement of a parish graveyard or otherwise for the general benefit of the parish, but the bequest must be held to have failed. *Id.*

NOTES AND BRIEFS.

See also CORPORATIONS.

Charities; what institutions are charitable. 591

Bequest for; what are; doctrine of *cy près*. 629

Distinction between trust and absolute gift for; gift to church or religious organization. 670

CHECKS.

Delay in presenting a check for payment does not release the drawer unless some loss has resulted to him from the delay. *Merritt* v. *Gate City Nat. Bank* (Ga.) 749

CLERKS. See also OFFICERS; VOTERS AND ELECTIONS, 2.

NOTES AND BRIEFS.

Clerks; right of women to be. 213

COAL. See ADVERSE POSSESSION.

COMMERCE.

The purchase and solicitation of wool by an agent of a foreign corporation, for shipment to other states wherein the principal business of the corporation is done, is a business directly pertaining to interstate commerce, which the foreign corporation is entitled to engage in without complying with the state statute imposing conditions upon its right to do business in the state. *Macnaughtan* v. *McGirl* (Mont.) 367

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Commerce; unlawful burden on. 672

COMMISSIONER.

NOTES AND BRIEFS.

Commissioner; of sewers, right of woman to be. 211

COMMON LAW.

The common law is simply the "right reason of the thing" in matters as to which there is no statutory enactment. *Wilson* v. *Leary* (N. C.) 240

COMMON SCHOOLS. See SCHOOLS.

COMMUNITY. See EVIDENCE, 7.

COMPULSORY SERVICE.

1. An action for damages cannot be maintained against members of an undertakers' association for refusal to furnish materials or render services at a funeral for one who has refused or failed to pay for such services previously rendered by some member of the association. *Brewster* v. *C. Miller's Sons* (Ky.) 505

2. One has the right to decline to enter into a business undertaking with another person, and any number of persons can enter into an agreement by which they can decline to assume business relations with or enter into any contract with one or more persons. *Id.*

CONFLICT OF LAWS. See also RECEIVERS, 4.

1. A statute providing that an association or partnership can be sued in its company name has no extraterritorial force or effect. *Edwards* v. *Warren Lindline & G. Works* (Mass.) 791

2. A transfer of stock in a national bank of another state, made in Maryland to a married woman, who is competent by the law of that state to be a stockholder, is valid irrespective of the law of the state in which the bank is situated. *Kerr* v. *Urie* (Md.) 119

3. A marriage contracted in another state by a resident of Oregon, who has been divorced in that state by a decree from which there is yet time to take an appeal, is absolutely void under 1 Hill's (Or.) Ann. Laws, § 503, providing that a divorce decree shall terminate the marriage "except that neither party shall be capable of contracting marriage with a third person" until the expiration of the period allowed for an appeal. *McLennan* v. *McLennan* (Or.) 863

4. That a contract for materials to be delivered "at and for" a building in New York was made and payable in another state does not prevent the materialman from obtaining a lien therefor, under N. Y. Laws 1885, chap. 342, providing that "any person" may have a lien who has furnished any materials which have been used in the erection of any building within the state. *Campbell* v. *Coon* (N. Y.) 410

Action for negligence.

5. The laws of Mexico defining negligence, and the civil rights resulting therefrom, are not too vague and indefinite to be administered by courts in this country. *Exey* v. *Mexican C. R. Co.* (C. C. App. 5th C.) 387

6. Dissimilarity between the law of Mexico, where the cause of action for negligence arose, and the law of Texas, in which an action is brought therefor, will not preclude the maintenance of the action, where the dissimilarity relates chiefly to matters of procedure, and does not involve any conflict with the settled public policy of Texas. *Id.*

7. The provision of the law of Mexico giving extraordinary indemnity for negligence considering the social position of the party injured does not constitute any reason why a court in this country should not entertain an action for negligence occurring in Mexico, when it is not asked to give such extraordinary indemnity. *Id.*

8. The fact that negligence may constitute a crime in Mexico does not make a civil action in this country for the negligence amount to the enforcement of a penal law of Mexico, when the civil liability does not depend, under Mexican law, upon the criminal prosecution. *Id.*

9. The requirement of an endeavor to procure an agreement and a compromise, which is found in the Mexican Code, art. 313, relates merely to procedure, and failure to comply therewith does not prevent an action in this country for negligence occurring in Mexico. *Id.*

10. The right, under the law of Mexico, to recover additional damages in a new suit, when they accrue after the first judgment for injuries caused by negligence, is a matter of remedy only, and does not prevent a court in the United States from enforcing a liability for negligence occurring in Mexico. *Id.*

NOTES AND BRIEFS.

See also LIENS.

Conflict of laws; as to actions for negligence. 392

Law of comity. 791

CONSPIRACY. See also COMPULSORY SERVICE, 2; CORPORATIONS, 3.

1. It is not unlawful for the undertakers of a community to associate themselves together, and agree to refuse to render service in their business to one who has refused or failed to pay a bill due to some member of the association for similar services previously rendered. *Brewster* v. *C. Miller's Sons* (Ky.) 505

2. The display of force by strikers, though none is actually used, is intimidation and as much unlawful as violence itself. *O'Neil* v. *Behanna* (Pa.) 382

3. All who participate personally in the unlawful conduct of strikers, or in such combination as makes them liable for the acts of the others done in pursuance of the common purpose, are liable for the damages done in the execution of such purpose. *Id.*

4. Strikers who induce newly employed men to break their contracts by meeting them and following them in considerable numbers as the new men enter the town, and calling them "scabs" and "blacklegs," sometimes surrounding them and endeavoring to pull them away, —are liable to the employer for any damages he may suffer in consequence. *Id.*

NOTES AND BRIEFS.

Conspiracy; against trader. 505

CONSTITUTIONAL LAW. See also MUNICIPAL CORPORATIONS, 5.

1. The New York Constitution of 1777, being adopted before the Constitution of the United States had been adopted, is a result of all the legislative power that the people of the state could exert untrammeled by any higher law. *Sage* v. *New York* (N. Y.) 606

2. Debates of a constitutional convention, although they may, for some purposes, but in a limited degree, be consulted in interpreting a doubtful phrase or provision of the Constitution, are as a rule deemed an unsafe guide. *Rasmussen* v. *Baker* (Wyo.) 773

3. The act of Congress admitting Utah as a state by accepting and ratifying the state Constitution invested all its provisions with all authority conferred by any act of Congress, even if the power given to provide for the transfer of causes pending in the territorial courts to the state and Federal courts was an invalid delegation of the power of Congress. *McCornick* v. *Western U. Teleg. Co.* (C. C. App. 8th C.) 684

Delegation of power.

4. An attempt to confer judicial authority on the county recorder in violation of Ohio Const. art. 4, § 1, is made by Ohio act April 27, 1896, for the registration of land titles, by giving him authority to determine the fact that a mortgage has been discharged or that a lien has become inoperative, and to enter those facts on the records, and also to correct memorials made or issued by mistake if the rights of bona fide purchasers or lien holders have not intervened. *State, Monnett,* v. *Guilbert* (Ohio) 519

5. Legislative powers are not delegated to the judiciary by Minn. Gen. Stat. 1894, § 5979, providing that the court or judge allowing a writ of mandamus shall direct the manner of serving the same. *State, Railroad & W. Com.,* v. *Adams Exp. Co.* (Minn.) 225

6. The provision of the Minnesota Constitution forbidding the delegation of the legislative powers to the judiciary is not violated by the provision of Minn. Gen. Stat. 1894, § 399, that the courts may direct the manner in which notice may be given to a common carrier of a hearing of an accusation that it refuses or neglects to obey any lawful order of the railroad and warehouse commission. *Id.*

7. The power given by the act of Congress to the constitutional convention of Utah to provide for the transfer of actions pending in the territorial courts to the state or Federal courts is not an invalid delegation of the power of Congress, as Congress has power to create local legislative bodies and invest them with legislative powers. *McCornick* v. *Western U. Teleg. Co.* (C. C. App. 8th C.) 684

Equality.

8. A statute forbidding the citizens of any other county from fishing in the waters of two specified counties without a license, without anything to forbid the citizens of those counties from fishing in other counties without a license, violates the constitutional guaranty of the equal protection of the laws. *State* v. *Higgins* (S. C.) 561

9. The exemption from a statute to license and regulate hawkers and peddlers, manufacturers, mechanics, nurserymen, farmers, and butchers, who sell their own manufactures or the products of their own nurseries or farms, makes an arbitrary distinction between the peddling by those persons and by a purchaser from them, and is therefore in violation of Minn. Const. art. 4, §§ 33, 34, prohibiting partial class legislation. *State, Luria,* v. *Wagener* (Minn.) 677

10. An insurance company is not denied the equal protection of the laws by a statute which in effect limits the liability of a railroad company for fires to the difference between the amount of loss and the amount of insurance on the property destroyed, thus depriving the insurer of the benefit of subrogation. *Leavitt* v. *Canadian P. R. Co.* (Me.) 152

Due process of law.

11. A statute authorizing administration upon the estate of a person who has left home and not been heard from for seven years is unconstitutional, since the administration upon the estate of a living person deprives him of property contrary to the law of the land or without due process of law. *Carr* v. *Brown* (R. I.) 294

12. The remedy by due course of law guaranteed by § 16 of the Ohio Bill of Rights extends to all the adversary rights of persons in property, and requires, before judicially determining such right, that jurisdiction of the person shall be obtained by process issued and served, although substituted or constructive service may be provided by the legislature when actual service is impracticable. *State, Monnett,* v. *Guilbert* (Ohio) 519

13. The determination against adverse claimants of real estate under Ohio act April 27, 1896, for the registration of land titles, made without any issuance and service of summons upon them, and without any notice except by one published in a newspaper "To whom it may concern," is in violation of the constitutional guaranty of due course of law. *Id.*

14. The refusal by a judge of the superior court at the time when judgment is to be entered or after it has been entered in a capital case, to allow or order a judicial investigation concerning the mental condition of the accused, either with or without the aid of a jury, is not a denial of due process of law, as the provisions of Ga. Pen. Code, § 1047, relating to inquisitions in such matters, are sufficiently comprehensive to cover all cases of alleged insanity beginning after the rendition of the verdict. *Baughn* v. *State* (Ga.) 577

15. The provision of Minn. Gen. Laws 1894, § 399, authorizing the courts to direct the manner in which service shall be made on the agents or servants of a common carrier of a notice of a hearing of an accusation that it refuses or neglects to obey a lawful order of the railroad and warehouse commission, is not objectionable as an attempt to obtain jurisdiction over the carrier without due process of law. *State, Railroad & W. Com.,* v. *Adams Exp. Co.* (Minn.) 225

16. Notice to the owner or occupant of premises before the passage of an ordinance by a board of aldermen, under authority of statute, requiring a privy vault to be filled up and destroyed, is not necessary to constitute due process of law, since his day in court can be had when sued for a penalty under the ordinance, or by bringing an action for damages if the authorities fill up and destroy the vault. *Harrington* v. *Providence* (R. I.) 305

Police regulation.

17. A statute requiring railroads and transportation companies to turn over to a storage company or public warehouseman all property which the consignees fail to call for or receive within twenty days after notice of its arrival (Minn. Gen. Laws 1895, chap. 149, § 11), is unconstitutional and void, not being a lawful exercise of the police power of the state. *State* v. *Chicago, M. & St. P. R. Co.* (Minn.) 673

18. A city ordinance providing that no persons shall establish or conduct any steam shoddy machine or steam carpet-beating machine within 100 feet of any church, schoolhouse, or dwelling-house, is valid under Cal. Const. art. 11, § 11, providing that any city may make or enforce within its limits all such "police regulations as are not in conflict with general laws." *Ex parte Lacey* (Cal.) 640

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Constitutional law; rule of construction. 774
Due process of law; what constitutes. 519
Privileges and immunities of citizens; due process of law; equal protection of laws; police power. 673
Equal protection of laws. 675
Equal privileges. 677

CONTEMPT.

1. Newspaper articles charging a judge who is a candidate for re-election with corruption and partiality in actions already past and ended, but not referring to any pending litigation, cannot be punished as a criminal contempt, although they are distributed to officers of the court and to persons summoned as jurors therein, as well as generally circulated. *State, Ashbaugh,* v. *Eau Claire Cir. Ct.* (Wis.) 554

2. An affidavit alleging the truth of newspaper statements filed in response to an order to show cause why the affiant should not be punished for a contempt because of such publication, cannot be itself held to constitute a contempt when the original publication did not. *Id.*

3. The obligation of a wife to pay money for the support of her husband under an order of court in a case within Cal. Civ. Code, § 176,

is not a debt within the provisions of the Constitution against imprisonment for debt. *Livingston* v. *Los Angeles County Super. Ct.* (Cal.) 175

NOTES AND BRIEFS.

Contempt; by newspaper publication; power to punish; affidavit justifying. 554

CONTINUANCE AND ADJOURNMENT.

1. An application for the continuance of a criminal case for the absence of witnesses, which complies strictly with all the requirements of Ga. Pen. Code, § 962, should be granted or the trial postponed until the attendance of such witnesses can be had, where it appears that their evidence is material on the controlling issue in the case, and also that defendant cannot as fully and satisfactorily make such proof by any other witnesses. *Ryder* v. *State* (Ga.) 721

2. A continuance of a trial for murder, in which the defense of insanity is set up, should be granted for the absence of witnesses by whom defendant expects to prove his insanity, where they have been acquainted with him all his life, and one of them is a physician who is familiar with the nature of the disease which is claimed to have caused the insanity; and others are defendant's brothers, although there are other witnesses, including near relatives, by whom many of the facts could be proved, and although the absent witnesses had not actually seen defendant for some time before the homicide. *Id.*

CONTRACTS. See also DAMAGES, 1, 2; INNKEEPERS; MORTGAGE, 4.

Validity.

1. A contract of a foreign corporation, if not contrary to public policy, is not invalid because the corporation has not complied with R. I. Gen. Laws, chap. 253, §§ 36–41, requiring it to appoint a resident of the state as its attorney but not declaring that such contract shall be void, while another statute expressly provides that in case of a foreign insurance company the contract shall be valid. *Garratt Ford Co.* v. *Vermont Mfg. Co.* (R. I.) 545

2. The illegality of a transfer of stock to the president of a corporation for the purpose of having it used to corrupt government officials for the benefit of the corporation will not prevent the owner from recovering the stock by action, if it has not been used for the illegal purpose, but has been taken by the transferee for his own use. *Wassermann* v. *Sloss* (Cal.) 176

3. An abandonment of effort to obtain a codicil to a will cannot constitute a valuable consideration for the assignment of an expected interest in the estate, as it is against public policy to recognize such importunity as the legitimate basis of a contract right. *Re Lennig's Estate* (Pa.) 378

4. Public policy does not require the avoidance of a contract by an employee not to disclose secrets which must necessarily be imparted to him by his employer to enable him to do his work. *O. & W. Thum Co.* v. *Tloczynski* (Mich.) 200

5. Insurance of a carrier of passengers against liability for injuries to them is not contrary to public policy. *Boston & A. R. Co.* v. *Mercantile Trust & D. Co.* (Md.) 97

6. A contract by a railroad employee which gives him his election, after an injury, to take the benefits of a relief fund to which he as well as the railroad company has contributed, or to sue for damages in a court of law, and providing that his acceptance of such benefits will release the employer from liability, —is not contrary to public policy. *Eckman* v. *Chicago, B. & Q. R. Co.* (Ill.) 750

Performance; breach.

7. An architect's certificate that a building has been actually completed, provided for in the building contract, need not be obtained by one who furnished materials to the contractor, where the latter abandons the work and the owner finishes the same in accordance with a provision of the contract. *Campbell* v. *Coon* (N. Y.) 410

8. The repudiation of a contract before the time for performance arrives does not constitute a breach thereof, but the only effect is to dispense with an offer by the other party to perform, if such repudiation is not withdrawn before the stipulated time for performance. *Stanford* v. *Magill* (N. D.) 760

9. The mere making of a second executory contract to sell property which the vendor had already agreed to sell is not of itself a breach of the prior agreement, as it does not incapacitate him from carrying it out. *Id.*

10. The vendor in a contract to sell property of a certain description, no particular articles being agreed upon, can, before the day of delivery, after an *ex parte* selection of the property which he intends to deliver, sell that property to another without breach of his agreement, as the law requires only that he deliver property of the prescribed description when delivery is due. *Id.*

11. A party having an option to deliver property under a contract at any time between certain dates, if he intends to treat the time of performance as having arrived and therefore to hold a repudiation of the agreement by the vendee before the last day of performance has arrived as a breach thereof, must give notice to the vendee of his exercise of his option for an earlier delivery; but he need not offer to perform, as that is waived by the vendee's refusal to perform. *Id.*

Impairing obligation.

12. The vested rights of owners abutting upon a public park dedicated with the restriction that no buildings shall be erected upon it, fixed by the acts of dedication, the acceptance of the city, and the acquiescence of the public and abutting owners, cannot be changed by the legislature granting the city the right to convey such land for railroad purposes, as such action would be an unconstitutional impairment of such rights. *Chicago* v. *Ward* (Ill.) 849

13. The obligation of a contract of fire insurance made at a time when a railroad company was by statute liable for fires communi-

cated by its engines is not impaired by a subsequent amendment of the statute restricting the liability of the railroad company in effect to the difference between the loss and the amount of insurance on the property, as the parties to that contract cannot limit the right of the legislature to change the statutory liability. *Leavitt* v. *Canadian P. R. Co.* (Me.) 152

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COPY. See DEFINITIONS.

CORPORATIONS. See also BANKS, 1; BENEVOLENT SOCIETIES; COMMERCE; CONFLICT OF LAWS, 2; CONTRACTS, 1, 2; COURTS, 6, 9–11; EVIDENCE, 8; JUDGMENT, 4; PLEADING, 4; RECEIVERS; STATUTES, 6; WRIT AND PROCESS, 3.

1. A water company entering upon the business of furnishing a public water supply under a constitution giving a tribunal the right to fix water rates is bound to submit to the conditions thereby imposed. *San Diego Water Co.* v. *San Diego* (Cal.) 460

2. A bequest to an incorporated charitable institution, of property in excess of the amount which such corporations are allowed by general statute to take and hold, if it is not prohibited by the statute of wills or by the charter of the corporation or by the law which authorized its organization, and there is no penalty for taking in excess of the limitation, is not void, but merely voidable, and can be avoided by the state alone. *Farrington* v. *Putnam* (Me.) 339

3. The private rights or interests of a dealer in plumbers' supplies are injured or put in hazard by proceedings of an incorporated plumbers' supply association which is not engaged in the trade and with which he has no dealings nor any relation by which its legitimate interests are affected by the question whether he shall have credit in the market, when it officiously and without right assumes to notify sellers of such goods that he has not paid his accounts, and to debar a considerable number of dealers from selling to him upon credit. *Hartnett* v. *Plumbers' Supply Asso.* (Mass.) 194

4. Proceedings to compel persons to pay demands of members of a plumbers' association by threatening to expose their alleged delinquencies and inform certain dealers that they owed overdue accounts, and thereby prevent them from obtaining credit in the business which they are carrying on, are not germane to the purpose declared by a plumbers' supply association "of promoting pleasant relations among its members," or "of establishing and maintaining a place for social meetings," or of "discussing, arbitrating, and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business." *Id.*

Stock and stockholders.

5. A contract to offer stock to the corporation at the lowest price at which the holder is willing to sell, before offering it to any other purchaser, is not binding in favor of the corporation when it was made by proposed stockholders before the corporation was in existence as a legal entity. *Ireland* v. *Globe Milling & R. Co.* (R. I.) 299

6. A corporation cannot enforce a contract between proposed incorporators to the effect that they will not transfer their stock without giving the option of purchase to the corporation; but the remedy, if any, for breach of the contract, would be a personal one against the offending stockholder. *Id.*

7. The mere issue of certificates of stock by a corporation does not amount to a ratification by it of a contract made before it came into existence between the proposed incorporators to the effect that they would not transfer their shares without giving the company an option to purchase them. *Id.*

8. A resolution of the members of a corporation for the increase of its capital stock is a sufficient by-law for that purpose. *Peck* v. *Elliott* (C. C. App. 6th C.) 616

9. An increase of the capital of a corporation by an amendment of a by-law is valid when by the constitution of the corporation it is given power to fix the amount of capital by by-law. *Id.*

10. The rule against an implied power of a corporation to increase the amount of its capital when that is definitely fixed by the charter or statutory articles of incorporation has no application where the power to determine upon the capital to be engaged is made one of the matters for internal regulation by by-law. *Id.*

11. A transfer of a patent right to a corporation in partial payment of a subscription to stock as a mere device for evading a condition that the stock must be taken at par, followed by a retransfer to the subscriber at a nominal consideration, is insufficient to relieve him from liability to pay for the stock at its par value. *Id.*

12. A mortgage by a corporation to secure money advanced to it in good faith cannot be reduced in favor of liens of subsequent creditors, because, at the time of, and as an inducement to, the advance, the mortgagees received stock of the corporation as a bonus. *Dummer* v. *Smedley* (Mich.) 490

13. Existing creditors of a corporation cannot impeach a transaction by which the corporate stock is increased and issued as a bonus to third persons to induce them to advance money to the corporation on mortgage security, so as to avoid the mortgage and treat the advance as a payment for stock. *Id.*

14. One who holds stock as the self-appointed attorney or trustee of an infant, without anything on the books of the corporation to show that the holder is not the actual and beneficial owner, is liable as a stockholder. *Kerr* v. *Urie* (Md.) 119

15. The failure of a corporation to pay a tax required on the increase of its capital stock

cannot be set up by a subscriber to such stock as a defense against his liability, when he has become president of the corporation by virtue of that stock alone. *Peck* v. *Elliott* (C. C. App. 6th C.) 616

16. A proceeding under the statute for an execution for unpaid subscriptions to corporate stock cannot be maintained after the appointment of a receiver for the purpose of collecting the assets of the corporation. *Rouse, H. & Co.* v. *Detroit Cycle Co.* (Mich.) 794

17. A receiver appointed in an action for the sequestration of the assets of an insolvent corporation, under the provisions of Minn. Gen. Stat. 1894, chap. 76, has no authority, except in cases where it is otherwise provided by statute, to enforce the individual liability of the stockholders for the debts of the corporation. *Minneapolis Baseball Co.* v. *City Bank* (Minn.) 415

Dissolution; disposition of property.

18. A court of equity cannot dissolve or wind up the affairs and sequestrate the property of a corporation without express statutory authority. *Wallace* v. *Pierce-Wallace Pub. Co.* (Iowa) 122

19. The exercise by a private corporation of franchises or privileges not conferred by law may be a serious usurpation and encroachment which, when it injures or puts in hazard the private rights of any person, will justify the exercise by the court of the powers given by Mass. Pub. Stat. chap. 186, §§ 17–25, on an information in the nature of a quo warranto. *Hartnett* v. *Plumbers' Supply Asso.* (Mass.) 194

20. A conveyance in fee to a corporation which has a limited existence is not limited to the life of the corporation, and does not give the grantor a resulting trust which will take effect when the corporation ceases to exist. *Wilson* v. *Leary* (N. C.) 240

21. A person employed at a salary of $100 per month by a mowing machine company to go from place to place and fix and set up machines and unpack and repack them when necessary, as well as to sell or solicit sales, is an employee within the meaning of N. Y. Laws 1885, chap. 376, giving a preference to claims of wages of "employees, operatives, and laborers" of corporations. *Palmer* v. *Van Santvoord* (N. Y.) 402

22. A preference of claims of clerks, servants, and employees of an insolvent corporation, does not extend to a trust fund devoted to a special purpose, as in case of a deposit for the benefit of policy holders of an insurance company. *Boston & A. R. Co.* v. *Mercantile Trust & D. Co.* (Md.) 97

23. An insurance adjuster, or a person rendering services of a higher degree than a clerk, is not included among the "clerks, servants, and employees" of an insurance company, to whom the statutes give a preference in distribution of the company's assets when it is insolvent. *Id.*

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Employee of; preference of wages. 402

Foreign; right to do business. 368

Power of equity over foreign company. 639

Foreign; validity of contracts of. 541

CORPSE.

An action against a hospital for an autopsy performed upon the dead body of a child without the consent of the father, who was the natural guardian, and who intrusted the child to the hospital for treatment, does not fail on the ground that there is no right of property in a dead body. *Burney* v. *Children's Hospital* (Mass.) 413

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Corpse; action for mutilation of. 413

COSTS AND FEES.

See also INSURANCE, 31.

Attorney's fees cannot be allowed to unsuccessful proponents of a will in the contest proceedings, but any allowance therefor must be made out of the estate in the course of administration. *Clark* v. *Turner* (Neb.) 433

COTENANTS.

See also ACCOUNT, 2; ESTOPPEL, 6.

It is waste in a tenant in common to take petroleum oil from the land for which he is liable to his cotenants to the extent of their right in the land. *Williamson* v. *Jones* (W. Va.) 694

COUNTIES.

The statutory provisions naming the time for trustees to convene in order to appoint a county superintendent are directory only, and the failure to get a quorum on that day does not prevent a meeting for that purpose on a subsequent day. *Wampler* v. *State, Alexander* (Ind.) 829

COURTS.

See also CONSTITUTIONAL LAW, 5, 6, 15; CONTEMPT, 1; CRIMINAL LAW, 2; STATUTES, 8.

1. A statute which attempts to deprive the governor of his constitutional power to appoint judges of an inferior court, by changing the

name of the court and requiring the judge to be elected, without changing its jurisdiction or functions, is void. *Johnson* v. *State* (N. J. Err. & App.) 373

2. When four of the five judges composing a court are declared by the Constitution to be a quorum, their agreement in a decision, the other being absent, makes the decision unanimous within the meaning of a statute requiring leave to appeal from unanimous decisions. *Harroun* v. *Brush Electric-Light Co.* (N. Y.) 615

3. The question of international comity is controlled and decided by international law and custom, and the decisions of local courts thereon are not controlling in the courts of the United States. *Evey* v. *Mexican C. R. Co.* (C. C. App. 5th C.) 387

4. The fact that an action might be brought in Mexico for injuries received there by a railroad employee who lives in Texas, since the defendant owns and operates a railroad in Mexico, does not constitute a reason why he should not sue in Texas,—at least when the defendant railway company is incorporated in the United States and its road extends into Texas. *Id.*

5. A transitory action for a personal tort, accruing in Mexico, is within the jurisdiction of a circuit court of the United States, where one party is a citizen and resident of Texas and the other a citizen of Massachusetts. *Id.*

See also CONFLICT OF LAWS.

6. The fixing of rates by legislative power or otherwise than by appropriate judicial proceedings in which full notice and opportunity to appear and defend are given is reviewable by the courts,—at least to the extent of ascertaining whether such rates will furnish some reward for the property used and services furnished. *San Diego Water Co.* v. *San Diego* (Cal.) 460

7. A review by the court of the action of the common council in fixing water rates is not limited to a determination of the question on the same evidence that was produced before the council, where the hearing before the council was conducted without notice to the water company or the rate payers, and without any right on their part to intervene effectually. *Id.*

8. An ordinance cannot be held invalid because it is unreasonable, when the power to pass ordinances on the subject is conferred by a constitutional statute. [Affirmed by divided court.] *Darlington* v. *Ward* (S. C.) 326

9. A court will not interfere with the internal management of a foreign corporation at the suit of a resident stockholder, by setting aside unwise and useless contracts which depreciate and destroy the value of the stock, although the visible, tangible property of the corporation, consisting of conduits in streets for electric lighting, is within the state. *Madden* v. *Penn Electric Light Co.* (Pa.) 638

10. The legal character of the liability of a stockholder does not prevent its enforcement by receivers in a proceeding which is wholly ancillary to the orginal receivership suit in equity. *Peck* v. *Elliott* (C. C. App. 6th C.) 616

11. A proceeding by receivers of a corporation to enforce the liability of a stockholder is ancillary to the receivership suit, and the jurisdiction thereof depends upon the jurisdiction in the original case. *Id.*

12. A decision which misconceives and wrongly declares the law, whether it is an ancient or a recent one, is subject to be overruled. *Wilson* v. *Leary* (N. C.) 240

NOTES AND BRIEFS.

See also CONFLICT OF LAWS.

Courts; vesting judicial power in recorder of land titles. 519

COVENANT. See LANDLORD AND TENANT, 3.

COVERTURE. See HUSBAND AND WIFE.

CREDIT.

NOTES AND BRIEFS.

Illegal combination to prevent. 194

CRIMINAL LAW. See also BANKS, 2; CONSTITUTIONAL LAW, 14; CONTINUANCE AND ADJOURNMENT, 1.

1. The constitutional right to an accusation by information before being put on trial for a misdemeanor stands on the same ground, under N. H. Const. art. 87, as the right to indictment before being put on trial for felony. *State* v. *Gerry* (N. H.) 228

2. The attempt to give police courts concurrent jurisdiction with the supreme court in any criminal case where the fine does not exceed $200 and the term of imprisonment does not exceed one year, although the offenses thus punishable were not within the jurisdiction of a justice of the peace in 1784, renders N. H. Laws 1895, chap. 117, unconstitutional, because it impairs the constitutional right of trial by jury, and of a presentment or indictment before prosecution in cases in which such rights existed when the state Constitution was adopted. *Id.*

NOTES AND BRIEFS.

Criminal law; insanity after the commission of a criminal act:—(I.) Effect; generally; (II.) question when and how raised; (III.) test of insanity which will prevent trial; (IV.) determination as to submission of issue: (*a*) doubts as to sanity; (*b*) evidence to establish doubt; (*c*) discretion of the court as to; (V.) disposition of the issue: (*a*) how tried; generally; (*b*) procedure on trial; (VI.) effect of the determination: (VII.) insanity after verdict; (VIII.) insanity after judgment; (IX.) appeals; (X.) effect of recovery. 577

CURTESY.

An estate by curtesy cannot attach to a mere life estate. *Bigley* v. *Watson* (Tenn.) 679

DAMAGES. See also FRIGHT.

1. An abortive attempt to sell property as prescribed by N. D. Rev. Code, § 4883, in order to fix the amount of liability of a vendee who has broken his contract, will not preclude the recovery of the damages prescribed by § 4988, subd. 2, and § 5009. *Stanford* v. *Mogill* (N. D.) 760

2. The measure of damages for a vendee's breach of an executory contract of purchase, when the property has not been resold as prescribed by N. D. Rev. Code, § 4833, is, under § 4988, subd. 2, the excess, if any, of the amount due from the buyer under the contract over the value to the seller, together with the excess, if any, of the expenses of marketing the property over those which would have been incurred in delivering it to the purchaser; while under § 5009 the value to the seller is deemed to be the price which he could have obtained in the market nearest the place where it should have been accepted by the buyer, and at such time after the breach as would have sufficed, with reasonable diligence, for the seller to effect a resale. *Id.*

3. A verdict for $3,500 for an injury to a laborer who is shot in the finger and through his thumb, and whose right arm is perforated with shot from the shoulder to his hand, many of which are never extracted, and whose right leg also receives several shot by which his capacity for lifting is permanently affected, is not excessive. *West Memphis Packet Co.* v. *White* (Tenn.) 427

4. A mortgagor may elect to recover full damages on account of the unlawful sale of the land under a power of sale in the mortgage when there was no default, and thus ratify the title of a purchaser who has bought the land for value in good faith, although he might, instead, repudiate the sale and redeem the premises. *Rogers* v. *Barnes* (Mass.) 145

DEAD ANIMALS.

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DEBTOR AND CREDITOR. See also HUSBAND AND WIFE, 4–6.

NOTES AND BRIEFS.

Debtor and creditor; gift to wife of husband's earnings. 190

DEDICATION.

Leaving land unsubdivided upon a plat with an express dedication as public ground not to be occupied by buildings of any description, or marking it as a street and holding it out as open ground, no buildings, to purchasers, is equivalent to a dedication for public use, and creates a restriction against the erection of buildings thereon. *Chicago* v. *Ward* (Ill.) 849

DEEDS. See also WATERS, 1.

The delivery of a deed to his natural child by the grantor to the deputy clerk of the court, with instructions to have it proved by the subscribing witness before the clerk who was then absent from the office, and to have it duly registered, is complete and passes title, and cannot be defeated by the grantor's subsequently changing his mind and recalling the deed and destroying it before it had been proved, although the grantee knew nothing of the deed or of its recall. *Robbins* v. *Bascoe* (N. C.) 238

DEFINITIONS. See also CORPORATIONS, 21.

A copy of an instrument is a reproduction or imitation of it, and a translation is not a copy. *Rasmussen* v. *Baker* (Wyo.) 773

DELEGATION OF POWER. See CONSTITUTIONAL LAW, 5–7.

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DIVORCE. See CONFLICT OF LAWS, 3.

DOMICIL. See also INFANTS, 1.

NOTES AND BRIEFS.

Domicil; of infant. 472

DRAINS AND SEWERS.

A riparian owner has no right to have the sewage of a city turned into the stream above his mill, instead of being diverted elsewhere, although from one third to one half of the stream has been taken by the city without right and has entered the sewerage system; but the disposal of the sewage is under the control of the city, and the remedy of the riparian owner for wrongfully taking the water is by action for damages or by injunction. *Fisk* v. *Hartford* (Conn.) 474

NOTES AND BRIEFS.

Drains; municipal regulation of, as nuisances. 319

DUE PROCESS. See CONSTITUTIONAL LAW, 11–16.

DUMMY RAILWAY. See NEGLIGENCE, 6; PLEADING, 3.

DUTIES.

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State imposts on imports. 673

EASEMENTS.

1. The rightful use for mill purposes of water from a great public pond belonging to the state has no element of adverseness in it, and can never ripen into a prescriptive title. *Auburn* v. *Union Water Power Co.* (Me.) 188

2. The right to use an elevator for hoisting goods from a basement room up to the sidewalk, or lowering them from the sidewalk to the basement, cannot be implied as incidental or appurtenant to the estate in the basement room, where the elevator was not originally intended for use by occupants of that room, and suitable means of ingress and egress were furnished by steps and doors from the basement to the street, while there was at no time any access to the elevator directly from

the basement, and only through another room by a way which was not a common passageway. *Cummings* v. *Perry* (Mass.) 149

NOTES AND BRIEFS.

Easement; by implication. 149

ELECTRICAL USES AND APPLIANCES. See also EVIDENCE, 11, 19.

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ELECTRIC RAILWAYS. See CARRIERS, 13, NOTES AND BRIEFS; RAILROADS, 13–16; STREET RAILWAYS, 5–7.

ELEVATORS. See also EASEMENTS, 2; NEGLIGENCE, 3.

A lessor who is not in possession or control of an elevator well in a leased building which the tenant has covenanted to keep in repair is not liable for the death of a person who falls therein while delivering goods to the tenant on the latter's invitation, although there was a dangerous defect consisting of a large opening between the elevator and the outer wall. *Henson* v. *Beckwith* (R. I.) 716

EMINENT DOMAIN. See also WATERS, 17.

1. An appropriation of water and a water plant to public use by the state, for which just compensation must be made, is in effect made by Cal. Const. art. 14, § 1, which subjects to the control of the state every public water supply. *San Diego Water Co.* v. *San Diego* (Cal.) 460

(Per Van Fleet, Henshaw, and McFarland, JJ.)

2. Assessments or charges for the creation of an assurance fund, under Ohio act April 27, 1896, made upon the issuance of certificates of title, when made on real estate in the hands of an assignee for creditors, constitute an unconstitutional taking of property without the consent of the owners and without compensation for uses that are not public, since the fund is for the benefit of persons whose lands have been wrongfully taken from them. *State, Monnett,* v. *Guilbert* (Ohio) 519

NOTES AND BRIEFS.

Eminent domain; railway as additional burden on street; injury to riparian owners. 608

Provision as to property damaged; compensation for vacating street. 285

EQUITY. See also HUSBAND AND WIFE, 2.

Compensation for damages may be allowed in equity to avoid multiplicity of suits, where remainderman, reversioner, or tenant in common sues to enjoin waste. *Williamson* v. *Jones* (W. Va.) 694

NOTES AND BRIEFS.

Equity; enforcement of constructive trust. 497

ESTOPPEL. See also CORPORATIONS, 15.

1. Consent of owners abutting upon a park dedicated under restrictions against the erection of buildings, to the erection of one or more buildings upon such park, will not estop them from bringing suit to enjoin the erection of other buildings. *Chicago* v. *Ward* (Ill.) 849

2. A city acting as trustee of a public park bounded upon a lake by filling in submerged land adjacent thereto as a part of the park is estopped from claiming title to the same free from the park trust, and from restrictions thereof against the erection of buildings upon the park. *Id.*

3. A city is not estopped from enforcing the forfeiture of a street-railway franchise for nonuser, merely because of its interference with the street railway company's rights in some respects, unless that was such as to justify or excuse the nonoperation of the road. *State, Kansas City,* v. *East Fifth Street R. Co.* (Mo.) 218

4. An infant of years of discretion by intentional fraudulent conduct will be barred, under the doctrine of estoppel *in pais*, from asserting title either to real or personal property against one misled thereby. *Williamson* v. *Jones* (W. Va.) 694

5. A married woman cannot, even by fraudulent conduct, be barred under the principle of estoppel *in pais*, from asserting her title to land, though separate estate; but it is different as to her personal estate, under statutes giving her the right to contract as if single. *Id.*

6. The mere silence of cotenants when a tenant in common who is also the owner of a life estate in the land proceeds to take petroleum from the land will not estop them from asserting their title against him. *Id.*

7. A parol ratification by a mortgagor of a void sale under a power in the mortgage is sufficient to confirm the title of a bona fide purchaser who has bought the land in reliance upon the records, which showed an apparently good title. *Rogers* v. *Barnes* (Mass.) 144

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Estoppel; doctrine of. 356

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EVIDENCE. See also WITNESSES.

Judicial notice.

1. Judicial knowledge is taken of the fact that at the elections in several years persons who could read the Constitution of the state only in a translation were allowed to vote. *Rasmussen* v. *Baker* (Wyo.) 773

2. The court knows judicially the proper biennial year in which the law requires trustees of each county in the state to meet and elect officers. *Wampler* v. *State, Alexander* (Ind.) 829

3. It is common knowledge that the condition in which privy vaults shall be kept, when allowed to exist, their construction, their locality, and the time and manner of removing their contents, have, especially in cities, been subjected to sharp police regulation. *Harrington* v. *Providence* (R. I.) 305

4. The expenditure by a city of vast sums of money in perfecting its water and sewer systems is a matter of common knowledge. *Id.*

Presumptions and burden of proof.

5. Defendant on trial for murder, who relies on the defense of insanity, must show affirmatively by a preponderance of the evidence introduced at the trial that he was insane when he committed the homicide. *Ryder* v. *State* (Ga.) 721

6. A wife who turns remittances from her husband into a business which she carries on in partnership with a third person, and out of which both families are supported, has the burden of proving, as against the husband's creditors, that their rights have not been injured thereby, and that an equivalent sum was properly and actually consumed by the husband's family. *Trefethen* v. *Lynam* (Me.) 190

7. The presumption is that a judgment obtained against a husband, and which is claimed to be a lien upon community property, was for a community debt, if there is no proof on the subject. *Goetzinger* v. *Rosenfeld* (Wash.) 257

8. It will be presumed that the law requiring payment of a tax on the increase of the capital stock of a corporation has been complied with, when the stock has been increased and there is no evidence that the tax has not been paid. *Peck* v. *Elliott* (C. C. App. 6th C.) 616

9. The burden is on the insurer to show materiality of a concealment by an applicant for life insurance, as well as fraudulent intent, for the purpose of avoiding the policy. *Penn Mut. L. Ins. Co.* v. *Mechanics' Sav. Bank & T. Co.* (C. C. App. 6th C.) 33

10. The burden of proving the truth of answers by an applicant for life insurance, which are by the contract made warranties, rests upon the one seeking to recover on the policy, although the burden may be lifted as to matters which only affect the right of action, by the presumption in favor of honesty and against fraud until something appears to rebut it. *Sweeney* v. *Metropolitan L. Ins. Co.* (R. I.) 297

11. The escape of electricity from a street railway, to the injury of a horse being driven on a public street, is presumptive proof of negligence in the operation of the railway. *Trenton Pass. R. Co.* v. *Cooper* (N. J. Err. & App.) 637

Oral as to writing.

12. Oral evidence that a duplicate draft was given to accommodate the payee in order to enable him to collect the money from the drawee does not contradict or vary the terms of a written contract between the parties, because the contract was made by the original draft and the duplicate adds nothing thereto. *Bank of Gilby* v. *Farnsworth* (N. D.) 843

Opinions.

13. Testimony of nonexperts as to the appearance of footprints in the sand near the scene of a crime, and prints made in sand by boots worn by the prisoner, is admissible upon the question of his connection with the crime. *Johnson* v. *State* (N. J. Err. & App.) 373

14. Testimony of expert witnesses as to the value of the property of a water company is not admissible, at least in favor of the company, as against the better evidence of its own books on the subject. *San Diego Water Co.* v. *San Diego* (Cal.) 460

15. An insurance expert will not be permitted to state whether or not a misrepresented or concealed fact in an application for a life policy would be regarded among insurance companies generally as material. *Penn Mut. L. Ins. Co.* v. *Mechanics' Sav. Bank & T. Co* (C. C. App. 6th C.) 33

16. An insurance expert cannot be permitted to give his opinion that certain undisclosed facts increased the risk of a life policy, but he may state the usage of insurance companies as to rejecting risks when made aware of such facts. *Id.*

Res gestæ.

17. Words spoken by a driver in the effort to control a runaway horse are admissible in evidence as a part of the *res gestæ*, in an action for damages resulting from the frightening of the horse. *Trenton Pass. R. Co.* v. *Cooper* (N. J. Err. & App.) 637

Relevancy.

18. Evidence legal for some purposes cannot be excluded because a jury may erroneously use it for another purpose. *Id.*

19. Evidence of previous experience of a driver in the case of electric shock to a horse is competent to account for his words and conduct in endeavoring to control a horse which had received a shock, but not to prove the fact of the shock. *Id.*

20. Evidence of the effect of air upon mail sacks thrown from running trains is inadmissible on the question of the effect upon a boy weighing 65 pounds standing near a passing train. *Graney* v. *St. Louis, I. M. & S. R. Co.* (Mo.) 633

21. Upon the question of intent in omitting existing policies from the answer to a question in an application as to the amount of other insurance, evidence of similar omissions by the applicant in answer to similar questions by other companies is relevant and competent. *Penn. Mut. L. Ins. Co.* v. *Mechanics' Sav. Bank & T. Co.* (C. C. App. 6th C.) 33

Weight and sufficiency.

22. The contents of a lost will cannot be proved solely by the declarations of the testator. *Clark* v. *Turner* (Neb.) 433

23. Testimony as to the contents of a lost will by a witness who has never inspected it but has derived knowledge only from the testator's reading it to him is in effect only testimony as to the testator's declarations, and is not sufficient to prove the contents of the lost will. *Id.*

24. A variance between an averment that plaintiff was an employee of a railroad company, and proof that he was employed by its lessee and injured through the lessor's negligent construction of its road, is immaterial. *Lee* v. *Southern P. R. Co.* (Cal.) 71

25. It is the duty of the jury on a trial for murder in which the defense of insanity is set up, to consider the evidence on such defense

in connection with the other evidence in the case, although it does not appear from the preponderance of such evidence that defendant was insane at the time of the homicide, and the jury must then, in view of all the evidence, determine whether or not a reasonable doubt of defendant's guilt exists in their minds. *Ryder* v. *State* (Ga.) 721

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Judicial notice of negro population. 373

Presumption from failure to offer. 695

Proof of tracks or impressions. 373

Non-expert opinions as to sanity or insanity:—(I.) The general rule as to admissibility: (*a*) when admissible; (*b*) grounds of admissibility; (II.) exceptions: (*a*) states adopting different rules; (*b*) privilege of witness; (III.) what constitutes opinion evidence; (IV.) who may give; (V.) acquaintance necessary: (*a*) general rules; (*b*) application in particular cases: (1) in criminal proceedings; (2) in civil actions; (VI.) facts and reasons as a basis for an opinion: (*a*) general rules as to statement of; (*b*) effect of failure to state; (*c*) what facts may be stated; (*d*) what facts warrant an opinion; (VII.) scope: (*a*) confinement to conclusions from facts stated; (*b*) comparisons and conclusions from observation; (*c*) conclusions of law and fact; (*d*) as to particular statements: (1) in criminal proceedings; (2) in civil cases; (VIII.) time to which opinion relates; (IX.) cross-examination, rebuttal, and impeachment; (X.) weight: (*a*) generally; (*b*) as affected by character, capacity, and opportunity; (*c*) as affected by the facts and reasons stated; (*d*) as compared with expert and other evidence; (*e*) a question for the jury. 721

Res gestæ. 637

To establish lost or destroyed wills:—(I.) Presumption as to revocation of missing will: (*a*) generally; (*b*) burden of proof; (*c*) rebutting presumption; (*d*) declarations; (*e*) where there is more than one will; (II.) proof of execution: (*a*) generally; (*b*) declarations; (*c*) witness; (III.) evidence of the contents; (*a*) sufficiency: (1) in general; (2) wills torn in pieces; (3) proof by copy; (4) number of witnesses; (5) proving part of the contents; (*b*) declarations; (*c*) loss after probating or filing for record. 433

EXCAVATION. See HIGHWAYS, 2; NEGLIGENCE, 4, 5.

EXECUTION. See CORPORATIONS, 16.

EXECUTORS AND ADMINISTRATORS. See also CONSTITUTIONAL LAW, 11.

NOTES AND BRIEFS.

Executors; administration on estate of living persons. 294

EXPECTANCY. See also CONTRACTS, 3.

A written agreement to transfer a share of a mere expectancy cannot be sustained as a gift and is not valid when it is entirely one-sided without any consideration, and is not made in settlement of any controversy or dispute. *Re Lennig's Estate* (Pa.) 373

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Expectancy; transfer of; consideration for. 378

EXPERTS. See EVIDENCE, NOTES AND BRIEFS.

EXPLOSION. See also CARRIERS, 10–12.

NOTES AND BRIEFS.

Explosives; municipal regulation of, as a nuisance. 306

EXPRESS COMPANIES. See CARRIERS, 5, 6.

EXTRADITION.

1. The governor of a state has the right to revoke his warrant for the surrender of an alleged fugitive from justice, at any time before he is taken out of the state. *State, Nisbett,* v. *Toole* (Minn.) 224

2. A person held for interstate extradition must be discharged on habeas corpus if it appears that the governor's warrant for his surrender has been revoked; and the ground of such revocation cannot be inquired into by the court. *Id.*

3. A fugitive from justice, who waives the necessity of requisition papers, and submits to an arrest upon a warrant and to be brought back into the state from which he has fled, is deemed to come back voluntarily into the jurisdiction, and may, on arrival there, be prosecuted for another offense than that described in the warrant and to respond to which he agreed to return. *State* v. *McNaspy* (Kan.) 756

NOTES AND BRIEFS.

For what person extradited may be prosecuted. 756

FAIR. See HORSE RACE.

FAMILY EXPENSE. See HUSBAND AND WIFE, 3.

FENCE. See RAILROADS, 7–9.

FERTILIZERS.

NOTES AND BRIEFS.

Municipal regulation of manufacture of, as nuisance. 653

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NOTES AND BRIEFS.

Municipal regulation of nuisance of. 314

FISH COMMISSIONER.

NOTES AND BRIEFS.

Right of woman to be. 211

FISHERIES. See also CONSTITUTIONAL LAW, 8; STATUTES, 7.

Fish are to be classed as game within the meaning of a constitutional provision against special laws to provide for the protection of game. *State* v. *Higgins* (S. C.) 561

FIXTURES.

Standing finish, consisting of window and door sashes, jambs, trimmings, wainscoting, baseboards, mantel piece without the tiling, and doors, including glass and hardware, when placed in a mortgaged building under a contract with the mortgagor by which the contractor retains title until he is paid, do not become a part of the real estate so as to defeat the contractor's right to remove them, when they are attached to the building by screws only and can be removed without injury to the building. *German Sav. & L. Soc.* v. *Weber* (Wash.) 267

NOTES AND BRIEFS.

Fixtures; what are; right to remove. 268

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FORFEITURE. See BETTING; STREET RAILWAYS, 2, 3.

FORGERY. See also INDICTMENT, 2.

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Forgery; ratification of. 485

FRANCHISES. See also STREET RAILWAYS, 3.

NOTES AND BRIEFS.

Franchise; public control of. 218

FRAUD. See also BILLS AND NOTES, 10.

NOTES AND BRIEFS.

Fraud; remedy of creditors against fraudulent transaction. 496

FRIGHT.

No recovery for fright, terror, alarm, anxiety, or distress of mind, even if these result in physical injury, can be had in an action for negligence where there are no physical injuries except those caused solely by the mental disturbance. *Spade* v. *Lynn & B. R. Co.* (Mass.) 512

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Fright; right of action for damage from. 512

GAME LAWS. See FISHERIES.

GIFT. See EXPECTANCY.

GOVERNOR. See COURTS, 1; EXTRADITION, 1.

GRAND JURY.

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Right of women to serve on. 214

HABEAS CORPUS. See also EXTRADITION, 2.

Only defects of a jurisdictional character, which render the proceedings not merely erroneous, but absolutely void, can be considered on habeas corpus. *State, Moriarity*, v. *McMahon* (Minn.) 675

HEALTH.

NOTES AND BRIEFS.

Municipal regulation of nuisances relating to. 311

Right of woman to be member of board of. 211

HIGHWAYS. See also PUBLIC IMPROVEMENTS, 2; WATERS, 8.

1. Taking a bond from a railroad company which is about to lay tracks in its streets, to save the city from the results of possible negligence of the company, will not increase the liability of the city in case of such negligence. *Terry* v. *Richmond* (Va.) 834

2. The caving of an excavation under a street, through the negligence of the railroad company making it, does not make a city liable for injuries to adjacent buildings, if the company had authority from the state to lay its tracks within the city, and the city had legally granted its permission. *Id.*

3. Permission to lay tracks under a street is within the power given to a city council to determine and designate the route and grade of any railroad to be laid in the city. *Id.*

4. Owners of property abutting on that portion of a street which is not vacated, but which is left in a cul de sac by vacating another part of the street, if the market value of the property is lessened thereby, are entitled to damages under Pa. act April 21, 1858, § 6, giving the owner of land injured by the vacation of a street the same right to damages as if it was injured by the opening or widening of a street. *Re Melon Street* (Pa.) 275

NOTES AND BRIEFS.

Highways; liability of persons creating defects in. 834

Vacation of; remedy of landowner. 285

HOGS. See ANIMALS, NOTES AND BRIEFS; MUNICIPAL CORPORATIONS, 5.

HOMICIDE. See TRIAL, 15, 16.

HORSE RACE.

1. The owners of a horse not known to be vicious or dangerous are not liable to a bystander injured by his bolting the track during a race in which he was entered, while he was in charge of a good and expert rider. *Hollyburton* v. *Burke County Fair Asso.* (N. C.) 156

2. A fair association is not liable for injuries to one who is injured by the bolting of a horse from a track where a race is being held, if it has provided a suitable grand stand from which the race could be viewed, and has erected a railing composed of 2 × 4 timber nailed to posts 3½ or 4 feet high, between the

race course and the place where spectators will be located. *Hallyburton* v. *Burke County Fair Asso.* (N. C.) 156

3. Contributory negligence will prevent a recovery by a spectator of a race, who is injured by a horse bolting the track, if he remained at a point from which the marshal commanded him to stand back because the place was dangerous. *Id.*

HOSPITAL.

NOTES AND BRIEFS.

Right of woman to be officer of. 211

HUNTING. See TRESPASS.

HUSBAND AND WIFE. See also CONFLICT OF LAWS, 2, 3; CONTEMPT, 3; ESTOPPEL, 5; EVIDENCE, 6, 7; JUDGMENT, 3.

1. The disabilities of married women at common law still exist as to their person and property, except to the extent of changes by legislation in express terms or by reasonable construction of the same. *Brown* v. *Brown* (N. C.) 242

2. An order to compel a woman to support her husband out of her separate property when she is required to do so by Cal. Civ. Code, § 176, can be made by a court of equity in the exercise of its general powers without any express provision of the statute therefor, since the legal remedy, if any, is inadequate. *Livingston* v. *Los Angeles County Super Ct.* (Cal.) 175

3. A diamond shirt stud procured for personal use and actually used and worn by a husband is a family expense within the meaning of Iowa Code, § 2214, charging family expenses upon the property of both husband and wife or either of them. *Nesham* v. *McNair* (Iowa) 847

4. Rent for a wife's homestead occupied by her with her husband and family cannot, at least in the absence of any agreement therefor, be charged to the husband in determining the liability of the wife to his creditors for the husband's earnings which had been used to improve the premises. *Trefethen* v. *Lynam* (Me.) 190

5. To the amount that a wife's premises are enhanced in value by additions and improvements made upon them, with her consent, out of her husband's earnings, she is liable to his creditors. *Id.*

6. A debtor's wife receiving her husband's earnings may entirely consume them in the suitable support of his family, including herself, without becoming in any way answerable to his creditors, but as against them she cannot appropriate such earnings or income to make investments in her own name, either for him or herself, or to keep down or pay off encumbrances on or otherwise improve her own property, or to pay the debts or increase the profits of her separate business. *Id.*

7. An action by a married woman who has been abandoned by her husband, against one who induced the abandonment, may be brought in her own name without joining her husband, under statutes giving an abandoned wife right to contract as a free trader, and also to set up, if sued for a tort, any counterclaim growing out of the same transaction, and recover affirmative judgment if her damages exceed those of the other party. *Brown* v. *Brown* (N. C.) 242

8. The common-law right of a husband to a right of action for the loss of consortium through an injury to his wife caused by negligence is not taken away by the Massachusetts statutes giving married women the control of their time and actions. *Kelley* v. *New York, N. H. & H. R. Co.* (Mass.) 631

NOTES AND BRIEFS.

See also DEBTOR AND CREDITOR.

Family expense. 847

Right of action by wife for abandonment. 242

Action for loss of consortium. 631

Remarriage after divorce; time for appeal. 863

IMPORTS. See DUTIES, NOTES AND BRIEFS.

IMPRISONMENT FOR DEBT. See CONTEMPT, 3.

IMPROVEMENTS.

1. One having notice of facts rendering his title inferior to another's who by mistake of law regards his title good cannot claim for permanent improvements. *Williamson* v. *Jones* (W. Va.) 694

2. One making permanent improvements on land as if his own, at a time when there is reason to believe his title good, is to be allowed their value so far as they enhance the value of the land, if he did not have notice, either actual or constructive, of the superior right of another. *Id.*

INCOMPETENT PERSONS. See CONSTITUTIONAL LAW, 14; CRIMINAL LAW, NOTES AND BRIEFS; EVIDENCE, 5, 25, NOTES AND BRIEFS; TRIAL, 16.

INDICTMENT AND INFORMATION. See also CRIMINAL LAW, 1.

1. The person injured is sufficiently shown by an indictment stating that defendant, a banker, had when insolvent received a deposit from a certain person named. *State* v. *Eifert* (Iowa) 485

2. An information for forgery committed by the insertion of additional words in an instrument materially changing its terms should set forth a copy so as to show the interpolated words and their materiality, or state reasons for the failure to do so other than mere lack of knowledge. *State* v. *McNaspy* (Kan.) 756

NOTES AND BRIEFS.

Indictment; certainty of averments in. 485

INFANTS. See also ESTOPPEL, 4; NEGLIGENCE, 2, 4.

1. The place at which an infant "resides" to give jurisdiction for the appointment of a

guardian under Conn. Gen. Stat §§ 458, 459, is the place of his actual stated residence, rather than his strict technical domicil. *Kelsey* v. *Green* (Conn.) 471

2. A father has no absolute right to the custody of a minor child, which he can transmit to another to the detriment of the child. *Id.*

3. A guardian of the person of a minor appointed on the application of the father in another state at his technical domicil has not an absolute right to the child as against a guardian appointed at the child's actual residence, but the custody will be awarded with reference to the welfare of the child. *Id.*

4. The right of a father to the custody of his child, which he has lost through his fault or misfortune, does not necessarily revive when by reformation or otherwise he has become able properly to care for and maintain the child, but the welfare of the child will be the controlling consideration. *Id.*

NOTES AND BRIEFS.

Infants; jurisdiction to appoint guardian of. 472

Negligence in getting on or off moving street car. 789

INJUNCTION.

1. The owners of lots abutting on ground dedicated for a public park with restrictions against the erection of buildings thereon have a right to maintain a suit to enjoin the erection of buildings. *Chicago* v. *Ward* (Ill.) 849

2. An injunction against the taking of petroleum from land by a life tenant or a cotenant may be granted to prevent irreparable injury to the land. *Williamson* v. *Jones* (W. Va.) 694

3. Equity may restrain the diversion of water under a claim of right in order to prevent the claim from ripening into a right. *Gould* v. *Eaton* (Cal.) 181

4. An injunction will not be refused to restrain the diversion of water from a milldam, to one who has acted promptly in asserting his rights, on the ground that the injury to him from the diversion of the water will be trivial compared with that suffered by the persons seeking to make the diversion in case they are not permitted to do so. *Stock* v. *Jefferson* (Mich.) 355

5. An employee who has learned trade secrets from his employer under the agreement, express or implied, that he will not make use of them for his own benefit or communicate them to strangers, will be enjoined from breaking his agreement. *O. & W. Thum Co.* v. *Tloczynski* (Mich.) 200

6. The operation of a railroad for a term of years under a lease may be required by mandatory injunction compelling the specific performance of the contract of lease. *Schmidt* v. *Louisville & N. R. Co.* (Ky.) 809

NOTES AND BRIEFS.

Injunction; for trivial injury; comparative detriment; against diversion of water 355

Against diversion of stream. 475

INNKEEPERS.

An innholder who has no license can not recover for board and lodging furnished by him in such inn, under Me. Rev. Stat. chap. 27, declaring that "no person shall be a common innholder or victualer without a license, under a penalty of not more than $50." and requiring a license fee of only $1, since the purpose of the statute is to protect the public, and not merely to obtain revenue. *Randall* v. *Tuell* (Me.) 143

INSOLVENCY. See BANKS, 1; INSURANCE, 31-38.

INSURANCE. See also BENEVOLENT SOCIETIES; CONSTITUTIONAL LAW, 10; CONTRACTS, 5, 13; CORPORATIONS 22; EVIDENCE, 9, 10, 15, 16, 21; STATUTES, 9; TRIAL, 5, 9, 14.

1. Certificates in mutual aid societies do not constitute insurance within the meaning of a question in an application blank of an insurance company as to "existing insurance" in this or any other company. *Penn Mut. L. Ins. Co.* v. *Mechanics' Sav. Bank & T. Co.* (C. C. App. 6th C.) 33

2. A contract whereby a benefit is to accrue upon the death or physical disability of a person, which benefit is or may be conditioned upon the collection of an assessment upon persons holding similar contracts, is a contract of insurance within the meaning of R. I. Gen. Laws, chap. 184, § 2, respecting business by foreign insurance companies. *Lubrano* v. *Imperial Council, O. of U. F.* (R. I.) 546

3. An extension or renewal of a policy of insurance under an option of the holder is not effected on the insurer's refusal to renew without payment or tender of the premium. *Boston & A. R. Co.* v. *Mercantile Trust & D. Co.* (Md.) 97

Assignment; change of beneficiary.

4. A stipulation requiring the consent of the beneficiary "in case of assignment" of a benefit certificate does not apply to a change of the beneficiary. *Carpenter* v. *Knapp* (Iowa) 128

5. A person to whom an endowment certificate is payable in case of the death of the assured within the limit of the endowment period has no assignable interest during that period and while the assured is living, when the latter has the right to change his beneficiary. *Id.*

6. The power to change the beneficiary is vested in the member of a mutual benefit society, in the absence of any restrictions in the certificate, by-laws, articles of incorporation, or statute. *Id.*

Representations; warranties; conditions.

7. Statements by an applicant for insurance are warranties, where by the terms of the policy he warrants the answers strictly true, and agrees that they shall form a part of the contract, and that any untrue answer will render the policy void. *Sweeney* v. *Metropolitan L. Ins. Co.* (R. I.) 297

8. Under a statute providing that, in case

of warranty of answers in an application for insurance, no misrepresentation made in good faith shall defeat the policy unless it is material to the risk, the mere fact of warranty in form will not render every statement of fact material, but the question of materiality is subject to judicial investigation. *Penn Mut. L. Ins. Co.* v. *Mechanics' Sav. Bank & T. Co.* (C. C. App. 6th C.) 33

9. False answers in an application for insurance, knowingly made for the purpose of misleading the company, although not material, will avoid the policy under a statute providing that such answers innocently made shall have no effect on the policy. *Id.*

10. A representation is made in bad faith, within the meaning of a statute providing that it shall not avoid the policy unless made in bad faith, only when it is made with actual intent to mislead, not when it is made through forgetfulness and inadvertence. *Id.*

11. Materiality of a concealment of other insurance, upon a life risk, cannot be presumed from the fact that such concealment was made by the applicant in applications to other companies. *Id.*

12. Concealment by an applicant for life insurance, of embezzlements by him which are not inquired about by the insurer, will not, unless fraudulent, avoid the policy, although the fact of embezzlement may be material to the risk. *Id.*

13. A warranty in an application for life insurance, that no circumstance or information has been withheld touching applicant's past or present state of health and habits of life with which the insurer ought to be acquainted, does not cover a habit of embezzlement as to which the application contains no inquiry. *Id.*

14. A question as to occupation, in an application for life insurance, does not call for information as to the fact of the applicant being an habitual embezzler. *Id.*

15. Mere temporary ailments or affections, not of a serious or dangerous character, which pass away and are likely to be forgotten because they leave no trace in the constitution, are not to be regarded as diseases within the meaning of a life insurance policy. *Id.*

16. Omitting a part of the insurance carried, from an answer to a question in an application as to policies in other companies, with directions to state companies and amount, will render the answer false. *Id.*

17. An application for a policy of insurance in Minnesota, on property located in Washington, which is delivered by the company on a certain day in the latter state, will be held to have been before a transfer of the property, which took place two days before the policy was delivered, for the purpose of determining the truthfulness of a statement as to the title to the property. *Pioneer Sav. & L. Co.* v. *Providence Washington Ins. Co.* (Wash.) 397

18. A conveyance from the mortgagor to mortgagee prior to the date of the fire, which is not accepted until after that date, will not avoid a policy of insurance on the property for change of title, since the mortgagor may keep his mortgage alive and prevent its merging in the title if it is to his interest to do so. *Id.*

19. Change of title by deed from mortgagor to mortgagee in the interval between the application by the mortgagee for insurance on the property and delivery of the policy will not render the insurance void for false description of the property as belonging to the mortgagor, if the facts of the existence of the mortgage and the pendency of foreclosure proceedings are stated in the application. *Id.*

20. A violation of the ordinary stipulation in a mortgage clause on an insurance policy, that the mortgagee will notify the insurer of a change of title to the property, is not a ground for forfeiture of the policy, but is merely a breach of contract for which an action for damages will lie if the insurer is injured. *Id.*

21. Additional insurance taken without the consent of the prior insurer increases the risk as matter of law, so that the provision of Ohio Rev. Stat. § 3643, as to the liability on a policy in the absence of any change increasing the risk without the consent of the insurers, does not apply. *Sun Fire Office* v. *Clark* (Ohio) 562

22. A mortgage, although in the form of an absolute deed, does not make any change in the title, interest, or possession of the property of the insured within the meaning of a provision in a policy that it shall be void in case of such change. *Id.*

Total disability.

23. Total disability within the meaning of an accident policy does not mean absolute physical inability to transact any kind of business pertaining to one's occupation, but it is sufficient if his injuries are such that common care and prudence require him to desist from transacting any such business in order to effect a cure. *Lobdill* v. *Laboring Men's Mut. Aid Asso.* (Minn.) 537

24. Ability to perform occasionally some trivial or unimportant act connected with some kind of business pertaining to one's occupation will not render his disability partial instead of total, provided that he is unable to transact substantially, to any material extent, any kind of business pertaining to his occupation. *Id.*

25. Inability to transact some kinds or branches of business pertaining to one's occupation as a merchant will not constitute total disability to transact "any and every kind of business pertaining to the occupation," if he is able to transact some other kinds or branches of business pertaining thereto. *Id.*

26. The fact that a merchant goes to his store several times a week when he is down town to see his physician and get shaved, and sits down for a brief time, but takes no part in the business except to hand out a small article to a customer and take change for it on one or two occasions, does not show that he is not wholly disabled from transacting any and every kind of business pertaining to his occupation. *Id.*

27. The fact that a man goes to his office every day for a short time without doing any work or business there does not show that he is not wholly disabled from prosecuting any

and every kind of business pertaining to his occupation, where his business consists in making loans on personal security. *Turner* v. *Fidelity & C. Co.* (Mich.) 529

Waiver of provision.

28. A letter from an insurer to a claimant asking that the matter be allowed to rest until the adjuster of the company can see the claimant or his attorney constitutes a waiver of a provision in the policy limiting the time for furnishing proofs of death and beginning an action on the policy. *Id.*

Delay of action.

29. Delaying action for insurance for more than one year and a half after a letter from the insurer asking that the matter may rest until an adjuster calls is not fatal, although nothing more is heard about the adjuster and the delay continued for nearly a year after the limitation of the time for action, which was waived by the letter, had expired. *Id.*

Subrogation.

30. The right of recovery against the person causing the loss, which is reserved to the insurer by a clause in a policy, depends upon the law existing at the time of the fire. *Learitt* v. *Canadian P. R. Co.* (Me.) 152

Insolvency of insurer.

31. A special fund for the benefit of policyholders of an insolvent insurance company cannot be charged with any portion of the costs and commissions incurred in administering the general fund, which is totally distinct. *Boston & A. R. Co.* v. *Mercantile Trust & D. Co* (Md.) 97

32. The importance of distributing assets of an insolvent insurance company at an early date prevents postponing the settlement to await the determination of every contingency on which its policy engagements are suspended; and the court may fix a reasonable time within which claims must be filed in order to participate, although this may result in a misfortune to those whose claims are cut off. *Id.*

33. Policy-holders of an insolvent insurance company have the right to participate with all other creditors in the general fund of the company's assets after they have exhausted a special fund which is held in trust for them alone. *Id.*

34. A surrender of a trust fund by a state treasurer under order of court, when he held it for the benefit of the policy-holders of an insurance company, does not affect their rights therein. *Id.*

35. A deposit with a state treasurer of securities as a guaranty for the payment of policies of an insurance company, whether made as a statutory requirement or voluntarily, and whether held by him in his official or in his individual capacity, creates a trust for the benefit of such policy-holders in case of the insolvency of the company, to the exclusion of other claims except a paramount claim for taxes. *Id.*

36. A loss or injury insured against, which takes place before the insolvency of the insurance company, but the amount of which is not ascertained or paid until after the insolvency, entitles the policy-holder to prove for a sum equal to his loss or damage plus the return premium, if any. *Id.*

37. Losses which happen after the insolvency of an insurance company are not provable against the funds in the hands of a receiver of the company, although the value of destroyed policies may be proved. *Id.*

38. On the breach of the contract of an insurance policy by insolvency of the company the policy holder has a claim for the value of the destroyed policy, amounting to the unearned or return premium, against the assets of the company. *Id.*

Reinsurance.

39. A reinsurer may be required to pay the amount of the loss which it is liable for, directly to the insured or the party ultimately entitled to the money when the prior insurer which it has indemnified has become insolvent. *Hunt* v. *New Hampshire Fire Underwriters' Ass.* (N. H.) 514

40. The liability of a reinsurer is not lessened by the insolvency of an intermediate insurer which has become unable to pay the loss, but the reinsurer's liability is for the entire amount of the loss against which they agreed to indemnify the prior insurer. *Id.*

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Is a benefit association an insurance company?—(I.) Where the question is as to "other insurance;" (II.) where the construction of the certificate is in question; (III.) where compliance with state insurance law is required before doing business; (IV.) where the question is in regard to jurisdiction; (V.) under statutes exempting benevolent societies; (VI.) where the question is not discussed; (VII.) some definitions; (VIII.) summary. 23

Insurable interest of assignee. 120

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Estoppel of insurer by act of agent; insurable interest of mortgagee; materiality of representations; change of ownership. 397

Mortgage as affecting change of title or interest in insured property:—Insurable interests; alienation; assignment; title or ownership; change of interest: sale, alienation, conveyance, transfer, or change of title; sale or otherwise; alienation in whole or in part; alteration in ownership or termination of interest; specific provision against encumbrance; other conditions; mutual companies; absolute conveyance. 562

What constitutes total disability of insured:—(I.) Ability to do some small act; (II.) inability to do anything; (III.) ability to attend to part of the business; (IV.) ability to do work in other occupation; (V.) disability of particular members: (a) eyes; (b) hands; (c) feet; (VI.) lunacy; (VII.) sickness; (VIII.) old age; (IX.) death; (X.) "immediately" construed; (XI.) "per week" construed; (XII.) other matters; (XIII.) summary. 529

Liability of reinsurer. 514

Distribution of assets of insolvent insurance company:—(I.) Who is to distribute: (a) as between different territorial jurisdictions; (b) as between courts and officers; (II.) valuation and

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INTEREST.

Interest cannot be allowed on a claim for taxes, or any other claim against an insolvent insurance company, when the failure to pay it was merely the result of insolvency. *Boston & A. R. Co.* v. *Mercantile Trust & D. Co.* (Md.) 97

INTERNATIONAL LAW. See also ACTION OR SUIT, 3; COURTS, 3.

NOTES AND BRIEFS.

International law; as to action against foreign government or its officers; recognition of foreign power. 405

JOINT WILL. See WILLS.

JUDGES. See also COURTS, 1.

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Judges; right of women to be. 209

JUDGMENT. See also MORTGAGE, 2.

1. Judgment *non obstante veredicto* cannot be given for either party where the special verdict is inconsistent and contradictory, until the conflicting portions of it are set aside. *Conroy* v. *Chicago, St. P. M. & O. R. Co.* (Wis.) 419

2. The rule that a decree which is not confined to the matters presented in the pleadings is subject to avoidance does not apply to a consent decree when the court has jurisdiction of the parties and of the subject-matter. *Bigley* v. *Watson* (Tenn.) 679

3. The disability of coverture of a party to a consent decree who does not avoid it in her lifetime will not prevent the decree from being binding on those claiming under her after her death. *Id.*

4. A decree awarding a mandamus requiring a trial judge to take evidence and award an execution for unpaid subscriptions to the capital stock of a corporation, as required by statute, in a proceeding to which the stockholders are not parties, is not *res judicata* upon the question of the right to enforce payment of the subscriptions, so as to prevent the stockholders, after being made parties to the proceeding, from showing that a receiver has been appointed who is entitled to collect all the assets of the corporation. *Rouse, H. & Co.* v. *Detroit Cycle Co.* (Mich.) 794

5. A judgment is a lien from the first day of the term, superior to a mortgage made before the judgment was rendered, under Neb. Code Civ. Proc. § 477, declaring that the debtor's lands shall be bound for the satisfaction of a judgment, unless it was confessed, from the first day of the term at which it was rendered. *Norfolk State Bank* v. *Murphy* (Neb.) 243

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Priority of judgment over conveyance made after beginning of term:—(I.) English rule; (II.) American comments on English rule; (III.) states in which the judgment relates back; (IV.) general American rule; (V.) judgment with stay of execution; (VI.) special cases. 243

JUDICIAL NOTICE. See EVIDENCE, 1–4.

JUDICIAL SALE. See also MORTGAGE, 7.

A purchaser at a judicial sale is conclusively held to have notice of all facts touching the rights of others in the property sold, if disclosed by the record of the case. *Williamson* v. *Jones* (W. Va.) 694

JURY. See also TRIAL, 1, 2.

The requirement of N. J. Rev. p. 526, that the sheriff shall file the jury list summoned for service with the county clerk, is directory merely; and failure to do so will not invalidate a trial unless it affirmatively appears that injury was done. *Johnson* v. *State* (N. J. Err. & App.) 373

JUSTICE OF THE PEACE.

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KNIGHTS OF PYTHIAS. See BENEVOLENT SOCIETIES.

LANDLORD AND TENANT. See also ELEVATORS.

1. A provision that an assignee of a lease takes it "subject to the agreements in the lease" does not impose a personal contractual obligation on the assignee. *Consolidated Coal Co.* v. *Peers* (Ill.) 624

2. The exclusion of "the agreements of the lessee" from a covenant against encumbrances in an assignment of a lease does not impose a personal liability upon the assignee to perform such agreements but leaves them *in statu quo.* *Id.*

3. A privity of estate between a lessor and an assignee of the term renders the assignee liable for breaches of any express covenants of the lease running with the land or term, if they occur while such privity continues to exist. *Id.*

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Lessor's liability to third party for defective premises. 717

Effect of assignment of lease. 625

LANGUAGE. See VOTERS AND ELECTIONS, 1.

LAUNDRIES.

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Municipal power over, as nuisance. 651

LEASE. See RAILROADS, 1–5.

LEGISLATURE.

NOTES AND BRIEFS.

Right of women to legislative office. 210

LEVY AND SEIZURE.

A perpetual scholarship in a college, granted in consideration of a donation thereto, entitling the donor to keep one pupil in the college free of charge, is not such property as can be taken and sold for debt. *Cleveland Nat. Bank* v. *Morrow* (Tenn.) 758

LIBEL AND SLANDER.

Written communications stating that a dealer has not paid his accounts, and debarring other dealers from selling to him upon credit, if not justified, are libelous. *Hartnett* v. *Plumbers' Supply Asso.* (Mass.) 194

LICENSE. See also CONSTITUTIONAL LAW, 9; INNKEEPERS.

An ordinance requiring a license for the business of a scavenger, or the removal of night soil, is within the general grant of power to make all regulations and ordinances expedient or necessary for the preservation of health, and the suppression or prevention of disease. *State, Moriarity,* v. *McMahon* (Minn.) 675

NOTES AND BRIEFS.

License; power to grant. 675

LIENS. See also CONFLICT OF LAWS, 4; JUDGMENT, 5; MORTGAGE, 4; SALE.

A lien for materials furnished to the principal contractor who abandons the contract filed before the owner assumes to complete the work in accordance with a provision of the contract, attaches after the completion to the extent of the difference between the cost of completion and the amount unpaid when the lien was filed. *Campbell* v. *Coon* (N. Y.) 410

NOTES AND BRIEFS.

Liens; mechanic's lien under contract made or performed in another state:—Immaterial when contract is made; where title passes in other state. 410

LIFE TENANTS. See also ACCOUNTING; CURTESY; ESTOPPEL, 6.

1. Equity has power to provide for the securing of any part of real property which is going to loss during a life tenancy, if imperative need calls for it and the life tenant be not harmed thereby, or if he be compensated. *Williamson* v. *Jones* (W. Va.) 694

2. Things part of the land wrongfully severed by a tenant for life become personalty, but belong to the owner of the next vested estate of inheritance in reversion or remainder, not the life tenant. *Id.*

3. A tenant for life may work open salt or oil wells or mines, even to exhaustion, without accounting, but cannot open new ones. *Id.*

4. A tenant for life who by waste has severed from the realty things that are a part of it, as petroleum oil, has no right to have their proceeds invested so he may have interest therein during the life estate, but their proceeds go at once to the owner of the next vested estate of inheritance. *Id.*

5. It is waste in a tenant for life to take petroleum oil from the land for which he is liable to the reversioner or remainderman in fee. *Id.*

LIMITATION OF ACTIONS. See also INSURANCE, 29.

NOTES AND BRIEFS.

Effect of laches. 856

LIVERY STABLES.

NOTES AND BRIEFS.

Municipal regulation of, as nuisance. 653

LODGE. See BENEVOLENT SOCIETIES, NOTES AND BRIEFS.

LOGS.

The owner of drifting logs which have escaped from a raft broken up by a violent storm on a lake without his fault is not under obligation to recapture and remove such of them as he can obtain only by extraordinary methods and at unreasonable expense, in order to escape liability for damages caused by them in a subsequent storm, although he has not definitely abandoned them but is proceeding to recover those which he can get without an unwarranted expenditure of money. *New Orleans & N. E. R. Co.* v. *McEwan* (La.) 134

LOST INSTRUMENTS. See BILLS AND NOTES, 4, 5; EVIDENCE, 22, 23.

MANDAMUS. See also CONSTITUTIONAL LAW, 5; JUDGMENT, 4; WRIT AND PROCESS, 4, 5.

1. An applicant for the writ of mandamus need not show any legal or special interest in the result, but only that he is a citizen and as such interested, in common with other citizens, in the execution of the law, when the object of the action is to enforce the performance of a public duty or right in which the people in general are interested. *Wampler* v. *State, Alexander* (Ind.) 829

2. The facts stated in an alternative writ of mandamus may be supplemented by those stated in the application in determining whether or not they are sufficient to withstand a demurrer. *Id.*

3. Mandamus may be invoked to force a township trustee to meet with others for the purpose of appointing a county superintendent as required by law, when they have met on a day fixed by law for that purpose, and have adjourned from day to day for want of a quorum. *Id.*

NOTES AND BRIEFS.

Mandamus; pleading and practice in. 828

MANDATORY INJUNCTION. See INJUNCTION, 6.

MARRIAGE. See CONFLICT OF LAWS, 3; HUSBAND AND WIFE.

MASTER AND SERVANT. See also ACCORD AND SATISFACTION; CARRIERS, 1; CONTRACTS, 4, 6; INJUNCTION, 5; RAILROADS, 4; STREET RAILWAYS, 8.

1. Authority of a brakeman on a freight train to eject a passenger cannot be implied, so as to render the employer liable for his acts in this respect, from rules of the company providing that such trains shall not carry passengers, and also that the brakemen must familiarize themselves with the rules, but also providing that brakemen are subject at all times to the orders of the conductors. *Randall* v. *Chicago & G. T. R. Co.* (Mich.) 666

2. The master is responsible for injury to a third person by the negligence of a servant acting in the execution of his orders, although the act was not necessary for the proper performance of the duty to the master, or was even contrary to the master's orders. *McCann* v. *Consolidated Traction Co.* (N. J. Err. & App.) 236

NOTES AND BRIEFS.

Scope of duty of railroad employee. 666

MASTER IN CHANCERY.

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MAXIMS.

1. Damnum absque injuria. *Sage* v. *New York* (N. Y.) 606

2. Reddendo singula singulis. *Peck* v. *Elliott* (C. C. App. 6th C.) 616

3. Res ipsa loquitur. *Trenton Pass. R. Co.* v. *Cooper* (N. J. Err. & App.) 637

4. Sic utere tuo, ut alienum non lædas. *Harrington* v. *Providence* (R. I.) 305

5. Where one of two parties must suffer, the loss should fall upon the one who had the best opportunity to protect himself and is most at fault. *German-American Sav. Bank* v. *Spokane* (Wash.) 259

MECHANIC'S LIEN. See LIEN.

MILITARY COMMANDER. See ACTION OR SUIT, 3.

MINES. See also ACCOUNTING; ADVERSE POSSESSION; COTENANTS; LIFE TENANT, 3, 4.

Petroleum oil in place is part of the land. *Williamson* v. *Jones* (W. Va.) 694

NOTES AND BRIEFS.

Mines; rights in oil wells; life estate and cotenancy in. 696

Possession of. 826

MORTGAGE. See also ACTION OR SUIT, 4; CORPORATIONS, 12; DAMAGES, 4; ESTOPPEL, 7; INSURANCE, 18–20; RECEIVERS, 5.

1. A deed absolute on its face, but shown by a separate written agreement to be a security for the performance of the personal obligation of the grantor to the grantee, is a mortgage. *Sun Fire Office* v. *Clark* (Ohio) 562

2. A mortgage to secure an antecedent debt, which is filed before the actual entry of a judgment which is filed soon afterward on the same afternoon, will not have priority over the judgment, but their liens will be equal. *Goetzinger* v. *Rosenfeld* (Wash.) 257

3. A mortgage will not be rendered invalid by the fact that all the money which it is given to secure is not paid over at its execution and it does not state that it is given for future advances, if it is given in good faith for a needed amount, and the money is paid over as fast as it can be raised by the mortgagee. *Dummer* v. *Smedley* (Mich.) 490

4. A lien may be given to a second mortgagee and to a receiver of a corporation, for money advanced to pay interest on the first mortgage and taxes, as against attachment creditors of the corporation. *Id.*

5. Attachments levied on the property of a mortgagor subsequently to the execution of the mortgage are properly given priority over money afterwards paid over on the security of the mortgage in accordance with the agreement under which it was executed. *Id.*

6. A mortgagee cannot sell the land under a power of sale, when there has been no default or breach of the conditions of the mortgage, so as to pass a good title, even to a bona fide purchaser for value or to any subsequent purchaser from him. *Rogers* v. *Barnes* (Mass.) 145

7. A mortgagor can recover the damages sustained by him from the wrongful execution of a power of sale in the mortgage when there was no default, even if the sale was an absolute nullity, if a subsequent transfer has placed the property in the hands of a purchaser for value with a title which appears perfect on the records and constitutes a cloud on the mortgagor's title. *Id.*

NOTES AND BRIEFS.

Mortgage; void sale under. 146

MUNICIPAL CORPORATIONS. See also CONSTITUTIONAL LAW, 18, ESTOPPEL, 2, 3; HIGHWAYS, 1; PUBLIC IMPROVEMENTS, 1; QUO WARRANTO, 2; STREET RAILWAYS, 3.

1. Municipalities may be authorized to own electric lighting plants which shall furnish lights, not only to the municipality, but also to its citizens. *Mitchell* v. *Negaunee* (Mich.) 157

2. The installation of an electric-light plant may be provided for at special election under Mich. Laws 1891, act No. 186, and the provisions of the charter of the city of Negaunee. *Id.*

3. A municipal corporation may not declare that to be a nuisance which in fact is not, although it is empowered by law to declare what shall constitute a nuisance. *Evansville* v. *Miller* (Ind.) 161

4. An ordinance declaring that any building or structure of any kind partially destroyed

by fire, which shall be permitted to remain in such condition after notification to remove, repair, or rebuild it, shall constitute a nuisance, without making any limitations with regard to its dangerous character by reason of its weak condition or location or surroundings,—is void. *Id.*

5. An ordinance making it unlawful to keep any hog within the corporate limits of a town cannot be held void for unreasonableness under statutes giving power to define nuisances and to regulate and control the keeping of animals in the town. [Affirmed by divided court.] *Darlington* v. *Ward* (S. C.) 326

6. The distance of 100 feet fixed by ordinance as the nearest to a church, schoolhouse, or dwelling that a steam shoddy machine or steam carpet-beating machine shall be established, is not unreasonable. *Ex parte Lacey* (Cal.) 640

NOTES AND BRIEFS.

See also NUISANCES.

Municipal corporations; power to furnish electric lights. 157
Delegation of power of. 675
Liability for nuisance. 835

NAME. See BENEVOLENT SOCIETIES.

NEGLIGENCE. See also ELEVATORS; EVIDENCE, 11; HORSE RACE, 1, 3, LOGS; PLEADING, 3; TRIAL, 6–8.

1. A mere failure to guard against a certain result is not actionable negligence unless under all the circumstances it might have been reasonably foreseen by a man of ordinary intelligence and prudence. *New Orleans & N. E. R. Co.* v. *McEwen* (La.) 134

2. The common law imposes no duty upon the owner to use care to keep his property in such condition that persons, even children of tender years, going thereon without his invitation, may not be injured. *Dobbins* v. *Missouri, K. & T. R. Co.* (Tex.) 573

3. Defects in the railing of a platform connected with a grain elevator do not render the owner of the premises liable to a person who was injured by the fall of the railing while he was leaning against it, thus putting it to a use for which it was not intended. *Kinney* v. *Onsted* (Mich.) 665

4. The maintenance of an excavation so near a path designed for the use of persons going to and from a railroad station platform on business as to be dangerous to one straying from the same does not render the company liable for the death of a child who fell therein while playing along the path. *Dobbins* v. *Missouri, K. & T. R. Co.* (Tex.) 573

5. The rule imposing upon the owner the duty not to permit any dangerous excavation to remain on his land so near a street or highway as to endanger persons who may accidentally stray from the same does not apply where one approaches the excavation from another route. *Id.*

6. Operating small cars by a dummy engine in a street at a low rate of speed, with occasional stops, without precautions to prevent children getting upon them, does not create a liability for the death of a child that got upon the cars and was thrown or fell from them. *Jefferson* v. *Birmingham R. & Electric Co.* (Ala.) 458

7. No recovery can be had for personal injuries by one whose own negligence contributed to the result. *Conroy* v. *Chicago, St. P. M. & O. R. Co.* (Wis.) 419

NOTES AND BRIEFS.

See also CARRIERS.

Negligence; what is. 136
As to excavation near path. 573
As to defects in premises. 665

NERVOUS SHOCK. See FRIGHT.

NOTARY.

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NOTICE. See also CARRIERS, 11; JUDICIAL SALE.

NOTES AND BRIEFS.

Notice; imputation of. 481

NUISANCES. See also MUNICIPAL CORPORATIONS, 3, 4.

1. A formal declaration that a thing is a nuisance does not necessarily make it so, and the failure of a statute to declare it to be a nuisance does not technically keep it from being one if it is treated as such in the statute. *Harrington* v. *Providence* (R. I.) 305

2. Legislative power to declare certain things nuisances *per se* in the exercise of its police power extends to privy vaults in cities. *Id.*

NOTES AND BRIEFS.

Municipal power over buildings and other structures as nuisances:—(I.) Extent of power over buildings as such: (II.) limit of power: (*a*) in general; (*b*) to destroy; (III.) over the use of buildings; (IV.) wooden and frame buildings. 161

Municipal power over nuisances affecting safety, health, and personal comfort:—(I.) Nuisances relating to public safety: (*a*) in general; (*b*) electricity, steam, and explosives; (II.) nuisances relating to health: (*a*) in general; (*b*) removal of filth, etc.; (*c*) water-closets and privies; (*d*) drains and drainage; (*e*) persons and things infected with disease; (*f*) with respect to offensive and unwholesome smells; (*g*) water and watercourses; (*h*) burial of the dead; (*i*) dead animals; (*j*) the keeping of animals; (*k*) articles of food. 305

Municipal power over nuisances relating to trade or business:—(I.) In general; (II.) slaughter-houses; (III.) laundries; (IV.) fertilizers; (V.) livery stables; (VI.) brick and lime kilns; (VII.) stockyards; (VIII.) tallow, fat, hides, etc.; (IX.) dairies; (X.) pawn brokers, junk and second hand clothes dealers; (XI.) miscellaneous trades. 640

ODORS. See SMELLS, NOTES AND BRIEFS.

OFFICERS. See also COURTS, 1; VOTERS AND ELECTIONS, 2.

1. A woman is eligible to election as a county clerk under Mo. Const. art. 8, § 12, providing that no person shall be chosen to an office "who is not a citizen of the United States and who shall not have resided in this state one year." *State, Crow,* v. *Hostetter* (Mo.) 208

2. The use of the masculine pronoun in Mo. Const. art. 8, § 12, and the statutes relating to the qualifications of a county clerk (§ 1965), does not restrict the right to hold such office to males, since other provisions of the Constitution expressly provide that certain officers must be males, while an express provision that the clerk should be a male citizen, which previously existed in the statute, has been dropped. *Id.*

NOTES AND BRIEFS.

Right of woman to hold office:—(I.) Distinction between the right to hold elective office and right to hold appointive office; (II.) right to hold judicial office: (*a*) office of judge; (*b*) office of justice of the peace; (*c*) office of arbitrator; (III.) right to hold legislative office; (IV.) right to hold administrative office: (*a*) when functions exercisable by deputy; generally; (*b*) when functions exercisable in person: (1) sheriff; (2) overseer of the poor; (3) sexton of the parish; (4) commissioner of sewers; fish commissioners, forester, etc.; (5) director of the workhouse, matron, medical superintendent of the hospital, member of the board of health, etc.; (6) superintendent of public instruction, school director, inspector, etc.; (7) pension agent, postmaster, etc.; (8) clerk of the county court; (9) master in chancery; (10) grand juror; (11) notary public; (V.), conclusion. 208

OIL. See ACCOUNTING; CARRIERS, 9–12; COTENANTS; INJUNCTION, 2; LIFE TENANT, 4, 5; MINES.

OPTION. See CORPORATIONS, 5–7.

ORDINANCE. See MUNICIPAL CORPORATIONS.

PARDON. See also BAIL AND RECOGNIZANCE.

NOTES AND BRIEFS.

Pardon; effect of. 808

PARENT AND CHILD. See also INFANTS, 2–4.

PARKS. See BUILDINGS; CONTRACTS, 12; ESTOPPEL, 1, 2.

PARTNERSHIP. See also CONFLICT OF LAWS, 1.

1. A partnership association organized under the laws of Pennsylvania is regarded in Massachusetts as an association or partnership, and not as a corporation, for the purpose of bringing an action against it. *Edwards* v. *Warren Linoline & G. Works* (Mass.) 791

2. Subscriptions to the capital stock of a partnership association may be paid by the giving of a promissory note, if the note is immediately converted into money and the proceeds applied for the benefit of the corporation. *Rouse, H. & Co.* v. *Detroit Cycle Co.* (Mich.) 794

3. Technical noncompliance with the statute in the formation of a partnership association, and failure to comply with the statutory requirements in its subsequent management, will not render subsequent stockholders who had no knowledge of the defects and had no intent to become partners liable as such, in the absence of a statutory provision making them so, for goods furnished by one who dealt with the concern as a limited association. *Stazer & A. Mfg. Co.* v. *Blake* (Mich.) 798

4. Omission in a single instance by the manager of a partnership association, of the word "limited" in dealing with a correspondent, will not render the members of the association liable as partners, in the absence of anything to show that any indebtedness, damage, or liability arose in consequence of that act. *Id.*

NOTES AND BRIEFS.

Partnership; limited, distinguished from corporation. 791, 794, 798

Limited; payment of subscription. 795, 798

PASTOR. See RELIGIOUS SOCIETIES, 1.

PATENTS. See BILLS AND NOTES, 11; CORPORATIONS, 11.

PAYMENT. See TRIAL, 4.

PEDDLERS. See also CONSTITUTIONAL LAW, 9.

The business of a hawker or peddler is so far a legitimate and moral business that the legislature can regulate it only for the purpose of preventing it from becoming a nuisance. *State, Luria,* v. *Wagener* (Minn.) 677

NOTES AND BRIEFS.

Peddlers; who are; restrictions on. 677

PENSIONS.

NOTES AND BRIEFS.

Right of woman to be pension agent. 213

PERPETUITIES.

The rule against perpetuities, so far as it applies to a trust for a meeting house of a religious society, is abrogated by Minn. Gen. Stat. § 3040. *Lane* v. *Eaton* (Minn.) 669

PETROLEUM. See ACCOUNTING; COTENANTS; INJUNCTION, 2; LIFE TENANT, 4, 5; MINES.

PIERS. See WATERS, 5.

PIGS. See ANIMALS, NOTES AND BRIEFS.

PLATFORM. See NEGLIGENCE, 3.

PLEADING. See also JUDGMENT, 2; MANDAMUS, 2.

1. It is not proper to strike a plea from the files because it is insufficient in substance or form, but the remedy in such case is by demurrer. *Consolidated Coal Co.* v. *Peers* (Ill.) 624

2. A presumption against the pleader as to the contents of an instrument will arise when he bases a claim upon it without setting it forth *in hæc verba* or making averments which definitely show its contents. *Id.*

3. An allegation that the defendant's servants recklessly and wantonly or intentionally caused a child to leave cars of a dummy line in a street while they were in motion is not sufficient to show negligence without anything to show that the conditions were not proper for the child to get off. *Jefferson* v. *Birmingham R. & Electric Co.* (Ala.) 458

4. A plea to an action by a corporation, alleging that it has been dissolved by a forfeiture of its charter and by misuser of its franchises, is good, against a general demurrer or mere motion to strike, as an allegation that the charter has been forfeited in the manner prescribed by law. *Merritt* v. *Gate City Nat. Bank* (Ga.) 749

5. An allegation that a note "is what is denominated under the laws of Kentucky a 'peddler's note'" is a mere legal conclusion, and does not sufficiently aver that the vendor of the article for which the note was given was an itinerant person. *Union Nat. Bank* v. *Brown* (Ky.) 503

6. An estoppel *in pais* cannot be relied upon unless pleaded. *State, Kansas City,* v. *East Fifth Street R. Co.* (Mo.) 218

PLUMBERS. See CORPORATIONS, 3, 4.

POND. See EASEMENTS, 1; WATERS, 11.

POOR.

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Woman as overseer of. 211

POSTOFFICE.

NOTES AND BRIEFS.

Right of woman to be postmaster. 213

PRINCIPAL AND AGENT.

NOTES AND BRIEFS.

Ratification of agent's act. 485

PRIVIES. See also CONSTITUTIONAL LAW, 16; NUISANCES, 2.

NOTES AND BRIEFS.

Privies; municipal regulations of. 316

PROHIBITION.

A writ of prohibition to restrain the judge from proceeding to punish a contempt in excess of his jurisdiction is an apt and proper remedy. *State, Ashbaugh,* v. *Eau Claire Cir. Ct.* (Wis.) 554

PROXIMATE CAUSE.

1. Negligence may be the proximate cause of an injury which directly results therefrom, although the particular consequences were unusual and could not ordinarily have been foreseen. *Graney* v. *St. Louis, I. M. & S. R. Co.* (Mo.) 633

2. An act must have been the proximate cause of the damage in order to render the person who did it liable therefor. *New Orleans & N. E. R. Co.* v. *McEwen* (La.) 134

PUBLIC IMPROVEMENTS.

1. Delay and negligence of city officers in providing a fund for the payment of street-grade warrants by levy and special tax or assessment will not render the city liable to an action,—at least so long as the assessment plan can be enforced in any way. *German-American Sav. Bank* v. *Spokane* (Wash.) 259

2. The sale of a narrow strip from the front of property abutting on a street, for the sole purpose of avoiding a street-improvement assessment, after the city has entered into a contract for the improvement but before the lien of the assessment attaches, is void, so far as concerns the assessment. *Eagle Mfg. Co.* v. *Davenport* (Iowa) 489

3. The lien of an assessment for a street improvement attaches from the time when labor is first done or material furnished by the contractor in making the improvement after the contract is made, and not from the adoption of a resolution for doing the work or the letting of the contract therefor, under Iowa Acts 23d Gen. Assem. chap. 14, § 12, providing that the assessment shall be a lien from the "commencement of the work." *Id.*

4. Land purchased after the execution of a contract for a street improvement, with the knowledge, actual or constructive, on the part of the purchaser, that a strip of land 2 feet wide between the land purchased and the street to be improved had previously been sold by his grantor for the sole purpose of avoiding the easement, is liable for such assessment although the assessment was made for a lawful purpose. *Id.*

5. The owner of land abutting on a street for the improvement of which a contract has been entered into may lawfully sell a strip from the front of his property, of less width than the 150 feet which would otherwise be liable for the assessment, if such sale is in good faith, for legitimate purposes, and not merely a subterfuge to defeat the assessment. *Id.*

NOTES AND BRIEFS.

Public improvements; transfer of property to defeat assessments. 481

PUBLIC LANDS.

Grants of land made by the King of Great Britain, or by persons acting under his authority, before October 14, 1775, are ratified and confirmed by the New York Constitution of 1777. *Sage* v. *New York* (N. Y.) 606

QUO WARRANTO. See also CORPORATIONS, 19.

1. The state may oust a street-railway company from its franchise to operate a railway in streets, by quo warranto proceedings brought on relation of the city, although the franchises were derived directly from the city under ordinances passed in the exercise of charter power conferred on the city by the state, which thus made the grant through the agency of the city. *State, Kansas City*, v. *East Fifth Street R. Co.* (Mo.) 218

2. A city cannot contract away, or in any way abridge, the sovereign power of the state to proceed against a street-railway company by quo warranto for forfeiture of its franchises, or even to do so on the relation of the city. *Id.*

RAILROAD RELIEF ASSOCIATION. See ACCORD AND SATISFACTION; CONTRACTS, 6.

RAILROADS. See also HIGHWAYS, 2; INJUNCTION, 6; NEGLIGENCE, 4, 6; RECEIVERS, 4, 5; SPECIFIC PERFORMANCE, 3.

1. A company which purchases all the property and rights of another railroad company, including a lease, and which takes charge of the leased road, operates it for a long time, and elects to sue and recover money due the lessee from the lessor, must be held to have assumed the obligations of the lease, and not be a mere tenant by sufferance. *Schmidt* v. *Louisville & N. R. Co.* (Ky.) 809

2. An abandonment of a railroad lease by a company which has acquired the lessee's property and rights is not authorized by the mere failure of the lessor to pay the money due under the lease, when the contract gives the lessee a lien therefor, and does not provide that it shall be a ground for forfeiture, although there are other conditions of forfeiture expressed. *Id.*

3. The lessor of a railroad which is leased under statutory authority without any provision exempting the lessor from liability remains liable for an injury resulting from negligent omission of a duty owing by it to the public,—such as the proper construction of its road. *Lee* v. *Southern P. R. Co.* (Cal.) 71

4. The lessor of a railroad is liable to an employee of its lessee who is injured by the imperfect construction and maintenance of the rails and track. *Id.*

5. The provision against leasing a franchise so as to relieve it or property held under it from the liability of the lessor, grantor, lessee, or grantee, made by Cal. Const. art. 12, § 10, does not give an employee of the lessee of a railroad a right of action against the lessor company, upon the fiction that it is his employer, but merely enables him to enforce his judgment, based on the negligence of his employer, against the property. *Id.*

6. Standing so near a passing train that there is danger of being drawn under it by a current of air is negligence, although the person does not stand near enough to be struck by the train. *Graney* v. *St. Louis, I. M. & S. R. Co.* (Mo.) 633

Fences.

7. Inclosed lands within the meaning of a statute requiring a railroad to fence its right of way through inclosed lands are those surrounded by a fence, hedge, ditch, wall, or any line of obstacle interposed so as to part off and shut in the land, and set it off as private property. *Kimball* v. *Carter* (Va.) 570

8. The inclosure of lands need not be by continuous and lawful fence at all times sufficient to prevent stock passing through it, in order to constitute them inclosed lands within the meaning of a statute requiring a railroad right of way to be fenced through such lands. *Id.*

9. The inclosure of lands leased by a lessee from different parties is sufficient to make them inclosed lands while in his possession, within the meaning of a statute requiring a railroad through them to be fenced, if the entire track in his possession is inclosed, although separate parcels are not divided by fences. *Id.*

Crossings.

10. A farm crossing is not a "traveled road or street" within the meaning of a statute requiring the bell or whistle of a locomotive to be sounded where a railway crosses such road or street. *Czech* v. *Great Northern R. Co.* (Minn.) 302

11. Reasonable care may require the giving of signals at farm crossings when they are peculiarly dangerous and a train is approaching at great speed, although the statute requiring signals does not apply to such crossings. *Id.*

12. An action for negligence in running a train at a rate of speed prohibited by ordinance, over a crossing at which there does not appear to have been any gates or watchmen, is not defeated by the subsequent substitution of an ordinance which makes the same limitation except when gates and a watchman are provided. *Graney* v. *St. Louis, I. M. & S. R. Co.* (Mo.) 633

13. A steam railroad has the right of way over a crossing as against an electric street-railway, and may run its cars at such speed as it chooses, if it exercises proper care in giving signals. *New York & G. L. R. Co.* v. *New Jersey Elec. R. Co.* (N. J. Sup.) 516

14. The same character or degree of care to avoid collision must be exercised by those operating an electric car along a public highway, in crossing a steam railroad, that is required from persons driving across it with ordinary vehicles, and they must look and listen for an approaching train. *Id.*

15. The failure of a railroad company to sound a whistle or ring a bell as required by statute, on a train's approach to a highway crossing will preclude, under the rule as to contributory negligence, a recovery by such company against an electric-railway company for damages resulting from a collision caused by the latter's negligence. *Id.*

16. An agreement between an electric-railway company and a railroad company, that the former shall have a derailing switch near a crossing as a precaution against collisions, and that a conductor of an electric car before it passes over the crossing shall look in both

directions and listen for the approach of a railroad train, does not excuse the railroad company from giving the statutory signals as a warning of the approach of a train. *Id.*

Waters.

17. Railroad companies are not charged with the duty of preventing the accumulation of water on their rights of way by Tex. Rev. Stat. 1895, art. 4436, providing that in no case shall any railroad company construct a roadbed without first constructing such necessary culverts or sluices as the natural lay of the land requires for the necessary drainage thereof. *Dobbins* v. *Missouri, K. & T. R. Co.* (Tex.) 573

NOTES AND BRIEFS.

Railroad; lease of; abandonment of; specific performance of contract to operate. 810

Liability of lessor of. 71

Duty to signal at crossing. 303

Collision with electric car at crossing. 517

RATES. See CORPORATIONS, 1; WATERS, 12–17.

REAL PROPERTY. See also CONSTITUTIONAL LAW, 4, 13; CORPORATIONS, 20; EMINENT DOMAIN, 2; MORTGAGE, 2.

1. A remainder will be regarded as vested, rather than contingent, if the disposition is so obviously upon the border as to be inherently doubtful between the two. *Bigley* v. *Watson* (Tenn.) 679

2. A remainder to the children of a woman who has an estate for life is not extinguished until her death, although she may be very old and childless, as the law does not assume that there is an impossibility of issue at any age, however great. *Id.*

3. The fee is not in abeyance while a remainder is contingent, under a consent decree in partition giving one party a life estate, with remainder at her death to her children then living or the issue of such as may be dead; but the fee abides with her during such contingency; and if the line of remaindermen is extinct at her death her title is freed from the remainder and subject to disposal by her will. *Id.*

4. The statute abrogating the rule in *Shelley's Case* (Tenn. Acts 1851-52, chap. 91, § 11) by providing that, on the termination of a life estate with remainders to heirs or heirs of the body of the life tenant, such heirs shall take as purchasers by virtue of the remainder so limited to them, gives no rights to "heirs" to whom no remainder was limited, as against devisees of one who was not only a life tenant but in whom the fee abode subject to a contingent remainder to her surviving children or issue of children, when by the extinction of the line of her descendants during her life the remainder failed and her title at the moment of her death became absolute. *Id.*

RECEIVERS. See also APPEAL AND ERROR, 1; CORPORATIONS, 16, 17; COURTS, 10, 11; INSURANCE, 37.

1. Dissensions between two persons who are equal owners of the stock of a corporation and are also its officers will not justify the appointment of a receiver so long as no actual wrong is committed by either of them. *Wallace* v. *Pierce-Wallace Pub. Co.* (Iowa) 122

2. A receiver of that part of the property of a corporation which consists of shares of stock in another corporation cannot be appointed on account of a disagreement respecting the management and control of the latter corporation, between two persons who are the officers of the former corporation and own all its stock in equal shares. *Id.*

3. A solvent corporation cannot be put into the hands of a receiver on account of a debt not reduced to judgment or secured by any lien on property of the corporation. *Id.*

4. The jurisdiction of a state court which has appointed a railroad receiver to direct him as to the wages to be paid for operating the road within that state is not defeated by the fact that the employees in operating the road crossed the state boundary and incidentally performed some service in another state, although the receivership is ancillary to a receivership in such other state. *Guarantee Trust & S. D. Co.* v. *Philadelphia, R. & N. E. R. Co.* (Conn.) 804

5. A railroad mortgagee is not liable for unpaid wages or other obligations incurred by a receiver appointed at the mortgagee's instance in a foreclosure suit, although the trust fund is sufficient to pay them, unless such responsibility was imposed by the court as a condition of the appointment or the continuance of the receiver in office. *Farmers' Loan & T. Co.* v. *Oregon P. R. Co.* (Or.) 424

6. Taxes upon the shares of stock in an insurance company, which are by statute charged to and made payable by the corporation, are a demand payable out of its assets in the hands of its receiver in case it becomes insolvent after they become due. *Boston & A. R. Co.* v. *Mercantile Trust & D. Co.* (Md.) 97

NOTES AND BRIEFS.

Receivers; of corporations; ground of appointment. 123

Charging expense of, on party obtaining appointment. 424

Jurisdiction as to property in other state 805

RECORDS. See CONSTITUTIONAL LAW, 13; EMINENT DOMAIN, 2.

RELIEF ASSOCIATIONS. See CONTRACTS, 6.

RELIGIOUS SOCIETIES. See also CHARITIES, 4, 7; PERPETUITIES.

1. A call to a pastor, made by a congregation of a Presbyterian church, fixing the amount of salary, does not become effective, under the rules and regulations of that church, until it is placed in the hands of the minister and formally sanctioned by the presbytery; and the refusal of the presbytery to place the call in his hands or to install him puts an end to the contract. *First Presby. Church* v. *Myers* (Okla.) 687

2. The chief governing body of a church

is the exclusive judge, within the jurisdiction prescribed by its rules and regulations, as to whether the pastoral relations shall be formed between a minister of the denomination and one of the local churches. *First Presby. Church* v. *Myers* (Okla.) 687

3. The decisions of church tribunals as to the terms upon which the pastoral relations shall be formed and the salary accompanying it shall be demanded, as well as in respect to doctrine and discipline, will be binding on the civil courts. *Id.*

4. Rules and regulations for church government and discipline, prescribed by the governing bodies of religious associations and churches, will be obligatory upon the members, congregations, and officers, and will be given effect by the civil courts. *Id.*

NOTES AND BRIEFS.

Religious societies; liability for salary of pastor:—Taxes, subscriptions, etc.; binding contract for services; interference with performance; abuse of contract; absence of incorporation; dissolution of pastoral relation; right to compensation; individual liability; sale of property; accord and satisfaction. 687

REMAINDER. See ACTION OR SUIT, 2; REAL PROPERTY, 1–3.

REMOVAL OF CAUSES. See CONSTITUTIONAL LAW, 7.

The provision of the Utah Constitution, under the authority given by the act of Congress for the transfer of causes pending in the territorial courts of which the Federal courts do not have exclusive jurisdiction upon motion or petition under and in accordance with the act or acts of Congress, does not require the application for removal to be made by the defendant before pleading or at any specified time before trial. *McCornick* v. *Western U. Teleg. Co.* (C. C. App. 8th C.) 684

RESERVATION. See WATERS, 1.

RESUME.

For résumé of contents of book, see 865

RIPARIAN RIGHTS. See WATERS.

SALE. See also CONTRACTS, 11.

Sale of machinery to a corporation with notice that it is in a bad condition financially, and under a guaranty of payment by a third person, does not entitle the seller to a lien for its price. *Dummer* v. *Smedley* (Mich.) 490

NOTES AND BRIEFS.

Sale; remedies of parties on. 760

SALVATION ARMY. See CHARITIES, 5, 6.

SCAVENGER. See LICENSE.

SCHOLARSHIP. See LEVY AND SEIZURE.

SCHOOLS.

The constitutional provision that the legislature shall provide for a system of free common schools wherein all the children of the state may be educated has no application to an institution wholly or partly under private control. *People, New York Inst. for the Blind* v. *Fitch* (N. Y.) 591

NOTES AND BRIEFS.

Schools; right of woman to be superintendent or other officer of. 212

SECRETS. See also CONTRACTS, 4; INJUNCTION, 5.

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SHELLEY'S CASE. See REAL PROPERTY, 4.

SHERIFF.

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SLAUGHTER-HOUSES.

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Municipal power over, as nuisances. 646

SMELLS.

NOTES AND BRIEFS.

Municipal regulation as to nuisance of. 322

SPECIFIC PERFORMANCE. See also INJUNCTION, 6.

1. A contract fair when made may be specifically performed, although it has become a hard one by force of subsequent circumstances or changing events. *Schmidt* v. *Louisville & N. R. Co.* (Ky.) 809

2. The mere fact that a contract having a number of years to run may turn out a losing investment affords no reason for refusing specifically to enforce it. *Id.*

3. A railroad lease is not so uncertain and indefinite that it cannot be specifically performed, where a fair construction of it will authorize such an operation of the road as the business interests of the community may require. *Id.*

NOTES AND BRIEFS.

Specific performance; of contract to operate railroad. 810

STATUTES. See also FISHERIES.

1. The constitutional provisions requiring three several readings, the printing of bills, and an aye and nay vote on final passage of any bill, are mandatory. *Cohn* v. *Kingsley* (Id.) 74

2. A court may go back of the enrolled bill to the journals of both houses of the legislature to ascertain whether or not the constitutional requirements were obeyed in the passage of the act in question. *Id.*

3. The journals of both houses of the legislature must affirmatively show that the provisions of the Constitution in regard to the passage of any law were substantially followed by the legislature in the passage of any act the validity of which is questioned. *Id.*

4. The failure of the journals of both houses of the legislature to show that any step required by the Constitution in the passage of a law was taken is conclusive evidence against the validity of the bill, that it was not taken. *Id.*

5. Neither house of the legislature can suspend the provision of the Constitution which requires three readings on separate days in each house except in case of urgency, and then there must be an aye and nay vote by two thirds of the house voting with reference to only one bill then before the house. *Id.*

6. The power to increase the capital of a corporation by by-law, which is given by Tenn. act March 23, 1875, is not repealed by Tenn. act March 27, 1883, making a different provision for an increase of stock, even if that applies to a corporation under a former act. *Peck* v. *Elliott* (C. C. App. 6th C.) 616

7. A special law to prevent fishing for profit by citizens of one county in the waters of another county, which is limited to certain counties, is in violation of the provision of S. C. Const. art. 3, § 34, against special laws "where a general law can be made applicable." *State* v. *Higgins* (S. C.) 561

8. A statute attempting to abolish several inferior courts, and to substitute one court in their place, cannot be separated so as to uphold the substituted court in place of some of them, if one is protected from destruction by the Constitution and its judge is a member of the others. *Johnson* v. *State* (N. J. Err. & App.) 373

9. A statute limiting the liability of a railroad company for fires to the difference between the amount of the loss and the amount of insurance upon the property applies to a pre-existing policy of insurance on which a loss occurs after the passage of the statute. *Leavitt* v. *Canadian P. R. Co.* (Me.) 152

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Statute; constitutional provisions as to enactment; readings of; yea and nay vote. 75

Constitutional provisions as to title. 225

Partly bad. 373

STEAM.

NOTES AND BRIEFS.

Municipal regulation of, as a nuisance. 305

STORAGE. See CONSTITUTIONAL LAW, 17.

STREET RAILWAYS. See also CARRIERS, 13; ESTOPPEL, 3; QUO WARRANTO; RAILROADS, 13-16; TRIAL, 8.

1. The forfeiture of the "road" of a street-railway company under a clause in the grant of the franchise stating that the company will forfeit the road to the city in one year after it ceases to operate the road includes the rails as well as the franchise. *Tower* v. *Tower & S. Street R. Co.* (Minn.) 541

2. The forfeiture of the road of a street-railway company to the city in case of failure to operate it for one year, which is provided for by a condition in the ordinance granting the franchise, is not unenforceable on the ground that it is a penalty or liquidated damages which can be recovered, but it may be judicially enforced. *Id.*

3. A contract that nonuser of street railway tracks for any specified time shall not operate as a forfeiture of the franchise cannot be made by a city, either by ordinance or otherwise, since this would involve authority to grant the right of the use of streets for private purposes. *State, Kansas City,* v. *East Fifth Street R. Co.* (Mo.) 219

4. Entire failure to operate a street railway for three years, when the ordinance under which the franchise is exercised requires cars to run sixteen hours every day in the year, constitutes a nonuser which forfeits the franchise. *Id.*

5. A street railway company has the right to use the trolley system without the sanction of the mayor and city council, where its charter authorizes it to use "any motive power and means of traction which the mayor and city council may sanction or which shall be authorized to be made use of in the city . . . by another corporation exercising street railway franchises thereon," and the legislature has subsequently given express authority to other companies to use the trolley system in that city. *Harper* v. *Baltimore City Pass. R. Co.* (Md.) 509.

6. The rule that a pedestrian must stop, look, and listen before crossing a railroad track applies to a street railway operated by electricity. *Hoelzel* v. *Crescent City R. Co.* (La.) 709

7. A pedestrian who suddenly attempts to cross an electric railway in the night when a street car is approaching so near that it must be visible and its noise apparent must be held negligent, so that no recovery can be had against the railway company for his death if he is struck by the car. *Id.*

8. Negligence in running a car upon an electric street railway having a sprinkler thereon upon which waving black coats are hung, without reasonable care to prevent frightening horses, renders the street railway company liable; and it would seem to be immaterial who placed the coats in that position, if the car was operated with knowledge that they were there. *McCann* v. *Co.* (N. J.) 236

9. Reasonable means to prevent frightening horses and thereby injuring persons riding or driving along the street must be taken when a street railway car is propelled in such a con-

dition that a reasonably prudent man would apprehend that it would frighten horses. *McCann* v. *Consolidated Traction Co.* (N. J.) 236

NOTES AND BRIEFS.

See also CARRIERS.

Street railways; ousting from franchise. 218

Forfeiture of franchise of. 541

Collision at railroad crossing. 517

Negligence of person struck by street car; duty to look out for car; care in running car. 709

STRIKE. See CONSPIRACY, 2–4.

SUBROGATION.

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Of subcontractor. 412

SUNDAY. See TIME, 2.

SYNDICATE. See BILLS AND NOTES, 10.

TAXES. See EVIDENCE, 8; INTEREST; RECEIVERS, 6.

TELEGRAPHS.

A telegraph company is not liable to a banker who cashes a draft upon the faith of a telegram from the drawee purporting to authorize the drawer to make such a draft because of a mistake in transmitting the amount for which the draft is authorized, as the company cannot be liable to a stranger to whom it has never delivered the message and to whom it owes no duty whatever merely because he has seen the telegram and acted upon it to his injury. *McCornick* v. *Western U. Teleg. Co.* (C. C. App. 8th C.) 684

NOTES AND BRIEFS.

Telegraphs; liability for negligence; who may have right of action. 684

TENDER.

Money tendered and paid into court as the full amount due the plaintiff constitutes a full discharge if plaintiff takes it from the court, although he protests that more is due and declines to accept it as full payment, if the terms on which it was tendered are not waived by the defendant or modified by rule of court. *Jonathan Turner's Sons* v. *Lee Gin & M. Co.* (Tenn.) 549

NOTES AND BRIEFS.

Tender; payment of money into court; effect of accepting it. 549

TIME. See also MORTGAGE, 2.

1. The law divides the day where equity requires it. *Goetzinger* v. *Roenfeldt* (Wash.) 257

2. The Sunday before a term of court which begins on Monday is not excluded from the computation of the twenty days that an action must be filed before the term in order to be triable, at least when by the long practice of the court that Sunday has been included in such twenty days, since there is nothing to be done on the last day, and the fact that it falls on Sunday makes no difference. *Merritt* v. *Gate City Nat. Bank* (Ga.) 749

NOTES AND BRIEFS.

Time; rule of, as to priority of judgment. 243

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Computation of; excluding Sunday. 749

TOLLS. See BICYCLES, NOTES AND BRIEFS.

TORRENS LAW. See CONSTITUTIONAL LAW, 4, 13; EMINENT DOMAIN, 2.

TOWN. See MANDAMUS, 3.

TRADE SECRETS. See INJUNCTION, 5.

TRESPASS.

One who anchors a boat in the shallow water of a river, at a marshy place which is not navigable, and there hunts wild fowl, is guilty of a trespass as to the owner of the soil. *Hall* v. *Alford* (Mich.) 205

TRIAL. See also CARRIERS, 13; CRIMINAL LAW, 2; EVIDENCE, 25; JURY.

1. A jury trial upon appeal does not answer the constitutional guaranty of a right to be tried by jury. *State* v. *Gerry* (N. H.) 228

2. The trial court is not bound to ask or to permit counsel to ask a juror on his *voir dire* any question the answer to which would tend to criminate or disgrace him. *Ryder* v. *State* (Ga.) 721

3. Defendant in a criminal action did not lose his right to complain of the absence of a witness, which was not in any way occasioned by him or his counsel, because such witness was present at an earlier period of the trial, and requested defendant's counsel to be allowed at that time to go on the stand and testify, and was subsequently compelled to leave the court for providential cause, as it is defendant's right to introduce his witnesses in the order in which he or his counsel may deem best. *Id.*

Questions for jury.

4. The jury must determine whether or not the giving of notes in payment of subscriptions to the capital stock of a corporation was in good faith. *Rouse, H. & Co.* v. *Detroit Cycle Co.* (Mich.) 794

5. The question whether or not a person is wholly disabled so as to prevent him from doing any and every kind of business pertaining to his occupation is for the jury, where the evidence shows that he went to his office every day, but was unable to do any kind of work. *Turner* v. *Fidelity & C. Co.* (Mich.) 529

6. Questions of dispute of matters of fact relating to negligence and contributory negligence are properly submitted to the jury. *New York & G. L. R. Co.* v. *New Jersey Elec. R. Co.* (N. J. Sup.) 516

7. The negligence of a boy twelve years old, in standing so near a passing train that he is drawn under it by a current of air is a question for the jury, and cannot be declared as a matter of law. *Graney* v. *St. Louis, I. M. & S. R. Co.* (Mo.) 633

8. The question of negligence in running a tank car on an electric street railway, with waving black coats hanging thereon in such way as to frighten horses, is a question for the jury. *McCann* v. *Consolidated Traction Co.* (N. J. Err. & App.) 236

9. The question as to the materiality of the omission to mention another policy in an application for life insurance, and of the fact that the applicant was an embezzler, is for the jury under a statute providing that misstatements and concealments shall not defeat the policy unless material. *Penn Mut. L. Ins. Co.* v. *Mechanics' Sav. Bank & T. Co.* (C. C. App. 6th C.) 33

Taking case from jury.

10. A motion to exclude the evidence of plaintiff from the jury on the ground that it will not support a verdict in his favor is not proper practice in Tennessee. *West Memphis Packet Co.* v. *White* (Tenn.) 427

11. A variance between the evidence of a plaintiff and his principal witness is not the ground of a nonsuit. *Wassermann* v. *Sons* (Cal.) 176

Instructions.

12. A charge is not erroneous because of generalization and abstractions which lead up to the statement of the law determining the rights and responsibilities of the parties on the issues of fact involved. *West Memphis Packet Co.* v. *White* (Tenn.) 427

13. An instruction in an action against a steamboat company for personal injuries to a passenger, that the evidence must satisfy them that the boat was being run by and in the interest of defendant at the time of the injury, sufficiently presents the theory that the excursion during which plaintiff was injured was an individual affair of a third person for which the company was not liable. *Id.*

14. An insurer is not entitled to an instruction to the jury that the failure of an applicant for insurance to mention a policy in another company, when asked about other insurance, raises the presumption that the omission was fraudulent. *Penn Mut. L. Ins. Co.* v. *Mechanics' Sav. & T. Co.* (C. C. App. 6th C.) 33

15. An instruction on a trial for murder, which refers to the homicide as the "act which the accused had committed," is improper where it is not distinctly admitted that the accused did commit the homicide, although many of the requests to charge practically conceded such fact. *Ryder* v. *State* (Ga.) 721

16. The trial court should not, on a trial for murder, in explaining the nature of expert and nonexpert testimony and the rules under which witnesses belonging to each class may give their opinions as to the sanity or insanity of defendant, charge that the testimony of expert witnesses is entitled to great weight, and add that it is the same with parties who associated with defendant, lived with him, and lived in the same community, as the probative value of the testimony of each witness should by determined by the jury. *Id.*

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Trial; right to jury in criminal case. 229

Question for jury as to negligence. 236

Question for jury as to negligence in getting on or off street car in motion. 788

Instruction to jury as to evidence; excluding evidence from jury. 427

TROLLEY. See STREET RAILWAYS, 5

TRUSTS. See ACTION OR SUIT, 1; BILLS AND NOTES, 2, 3; CORPORATIONS, 14; INSURANCE, 34, 35.

UNDERGROUND RAILWAY. See HIGHWAYS, 2, 3.

UNDERTAKERS. See COMPULSORY SERVICE, 1; CONSPIRACY, 1.

VENDOR AND PURCHASER. See ESTOPPEL, 7.

VOTERS AND ELECTIONS. See also BETTING.

1. A person is not "able to read the Constitution of this state" within the meaning of Wyo. Const. art 6, § 9, unless he can read it in the English language, instead of a translation. *Rasmussen* v. *Baker* (Wyo.) 773

2. A vacancy in office caused by the death of a county clerk within fifteen days before a general election should be filled at that election under Mo. Stat. § 1964, read in connection with § 4766, as amended by Mo. Laws 1893, p. 155. *State, Crow,* v. *Hostetter* (Mo.) 208

NOTES AND BRIEFS.

See also BETTING.

Voter's ability to read and write 774

WAGES. See APPEAL AND ERROR, 1; CORPORATIONS, 21; RECEIVERS, 4.

WALLS. See MUNICIPAL CORPORATIONS, 4.

WAR. See ACTION OR SUIT, 3.

WAREHOUSEMEN. See CONSTITUTIONAL LAW, 17.

WARRANT. See ARREST.

WASTE. See COTENANTS; EQUITY; LIFE TENANT, 5.

WATER-CLOSETS.

NOTES AND BRIEFS.

Municipal regulations of. 316

WATERS. See also BOUNDARIES; BUILDINGS, 2; COURTS, 7; DRAINS AND SEWERS; EASEMENTS, 1, EMINENT DOMAIN, 1; INJUNCTION, 3, 4; RAILROADS, 17; TRESPASS.

1. A public grant of lands bounded by tidewater is impliedly subject to those paramount uses to which the government as trustee for the public may be called upon to apply the water front for the promotion of commerce and the general welfare. *Sage* v. *New York* (N. Y.) 606

2. Absolute power to improve a water

front for the benefit of navigation exists in the state or its municipal grantee as a trustee for the public, free from any interference by a riparian owner, whose sole right as against such authority is the statutory right of preemption in case of a sale. *Sage* v. *New York* (N. Y.) 606

3. A riparian owner's right of ingress and egress to his water front does not include a right to compensation for an interference therewith caused by the public improvement of the water front for the benefit of navigation. *Id.*

4. The privileges or easements of riparian proprietors upon tidewater include the right of access to the navigable part of the water in front, as against all but the government as trustee for the people at large. *Id.*

5. Lands made by filling up a water front and constructing piers, in a municipal improvement of the water front for the benefit of navigation, do not constitute an accretion to the land of a riparian proprietor, but remain the property of the city for the benefit of the public as dry land, just the same as when it was land under water. *Id.*

6. The governmental power of the state to control public waters cannot be lost by mere nonuser. *Auburn* v. *Union Water Power Co.* (Me.) 188

7. The fee to land under the waters of a river is in the riparian owner up to the middle of the stream. *Hall* v. *Alford* (Mich.) 205

Diversion.

8. The improvement of highways, draining of lands, and general improvement of the country, will not justify the diversion of water from a mill without compensation and due process of law. *Stock* v. *Jefferson* (Mich.) 355

9. The manner in which water diverted from a stream is returned to it is immaterial to a lower riparian proprietor, if the water is returned before the stream reaches his land. *Gould* v. *Eaton* (Cal.) 181

10. A riparian proprietor cannot confer upon another person the right to divert water from a stream to use on nonriparian lands to the injury of a lower proprietor, since the riparian owner himself has a right to divert waters to riparian lands only. *Id.*

11. The right of a city to take water for the use of its inhabitants from a great public pond belonging to the state can be granted by the legislature, without making any compensation to those who want the water for the use of mills. *Auburn* v. *Union Water Power Co.* (Me.) 188

Water rates.

12. The current expenses which may be allowed in determining the sufficiency of the income provided by water rates consist of the money which is reasonably and properly expended in each year in collecting and distributing the water. *San Diego Water Co.* v. *San Diego* (Cal.) 460

13. Expenses of litigation contesting an ordinance fixing water rates cannot be considered as part of the expenses to be allowed in determining the sufficiency of the income produced by the rates. *Id.*

14. The investment on which a water company is entitled to base its compensation in determining the sufficiency of rates cannot include property not at present actually employed in collecting or distributing the water, however useful it may have been in the past or may yet be in the future. *Id.*

15. Water rates which will produce some reward to the owner of the water plant may nevertheless be so grossly and palpably insufficient to afford just compensation to the owner as to give the court power to relieve against an ordinance establishing such rates. *Id.*

16. Water rates which will produce but little more than 3½ per cent upon the actual cost of the waterworks after deducting current expenses do not constitute just compensation to the water company, where it is compelled to pay a much higher rate upon money which it appears to have fairly borrowed, when the rate paid does not appear to be above the lowest market rate, and the prudence and economy of the management are not successfully impeached. *Id.*

17. An ordinance fixing water rates so palpably unreasonable and unjust as to amount to a taking of the property of a water company without just compensation is not justified by Cal. Const. art. 14, § 1, providing for the establishment of such rates. *Id.*

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WILLS. See also CONTRACTS, 3; EVIDENCE, 22, 23.

1. A will jointly executed by husband and and wife cannot be proved as the will of both during the lifetime of one of them. *Re Davis's Will* (N. C.) 289

2. An instrument executed by husband and wife as their joint will may be proved and take effect as the separate will of the husband after his death during the wife's lifetime, and, unless in some way revoked, may, upon her death, be again probated as to her property mentioned therein. *Id.*

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Wills probate of joint or mutual will:—(I.) Two wills in one instrument; (II.) right to revoke; (III.) joint wills to operate on survivor's death. 289

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WITNESSES.

A banker who, to show that deposits

were not received with his knowledge or consent, testifies that on the day they were received he went to another town, and telephoned those in charge of the bank not to receive any more deposits, may be asked on cross examination how long he remained at that place, and whether or not on his return he found any deposits to have been made after his instructions not to receive them, for the purpose of fully disclosing his connection with the deposit. *State* v. *Eifert* (Iowa) 485

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WRIT AND PROCESS. See also CONSTITUTIONAL LAW, 5, 6, 12, 15.

1. An attorney at law is privileged from the service of process while attending upon the supreme court of Michigan and while going to and returning from the court to the county of his residence. *Hoffman* v. *Bay County Circuit Judge* (Mich.) 663

2. The privilege of exemption of attorneys from arrest in certain cases, given by How. Mich. Ann. Stat. § 7253, is not exclusive of the common-law privilege from service of process while attending court or returning therefrom. *Id.*

3. Jurisdiction of a foreign insurance company doing business in the state without complying with the statute which requires it before doing business to appoint the insurance commissioner as attorney on whom process may be served cannot be acquired by service on such commissioner, where the fact appears from the plaintiff's own showing, and the defendant has not appeared to plead to the jurisdiction, and is not shown to have received notice, either actual or constructive. *Lubiano* v. *Imperial Council, O. of U. F.* (R. I.) 546

4. Service of an alternative writ of mandamus to compel a nonresident joint-stock association engaged in business in the state as a common carrier to print and keep for public inspection schedules showing the classification, rates, fares, and charges for transportation of property of all kinds and classes in the state, and to file a copy thereof with the state railroad and warehouse commission, made upon a specified person described by the court allowing the writ as the general agent of such association,—is sufficient to give jurisdiction to the court to proceed with the hearing, although the person served was only a local agent, where there is no general agent or any officer or agent superior to him in the state, and all the officers and shareholders are nonresidents. *State, Railroad & W. Com.*, v. *Adams Exp. Co.* (Minn.) 225

5. Mandamus may be served on a joint-stock association by serving it on the head officer or the select body or person within the corporation whose province it is to put in motion the machinery necessary to secure performance of the duty. *Id.*

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