quality of which they deprived him." Assuming, then, as we must, for the jury might have so determined, that no cautionary or warning signals were given, it must be held that if, by reason if this omission or neglect on the part of defendants' servants, Mr. Hendrickson was led to be less vigilant when drawing near to the railway, his view along the tracks being obscured until he reached a place or situation in which his life was jeopardized and finally lost, his want of vigilance cannot be pronounced culpable, or concurring negligence as a matter of law. It is not an absolute answer to the claim for redress made by his legal representative that, notwithstanding the alleged omission of cautionary signals by the persons in charge of the locomotive, he might, by the exercise of greater vigilance, have discovered the approaching train, if he had foreseen a violation of the statute, instead of relying, perhaps, on its observance. *Ernst* v. *Hudson River R. Co.* 35 N. Y. 9, 90 Am. Dec. 761.

In respondent's brief, reference has been frequently made to the excellent opportunity there was for observing the line of railway as a person on the public road journeyed easterly from Darwin towards King's crossing. When so journeying, and with a crossing of the track to be made, it would be the duty of the traveler to be watchful, and at all times to exercise ordinary care; but the fact that for two or three miles along the road, and before reaching the point where the view was obstructed, Mr. Hendrickson might have seen the train had he looked to the rear some distance, was, at most, a simple circumstance to be considered by the jury when considering the claim that he ought to have seen the train in ample time to avoid the collision. While the view for some two or three miles west of the cut was not interfered with, it was greatly obstructed for a distance of more than 1,000 feet, just at the point where the opportunities for observation were most needed, and are ordinarily regarded and made useful. Of course, if the train was within range of the traveler's vision, as he looked over or be-

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evidence on which the case rests shows that he was careless, the court may rightfully instruct the jury as a matter of law that the action cannot be maintained. Gahagan v. Boston & L. R. Co. 1 Allen, 187, 79 Am. Dec. 724.

The case will not be taken from the jury if the facts proved fall short of requiring as the sole inference from them that a want of ordinary care on the part of the intestate contributed to the injury." Palmer v. New York Cent. & H. R. R. Co. 112 N. Y. 245.

*Applications of the rule.*

Where a person attempting to deliver coal at a court-house was killed by the iron grating covering the area falling upon him, and there was nothing to show how he happened to be so situated as to be caught by it, the jury were permitted to draw the inference that the proper discharge of his duties called him there. Galvin v. New York, 112 N. Y. 223.

Where a woman was killed at a crossing while riding with her husband who was guilty of negligence, and the evidence did not disclose what her actions were previous to and at the time of the injury, the jury were left to infer her probable course of action and whether or not it was negligent. Hoag v. New York Cent. & H. R. R. Co. 111 N. Y. 202.

Where a laborer on a railroad was engaged in cleaning snow from a street crossing and an engine backed down upon and killed him, the court ruled that it was for the jury to determine what inferences should be drawn from the facts and circumstances disclosed by the evidence. Wall v. Delaware, L. & W. R. Co. 54 Hun, 454.

Where a night-watchman was found dead at the bottom of an area, the court said that plaintiff had furnished the jury with nothing from which they could infer the freedom of the intestate from fault. They were simply furnished with food for speculation and that would not do for the basis of a verdict. Bond v. Smith, 113 N. Y. 385.

Where a person going to a railroad station was killed by a car running in on a switch, and the circumstances under which he was struck were not developed, and there was nothing in the evidence which tended to show due care or the want of it on his part, the court said that it is impossible to infer from the evidence offered that he exercised the care and circumspection properly to be demanded from one in his situation and that the action could not be maintained. Hinckley v. Cape Cod R. Co. 120 Mass. 262.

*How far jury may draw inference of due care.*

In Chase v. Maine Cent. R. Co., 77 Me. 63, 52 Am. Rep. 746, the court said that the fact of a natural instinct of men to preserve themselves from injury was not evidence and was no more than an accompaniment or appurtenance of evidence. It may have some influence on the interpretation of facts affirmatively proved. It pertains to those natural laws in connection with which all evidence may be weighed. Taken singly, it does not constitute proof or shift the burden. It may give character or force to facts already proved. It is a mode of reasoning upon the evidence.

In weighing the circumstances it may be assumed that all creatures are desirous of preserving their lives and keeping their bodies from harm. Morrison v. New York Cent. & H. R. R. Co. 63 N. Y. 643.

In connection with the facts and circumstances of the case it is competent for the jury to infer the absence of fault on the part of the deceased from the general and well known disposition of men to take care of themselves and to keep out of the way of difficulty and danger. Northern Cent. R. Co. v. State, 29 Md. 420, 96 Am. Dec. 545, 31 Md. 357, 100 Am. Dec. 70.

The inference of care is only warranted when circumstances are shown which fairly indicate care or exclude the idea of negligence. Hinckley v. Cape Cod R. Co. 120 Mass. 262.

The jury cannot be permitted to assume that the deceased had not omitted the precautions which a prudent man would take in the presence of known danger. Riordan v. Ocean S. S. Co. 124 N. Y. 655.

While want of contributory negligence may be established by inference drawn from the circumstances, such an inference may not be drawn simply from a presumption that a person exposed to danger will exercise care and prudence in regard to his own safety. Wiwirowski v. Lake Shore & M. S. R. Co. 124 N. Y. 420.

Where a person was seen going toward a railroad track, and shortly afterward his body was found in a cattle-guard after having been struck by a train, the court said that there was nothing to show absence of negligence on his part. "Doubtless the jury might infer that the deceased was

tween the piles of earth, small trees, and other obstructions between the track and the highway, it would be seen, but it would remain unseen and unobserved unless it was at the exact place commanded by a view from that precise point of observation. The view and the presence of the train would have to concur as to time and place.

Nearly all of plaintiff's witnesses, residents of that immediate locality, testified that, although no signals were sounded for the crossing, they heard the train coming from the time it left Darwin station, some three miles west; and from this it is maintained by respondent that had the deceased listened, as was his duty, when he approached the crossing, he, too, would have heard it coming, and would have been warned in ample time to prevent his driving so near the rails. The fact that the swift coming of the train was clearly manifested to the witnesses by the noise it made when running, conclusively established, it is argued, that the deceased failed to listen, or, listening, neglected to pay attention to the obvious warning of imminent danger. But in this contention respondent's counsel overlooked two conditions, both present, which might have a bearing upon the matter: *First*, that Mr. Hendrickson was in an empty lumber wagon, which must have made more or less noise as it was driven along; and, *second*, and of more moment probably, that all of these witnesses were well acquainted with the movements of this particular train, knew when it might be expected at Darwin station, as well as at the crossing, while some of them were paying special attention to its coming on that occasion. A stranger to the neighborhood and to the movements of this train would not be expected to know that a train was approaching King's crossing from the west simply because it whistled and blew off steam at Darwin, or because its approach was apparent to those who knew all about its running time and movements.

*Order reversed.*

**Gilfillan,** *Ch. J.*, absent, sick, did not sit.

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governed by the natural instinct of self-preservation and would not put himself recklessly and consciously in peril of death; but that no presumption exists in the absence of proof that he was exercising due care at the time. Reynolds v. New York Cent. & H. R. R. Co. 58 N. Y. 252.

*Special circumstances which relieve from care.*

It seems that the evidence of due care may be less strong in cases where the defendant has by his conduct justified the decedent in taking the course which resulted in his death. Newell v. Ryan, 40 Hun, 286; Palmer v. New York Cent. & H. R. R. Co. 112 N. Y. 245.

It is not necessary to show that a passenger was free from negligence. McKimble v. Boston & M. R. Co. 159 Mass. 542.

Evidence of due care on the part of a passenger may be less strong when the injury is caused by the carrier than though there was no relation between them. Parsons v. New York Cent. & H. R. R. Co. 3 L. R. A. 683, 113 N. Y. 363.

Where a person in attempting to cross a railroad track after dark was struck and killed by a train running down grade without steam and with no lights or signals as it approached the crossing, defendant insisted that since there was no witness to testify that deceased looked or listened when he approached the crossing it must be assumed that he did not, and that such omission was negligence on his part; but the court ruled that it was only where it appeared from the evidence that he might have seen had he looked, or might have heard had he listened, that the jury was authorized to find that he did not look and did not listen. Smedis v. Brooklyn & R. B. R. Co. 88 N. Y. 19.

*Circumstances showing negligence.*

The very happening of the accident may negative the existence of due care. Riceman v. Havemeyer, 84 N. Y. 647.

When the only theory upon which the deceased could have been on the track was that either he did not see the train, or did not stop when he should have done so, either of which would have been negligence, a nonsuit should have been granted. Connelly v. New York Cent. & H. R. R. Co. 88 N. Y. 346.

It will be presumed that deceased did not look, if by looking he could have seen the approach of the train and escaped. Wilcox v. Rome, W. & O. R. Co. 39 N. Y. 358, 100 Am. Dec. 440; Havens v. Erie R. Co. 41 N. Y. 296; Nicholson v. Erie R. Co. Id. 525; Harty v. Central R. Co. of N. J. 42 N. Y. 468; Madden v. New York Cent. & H. R. R. Co. 47 N. Y. 655; Mitchell v. New York Cent. R. Co. 64 N. Y. 655.

Where the only reasonable way of accounting for the collision is, that deceased did not look or listen for the approaching train, it will be presumed that he did not do so and he cannot recover. Brown v. Milwaukee & St. P. R. Co. 22 Minn. 165; State v. Maine Cent. R. Co. 76 Me. 357, 49 Am. Rep. 622.

*2. Burden on defendant.*

Although the general rule is that the burden is on plaintiff to make a case which will leave him blameless, he need not in all cases prove affirmatively that he exercised ordinary care and diligence. In the absence of any direct proof the jury are at liberty to infer ordinary care from all the circumstances of the case. To hold otherwise would be to presume negligence on the part of one in excuse of negligence on the part of another. If the plaintiff makes a case which does not charge him with negligence the case must go to the jury. Gay v. Winter, 34 Cal. 164.

Later California cases have placed the burden of showing contributory negligence on defendant. McQuilken v. Central Pac. R. Co. 50 Cal. 7; MacDougall v. Central R. Co. 63 Cal. 434.

H. P. F.

## TENNESSEE SUPREME COURT.

LOUISVILLE & NASHVILLE R. CO.
*Appt.*,
*v.*
Dora NORTHINGTON.

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

**1. Showing that loose boxes placed by the foreman of a gang of railroad laborers upon a car to be pushed along the track by a hand-car and remaining in his charge, came in contact with a station platform** while the cars were in motion, causing injury to an employé on a hand-car, makes out a prima facie case of negligence for which the company is responsible without showing that the foreman could have prevented the boxes slipping or that the slipping was not caused suddenly by a joint in the rails.

**2. A negligent injury to one having an incurable disease followed by his death furnishes a good cause of action** if the death was materially hastened by reason of the injury as an efficient cause; but not if death was inevitable in a short time from the disease and the injury was so slight as to simply aggravate the disease which remains the cause of death.

(December 19, 1891.)

APPEAL by defendant from a judgment of the Circuit Court for Montgomery County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

*Messrs.* **Leech & Savage** and **T. L. Yancey** for appellant.

*Messrs.* **West & Burney** for appellee.

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

The defendant in error sued and obtained a verdict for $5,000 damages of the Louisville & Nashville Railroad Company for the negligent killing of her husband. Pending a motion for a new trial, $2,000 of this amount was remitted, and judgment was rendered for the plaintiff for $3,000. The railroad company appealed.

Several errors are assigned, the first being that there was no evidence of negligence. The accident occurred on a hand-car running from a point north of Hampton station, in Montgomery county, to a point south of said station, where the hands using the car were to resume work after dinner, this being just before. The foreman in charge of the work ordered the men (of whom Henderson Northington, husband of plaintiff, was one) to get on the hand-car and go to the place indicated. They did get on and set out for it, pushing before them a truck or push-car containing two dump beds or boxes, as was the custom in such removals from place to place for work. These were empty, and there was no way to fasten them. The foreman stood upon them with a foot in each, thus holding them on. The hands rode on the car, and worked the levers propelling it. In attempting to pass the station platform, one of these boxes struck it, and was

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NOTE.—*Effect of previous disease of person injured on liability for causing the injuries.*

The measure of damages for personal injuries caused by negligence is the injury done although it might not have resulted except for a disease or peculiar physical condition of the person injured or may have been aggravated thereby. Lapleine v. Morgans' L. & T. R. & S. B. Co. 1 L. R. A. 378, 40 La. Ann. 661; Ohio & M. R. Co. v. Hecht, 115 Ind. 443; Louisville, N. A. & C. R. Co. v. Jones, 7 West. Rep. 33, 108 Ind. 551; Louisville, N. A. & C. R. Co. v. Wood, 12 West. Rep. 303, 113 Ind. 544; Louisville, N. A. & C. R. Co. v. Falvey, 1 West. Rep. 868, 104 Ind. 409; Louisville, N. A. & C. R. Co. v. Snider, 3 L. R. A. 434, 117 Ind. 435; Baltimore City Pass. R. Co. v. Kemp, 61 Md. 74; Stewart v. Ripon, 38 Wis. 584; Mobile & O. R. Co. v. McArthur, 43 Miss. 180; Driess v. Friederick, 73 Tex. 460; Allison v. Chicago & N. W. R. Co. 42 Iowa, 274.

The same rule has been applied in many cases to a miscarriage caused by personal injuries to a pregnant woman or by frightening her. Hill v. Kimbell, 7 L. R. A. 618, 76 Tex. 210; Barbee v. Reese, 60 Miss. 906; Oliver v. LaValle, 36 Wis. 596; Brown v. Chicago, M. & St. P. R. Co. 54 Wis. 342, 41 Am. Rep. 41; Shartle v. Minneapolis, 17 Minn. 308; Fitzpatrick v. Great Western R. Co. 12 U. C. Q. B. 645; Powell v. Augusta & S. R. Co. 77 Ga. 179; Campbell v. Pullman Palace Car Co. 42 Fed. Rep. 484.

By application of the same principle proof of the pregnancy of a woman was allowed to show aggravation of the wrong of a steamboat carrier in failing to stop at a landing for passengers where the woman was waiting to take passage and suffered from exposure. Heirn v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588. But see Pullman Palace Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89.

The principle above stated is illustrated also in the following cases:

The fact that a person was suffering from Brights' disease at the time he was injured does not impair his right of recovery against the party in fault for the injury although the injury was aggravated by the disease. Louisville, N. A. & C. R. Co. v. Snider, *supra.*

The fact that a person injured had a tendency or predisposition to cancer will not defeat the liability of the party causing the injury for a cancer which develops as a result of it. Baltimore City Pass. R. Co. v. Kemp, *supra.*

The aggravation of damages from an injury to a person's arm by an organic scrofulous tendency is within the damages for which recovery may be had from the person liable for the injury. Stewart v. Ripon, *supra.*

So a person predisposed to malarial, scrofulous, or rheumatic tendencies, but otherwise in good health, may recover damages for the development of such tendencies in an action for wrongful injuries. Louisville, N. A. & C. R. Co. v. Falvey, *supra.*

A passenger subject to chronic rheumatism may recover for injuries occasioned by a carrier's fault in taking him beyond his destination and compelling him to walk back through the rain. Mobile & O. R. Co. v. McArthur, *supra.*

The prior fracture of a leg does not affect the measure of damages recoverable for another fracture caused by negligence. Driess v. Friederick, *supra.*

A previous fracture of a person's arm will not prevent his recovering from a defendant who is in fault for an injury by which his arm is again broken and his shoulder and collar bone permanently in-



See also 26 L. R. A. 46.

thrown under the car, stopping it suddenly. This threw deceased against the lever, and injured his right side. Of this injury it is claimed he died. This, of itself, made out a case of negligence. If the foreman allowed the boxes to be so balanced as to strike a platform on the road, and bring about this injury, it devolved upon the company to show that it was unavoidable, or not the result of negligence; but, in addition to this, it is proven that the foreman said, at the time of the accident, that he saw the dump-box had slipped, or was slipping, but did not think it would strike the platform,—thus letting the men, without warning, take the risk of a danger he foresaw and speculated about. The argument for the company is that the proof fails to show that the foreman could have prevented the box slipping, or that it did not slip suddenly, when the car passed over a joint in the rails at the place of the wreck. The car having struck or dump-box thereon having struck, the platform, this was a circumstance showing negligence (as the overturned coach in *Stokes* v. *Saltonstall*, 38 U. S. 13 Pet. 181, 10 L. ed. 115), and made out a prima facie case, which it devolved upon defendant to meet. This it not only did not do, but predicates its reliance for reversal on weakness of plaintiff's additional affirmative evidence of negligence. It was the duty of the foreman representing the company to see that it was so placed it would not strike the platform naturally, and when it did strike it then devolved upon the company to show that this was not the result of any negligence. The *onus* was not upon the plaintiff to show why it struck after having shown that it did strike. The reason, if there were any proper one therefor, should have been shown by the defendant to remove the presumption of negligence arising from the fact of collision. The case referred to in 38 U. S. 13 Pet. 181, 10 L. ed. 115, has been often followed in this state.

The remaining error to be noticed in the number assigned is that on the qualification of a proposition submitted by defendant to the court as instruction to the jury. Though the plaintiff's intestate died about a month after the injury, and there was evidence to sustain the theory that his death was the direct result thereof, there was evidence tending to show that he died of galloping consumption, of which he was probably, though not very visibly, affected when injured. In this condition of the evidence the court was asked to charge as follows: "If you find that the company was negligent, and the deceased was injured by such negligence, then did the injury cause his death, or did he die of some disease? If he died of the injury,—and by that is meant the injury produced the death, or produced a disease which resulted in death, or so weakened the powers of deceased as to render him unable to resist a disease of which he might otherwise have recovered, or with which he might have lived an indefinite time,—the plaintiff should recover. But, if deceased already had a fatal disease from which there was no hope of recovery, and his death was inevitable from that disease in a short time, and the injury was slight, and of such a character as to simply aggravate the disease, and he died of the disease, and not of the injury, then plaintiff cannot recover at all, for this is a suit for the death of deceased." The court gave this instruction to the jury, with this addition:

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jured, even if the latter injury would not have been received if the arm had been well and sound. Allison v. Chicago & N. W. R. Co. *supra*.

Where an injury to a child was aggravated by a latent, hereditary, hysterical diathesis which had never exhibited itself before the accident and might never have developed but for it, the entire damages were recoverable from the party whose negligence caused the accident. Lapleine v. Morgans L. & T. R. & S. B. Co. 1 L. R. A. 378, 40 La. Ann. 661.

In other cases similar to these a party causing an injury has been held liable for a disease developing as the result of the injury, but without anything to show a previous diseased condition or tendency to disease. As for instance in a case where erysipelas develops in a wound or in consequence of an injury. Dickson v. Hollister, 123 Pa. 421; Houston & T. C. R. Co. v. Leslie, 57 Tex. 83.

So where pneumonia supervened causing the death of a boy who had been seriously injured by a blow on the head. Beauchamp v. Saginaw Min. Co. 50 Mich. 163, 45 Am. Rep. 30.

The same rule was applied to the development of catarrh as a result of an injury to the nose of a person who never had catarrh before. Quackenbush v. Chicago & N. W. R. Co. 73 Iowa, 458.

Of course there is no question that a disease which supervenes as the direct result of an injury is to be regarded as part of it, if there was not in fact any prior diseased condition or tendency.

*Causing death of diseased person.*

The distinction taken in the main case between a slight hastening of death merely by aggravation of the disease itself consequent upon a injury and a material hastening as a result of the injury to a diseased person does not appear to have been made in any prior case.

A statute giving an action for causing death was held in a Missouri case not to extend to a case where the death of a person already mortally wounded was merely hastened but "not caused" by taking him as a passenger on a railroad train. The court said that the statute was in derogation of the common law and must be construed strictly. Jackson v. St. Louis, I. M. & S. R. Co. 3 West. Rep. 236, 87 Mo. 422, 25 Am. & Eng. R. R. Cas. 227.

But this case, unless limited strictly to its peculiar facts and so harmonized with the main case, is not in harmony either with other cases as to death or with the principle of the great bulk of the cases concerning lesser injuries as shown above.

In line with that case is the decision that liability for wrongfully causing the death of a person is not defeated by the fact that he had a tendency to insanity or disease and that the injury would not have caused the death of a well person. Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568.

Also that death from a disease may be legally attributable to negligence which causes an injury that renders a person more susceptible to disease and less able to resist it. It is not necessary that the injury should be the sole or direct cause of the death if it concurs in producing death. Terre Haute & L. R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168.

This accords also with the recognized doctrine in criminal cases. Com. v. Fox, 7 Gray, 585; State v. Morea, 2 Ala. 275.

*Limitations and exceptions to the rule.*

The fact that a person who is injured was at that time an invalid may be taken into account in de-

"This is the law, but, if the death was hastened or occurred sooner by reason of the injury than it otherwise would, then the injury was the cause of the death." It is objected that the addition of the court to the request submitted is not the law, and a case to the contrary in terms, if not in effect, as to "hastening" the death, is cited in 25 Am. & Eng. R. R. Cas. 327. The case is from Missouri, and is that of *Jackson* v. *St. Louis, I. M. & S. R. Co.*, 87 Mo. 422, 3 West. Rep. 236. There the evidence showed that a mortally wounded man had been suffered to be placed upon a train, and removed from the place where he was injured, under circumstances of, at least, slight negligence on the part of the conductor. The court charged that "if the conductor was informed of the condition of the wounded man, and knew he was being taken against his will and consent of plaintiff (his wife), and that he was so taken and transported from Dexter to Clay county, thereby causing or hastening his death, the jury should find for plaintiff." He further refused, on request of defendant, to charge "that if the wrongful act only hastened the death of Jackson, and was not the cause of same, you must find for defendant." The Supreme Court of Missouri on appeal held that the giving of the first and refusal of second instruction quoted was error.

Under the facts of that case, with the brief and summary propositions standing as they do, the case may be right,—it is not necessary to determine that question,—but the charge we have here is not the same. It presents in the proposition submitted by the circuit judge all the qualification which makes the use of the term "hastened" objectionable in the Missouri case. He had already said that, "if the injury was slight, and of such a character as to simply aggravate the disease, and he died of the disease, and not of the injury, then plaintiff cannot recover." He now adds," but if the death was hastened or occurred sooner by reason of the injury," in other words, if the death was hastened or occurred by reason of the injury, and sooner than deceased would have died of the disease,—then the injury was the cause of the death,—that is, of the death when it occurred, at another and different time than death would have occurred from the disease. This must be true, or there could be no cause of an earlier death than that, which, nothing else intervening, would have produced a later one. A man might be suffering from an incurable disease, or a mortal wound, with only two days to live, when a negligent wrong-doer inflicted upon him an injury which in his condition of debility took his life, or developed agencies which destroyed him in one day, and yet the latter wrong be in a legal sense the cause of his death, though it only hastened that which on the next day would have inevitably happened. We think the proposition submitted by counsel, and qualified by the wise and judicious view of the court, an admirable statement of the true rule on this very delicate question. The Supreme Court of Missouri said it found no precedent for the decision rendered in the *Jackson Case*, and there are confessedly few reported cases that touch upon the question. Those supposed to present an antagonistic view are embodied and cited in 1 Sedgw. Damages, 8th ed. p. 160; *Baltimore City Pass. R. Co.* v. *Kemp*, 61 Md. 74; *Beauchamp* v. *Saginaw Min. Co.* 50 Mich. 163, 45 Am. Rep. 30. It is sufficient, for the purpose of this opinion, to say that, treating it from the stand-point of an original proposition, we were entirely content with the view of it embodied in the instruction submitted as qualified by the court upon the facts of this case. That qualification upon the proposition put, removed here in fact, and will remove hereafter, in precedent, all danger that this case will be authority, or treated as authority, for holding that any slight aggravation of a disease is a cause of death, within the meaning of the

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termining how much of the subsequent suffering and ill health is to be attributed to the injury. Robinson v. Waupaca, 77 Wis. 544.

This is manifestly just on any theory, as suffering and ill health which would have existed independent of the injury cannot constitute an element of damages for causing it.

So it is a question of fact for the jury to determine whether a cancer which developed on a person at a place where she was injured and shortly after the injury was a result of the injury. Baltimore City Pass. R. Co. v. Kemp, 61 Md. 74.

If a person injured was already suffering under permanent disability, his recovery for the injury is only for the additional disability resulting therefrom. Whelan v. New York, L. E. & W. R. Co. 38 Fed. Rep. 15.

The decisions just cited are plainly in harmony with the line of decisions given at the beginning of this note, and merely show the true application of the rule. Evidently the same should be said in regard to the following language of the court in a Georgia case, where it is said: "A tort to health already impaired cannot be redressed except by giving damages for any further impairment and for any obstruction occasioned by the tort, to recovery from existing maladies." Also "Where the subject of a tort is already diseased the question should be how much if any the tort contributed to aggravate or protract the disorder. This was said in condemnation of an instruction to the jury denying a right to damages so far as prior sickness or disorder contributed to plaintiff's unsound condition after the tort. Bray v. Latham, 81 Ga. 640.

But in conflict with the above current of decisions it is decided in a Colorado case that the increased risk of injury resulting from the fact that she is "unwell" must be taken by a woman who is a passenger on a railroad train and the carrier is not liable for a long sickness which results from her exposure when compelled to leave a burning car only half clad, if the sickness would not have resulted except for her condition at the time of the exposure. Pullman Palace Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89.

So an English decision which has been frequently disapproved in this country holds that illness caused by a cold which is caught by a passenger in a drizzling wet night during a walk to her home, which was rendered necessary by the carrier's fault, is not within the damages for which she can recover although recovery is allowed for the inconvenience caused. The court said the action must be regarded as one upon contract and the damages limited to what could have been reasonably within the contemplation of the parties. Hobbs v. London & S. W. R. Co. L. R. 10 Q. B. 111.

statute. The circuit judge had already charged upon the propriety of reducing damages according to expectation of life, and had justly exercised his judgment and discretion in requiring a remission if the judgment was to stand, there being no grossly negligent or wanton conduct in bringing about the injury.

*We are satisfied with the judgment, and it is affirmed,* with costs.

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## WEST VIRGINIA SUPREME COURT OF APPEALS.

M. A. MANNING, Admr., etc., of A. D. Woolwine, Deceased, *Plff. in Err.*,
*v.*
CHESAPEAKE & OHIO R. CO.

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

***1. A person who, without invitation, visits a telegraph office merely for the purpose of paying a friendly call to the operator,** which office is owned and occupied by a railroad company for its own purposes and convenience, and which is located on its land and near its track, from which occasional messages are sent and received for outside parties for pay, visits said office as a mere voluntary licensee, subject to the concomitant risks and perils, and no duty is imposed upon the owner or occupant to keep its premises in safe and suitable condition for such visitors, and the owner is only liable for such willful or wanton injury as may be done such licensee by the gross negligence of its agents or employés.

**2. Where there is no controversy in regard to the facts** or inferences that may be fairly drawn therefrom, the question of negligence is one of law for the court to determine.

**3. This is a case in which the facts proven did not tend in any clearly appreciable degree to sustain the plaintiff's claim,** and the evidence was properly excluded from the jury by the court.

(April 2, 1892.)

ERROR to the Circuit Court for Summers County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

*Messrs.* **Adams & Miller,** for plaintiff in error:

The ruling that a railway company is not responsible for the death of a person who is not in its employ, and who has no special business with said company, if said person is killed on the property of the railway company, and although the accident was caused by its gross negligence, was error.

*Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; 2 Rorer, Railroads, p. 1131; *Hicks* v. *Pacific R. Co.* 64 Mo. 430, 17 Am. Ry. Rep. 273; *Daley* v. *Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413, *notes p, 421; Hann* v. *Wickham*, 55 Iowa, 546; *Langan* v. *St. Louis, I. M. & S. R. Co.* 72 Mo. 392; *McMillan* v. *B. & M. R. Co.* 46 Iowa, 231; *Freer* v. *Cameron*, 4 Rich. L. 228, 55 Am. Dec. 674; *State* v. *Manchester & L. R. Co.* 52 N. H. 556; *Norris* v. *Litchfield*, 35 N. H. 271, 69 Am. Dec. 549; *Kerwhacker* v. *Cleveland, C. & C. R. Co.* 3 Ohio St. 172, 62 Am. Dec. 246; *Birge* v. *Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Brown* v. *European & N. A. R. Co.* 58 Me. 384; *Lynch* v. *Smith*, 104 Mass. 53, 6 Am. Rep. 188; 2 Wood, Railway Law, p. 1292.

There is a general principle which governs the cases which decide that a trespasser or licensee cannot recover damage against the owner of land on which the trespasser or licensee goes, in case the licensee be there injured by defects in the premises.

By bearing in mind this general principle, and a general and manifest distinction (sometimes lost sight of) the difficulty vanishes.

That general principle is that trespassers and licensees going upon the premises of another take the premises as they find them, and run such risks as are incident to the existing condition of such premises, and therefore cannot complain of their needing repairs, and cannot recover for injuries resulting from the condition in which they find the premises.

But the distinction is, that they can recover for injuries resulting from the subsequent actual negligence of the defendant, while the licensee is on the premises.

Patterson, Railway Accident Law, p. 178, § 187; *Gallagher* v. *Humphrey*, 6 L. T. N. S. 684.

Patterson, on p. 179, § 188, says that it is on this principle that railway companies are held liable to licensees for injuries caused by movement of trains by a flying switch.

*Kay* v. *Pennsylvania R. Co.* 65 Pa. 269; *Philadelphia & R. R. Co.* v. *Troutman*, 11 W. N. C. 455.

A railway company is held liable for negligence in leaving unattended the boiler of a steam pile-driver, which exploded and injured one passing over a footway, which, without objection from the railway company, had been used for many years by the public.

*Davis* v. *Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 667.

Where a railroad company permits persons to cross its lines or its premises, it is bound, as to those persons, to exercise care in the opera-

*Head notes by ENGLISH, J.

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NOTE.—In addition to the very full review of the subject of negligence towards licensees which appears in the above opinion, we refer to Redigan v. Boston & M. R. R. (Mass.) 14 L. R. A. 276; Gordon v. Cummings, 9 L. R. A. 640, and *note*, 152 Mass. 513; Schmidt v. Bauer, 5 L. R. A. 580, and *note*, 80 Cal. 565.

The above case seems to come fairly within the rule applied; nevertheless, the application of the rule to the facts of this case is not without an appearance of hardship that suggests the question whether the rule has not some limitation.



See also 17 L. R. A. 588; 20 L. R. A. 714; 24 L. R. A. 215.

tion of its line, and cannot treat them as trespassers.

*Townley* v. *Chicago, M. & St. P. R. Co.* 53 Wis. 626; *Murphy* v. *Boston & A. R. Co.* 133 Mass. 121; *Barrett* v. *Midland R. Co.* 1 Fost. & F. 361; *Barry* v. *New York Cent. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Goodfellow* v. *Boston, H. & E. R. Co.* 106 Mass. 461.

In cases of technical trespasser, the trespass is not enough to convict him of contributory negligence.

1 Shearm. & Redf. Neg. pp. 154-156, § 97; *Philadelphia & R. R. Co.* v. *Hummell*, 44 Pa. 375; *Larmore* v. *Crown Point Iron Co.* 2 Cent. Rep. 409, 101 N. Y. 391, 54 Am. Rep. 718; *Savery* v. *Nickerson*, 120 Mass. 306, 21 Am. Rep. 514; *Parker* v. *Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262; *Honnsell* v. *Smyth*, 7 C. B. N. S. 731; *Barry* v. *New York Cent. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Beck* v. *Carter*, 68 N. Y. 283, 23 Am. Rep. 175; *Holmes* v. *North Eastern R. Co.* L. R. 4 Exch. 257; *Blackmore* v. *Toronto Street R. Co.* 38 U. C. Q. B. 173; *Forsyth* v. *Boston & A. R. Co.* 103 Mass. 513; *Pierce* v. *Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120.

A trespasser on the railway track may recover if hurt by gross negligence of the railroad company.

*Spicer* v. *Chesapeake & O. R. Co.* 11 L. R. A. 385, 34 W. Va. 514.

It will not do to say that the negligence must be directed against that particular person. Gross negligence warrants a recovery, even where the trespass is actual and not merely technical.

*Cincinnati & Z. R. Co.* v. *Smith*, 22 Ohio St. 227, 10 Am. Rep. 729; *Card* v. *New York & H. R. Co.* 50 Barb. 39; *Townley* v. *Chicago, M. & St. P. R. Co.* 53 Wis. 626; *Brown* v. *Hannibal & St. J. R. Co.* 50 Mo. 461, 11 Am. Rep. 420; *Barry* v. *New York Cent. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Chicago & N. W. R. Co.* v. *Barrie*, 55 Ill. 226; Thomp. Neg. 1155; *Chicago, B. & Q. R. Co.* v. *Cauffman*, 38 Ill. 424; Shearm. & Redf. Neg. pp. 163, 164, § 99; *Baltimore & O. R. Co.* v. *State*, 36 Md. 366; *Hicks* v. *Pac. R. Co.* 64 Mo. 439.

*Bradley* v. *Pratt*, 23 Vt. 378, says: "A direct liability exists in all cases where injuries are sustained by a neglect of duties which are of a general and public character, and where the observance of those duties is required as a matter of public security and safety."

See also *Com.* v. *Power*, 7 Met. 602, 41 Am. Dec. 465; *Birge* v. *Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Philadelphia & R. R. Co.* v. *Derby*, 55 U. S. 14 How. 485, 14 L. ed. 509; *Sioux City & R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Daley* v. *Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; *Lynch* v. *Nurdin*, 1 Q. B. 29; 2 Rorer, Railways, 1130.

Persons at depots to see friends arriving or departing, can recover if injured by want of ordinary care of railroad company.

*Gillis* v. *Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 317; 2 Rorer, Railways, p. 1131, citing *Hicks* v. *Pacific R. Co.* 64 Mo. 430, 17 Am. Ry. Rep. 273.

Whether an intruder be an infant or an adult, his being technically a trespasser on the railroad company's premises will not dispense with the duty of ordinary care on the part of the railroad company, to avoid his injury by negligence.

2 Rorer, Railways, p. 1068, citing *Pennsylvania R. Co.* v. *Lewis*, 79 Pa. 33; *Daley* v. *Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; *Isabel* v. *Hannibal & St. J. R. Co.* 60 Mo. 475, 9 Am. Ry. Rep. 2611. See also 1 Addison, Torts, pp. 202, 203, 228; 2 Wood, Railway Law, p. 1200; *Bryant* v. *Rich*, 106 Mass. 180, 8 Am. Rep. 311.

A person on the track or premises of a railroad company by license is not a trespasser.

*Harty* v. *Central R. Co. of N. J.* 42 N. Y. 463; *Patterson* v. *Philadelphia, W & B. R. Co.* 4 Houst. (Del.) 103; *Illinois Central R. Co.* v. *Hammer*, 72 Ill. 347. See *Barry* v. *New York Cent. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Campbell* v. *Boyd*, 88 N. C. 129, 43 Am. Rep. 740.

If the distinction between active and passive negligence—between leaving the owner's premises as the licensee finds them, and committing some positive act of negligence while the licensee is on the premises.—is borne in mind; and also the requirement that the degree of care exercised must be commensurate with the danger incident to the business engaged in by the defendant; and also the fact that even an actual trespasser on a railroad company's track, where danger is expected always, can recover for injuries resulting from gross negligence of a railroad company, (*Spicer* v. *Chesapeake & O. R. Co.* 11 L. R. A. 585, 34 W. Va. 514),—it would seem incredible that there can be no recovery against a railroad company by the administrator of one who is killed by the grossest negligence of the railroad company, and while he was doing no wrong and in no one's way, and in a place where no danger could be expected, except from gross negligence, and while he was either seeking employment as telegraph operator, or visiting the railroad company's operator, under whom he had formerly worked for that company, in that office.

See Patterson, Railway Law, pp. 176, 178, 179., §§ 187, 188; *Gallagher* v. *Humphrey*. 6 L. T. N. S. 684; *Kay* v. *Pennsylvania R. Co.* 65 Pa. 269; *Davis* v. *Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 667; *Townley* v. *Chicago, M. & St. P. R. Co.* 53 Wis. 626; *Murphy* v. *Boston & A. R. Co.* 133 Mass. 121; *Barrett* v. *Midland R. Co.* 1 Fost. & F. 361; *Barry* v. *New York Cent. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Goodfellow* v. *Boston, H. & E. R. Co.* 106 Mass. 461; 1 Shearm. & Redf. Neg. pp. 154, 163, 164, §§ 97-99; *Cincinnati & Z. R. Co.* v. *Smith*, 22 Ohio St. 227, 10 Am. Rep. 729; *Card* v. *New York & H. R. Co.* 50 Barb. 39; *Brown* v. *Hannibal & St. J. R. Co.* 50 Mo. 461; *Chicago & N. W. R. Co.* v. *Barrie*, 55 Ill. 226; *Chicago, B. & Q. R. Co.* v. *Cauffmann*, 38 Ill. 424; Thomp. Neg. 1155; *Baltimore & O. R. Co.* v. *State*, 36 Md. 366; *Hicks* v. *Pacific R. Co.* 64 Mo. 439; *Bradley* v. *Pratt*, 23 Vt. 378; *Com.* v. *Power*, 7 Met. 602, 41 Am. Dec. 465; *Birge* v. *Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Philadelphia & R. R. Co.* v. *Derby*, 55 U. S. 14 How. 485, 14 L. ed. 509; *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Daley* v. *Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413;

2 Rorer, Railways, 1068, 1130, 1131; *Pennsylvania R. Co.* v. *Lewis*, 79 Pa. 33; *Isabel* v. *Hannibal & St. J. R. Co.* 60 Mo. 475; 1 Addison, Torts, pp. 202, 203, 228; 2 Wood, Railway Law, pp. 1200, 1206, 1270, 1271, 1292; Wharton, Neg. §§ 346, 348, 388; Cooley, Torts, top page, 358; 3 Lawson, Rights & Remedies, § 1194; *Nuzum* v. *Pittsburgh, C. & St. L. R. Co.* 30 W. Va. 229.

*Mr.* **J. E. Chilton,** for defendant in error:

When all the evidence introduced by the plaintiff is insufficient to sustain a verdict in his favor, should such verdict be rendered the court will on motion of the defendant before he offers any evidence exclude the evidence from the jury.

*Wandling* v. *Straw*, 25 W. Va. 692; *Christy* v. *Chesapeake & O. R. Co.* 35 W. Va. 117.

Woolwine while in this office was there as a mere trespasser, and in law should be so treated.

The gist of the plaintiff's action is the negligence of the defendant in causing Woolwine's death.

"Negligence in law is a breach of some duty. There can be no negligence where there is no breach of duty."

1 Shearm. & Redf. Neg. § 15; Bigelow, Torts, 662.

A trespasser on a railroad company's premises cannot recover for injuries, unless the company was guilty of wanton or gross negligence.

*Spicer* v. *Chesapeake & O. R. Co.* 11 L. R. A. 385, 34 W. Va. 514.

The only duty owing to a trespasser is not to wantonly or willfully injure him.

See Wood, Railway Law, pp. 1270, 1271; *Norfolk & W. R. Co.* v. *Harman*, 83 Va. 554; *Grethen* v. *Chicago, M. & St. P. R. Co.* 22 Fed. Rep. 609.

A licensee is one who enters premises by permission, either express or implied.

A licensee takes his own risk, and so long as there is no active misconduct towards him no liability is incurred by the occupier of the premises by a visitor on his premises.

Bigelow, Torts, p. 697; *Nichols* v. *Washington, O. & W. R. Co.* 83 Va. 102, *Sweeney* v. *Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Gillis* v. *Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 317. See also *Hargreaves* v. *Deacon*, 25 Mich. 1; *Sanders* v. *Reister*, 1 Dak. 166; *Victory* v. *Baker*, 67 N. Y. 366, 370; *Lary* v. *Cleveland, C. C. & I. R. Co.* 78 Ind. 323, 41 Am. Rep. 572; *Carleton* v. *Franconia I. S. Co.* 99 Mass. 216; *Pittsburgh, Ft. W. & C. R. Co.* v. *Bingham*, 29 Ohio St. 364; *Howland* v. *Vincent*, 10 Met. 371; *Larmore* v. *Crown Point Iron Co.* 2 Cent. Rep. 409, 101 N. Y. 391; *Wright* v. *Boston & A. R. Co.* 2 New Eng. Rep. 725, 142 Mass. 296; *Hounsell* v. *Smyth*, 7 C. B. N. S. 731; *Evansville & T. H. R. Co.* v. *Griffin*, 100 Ind. 221; *Gwynn* v. *Duffield*, 66 Iowa, 708, 713; *Parker* v. *Portland Pub. Co.* 69 Me. 173; 2 Wood, Railway Law, p. 1271; Bishop, Non-Cont. Law, 446, 1054; Cooley, Torts, 358.

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

This was an action of trespass on the case, instituted on the 13th day of March, 1890, by M. A. Manning, administrator of the estate of A. D. Woolwine, deceased, in the circuit court of Summers county, against the Chesapeake & Ohio Railway Company charging that the death of his intestate was occasioned by the gross carelessness and negligence of the defendant, and claiming $10,000 damages. There was a demurrer interposed to the declaration, which was overruled; the defendant pleaded "not guilty," and the case was submitted to a jury. The plaintiff, having introduced his evidence, rested his case, and the defendant moved the court to strike out all of the plaintiff's evidence, which motion was sustained, and the plaintiff's evidence was stricken out, to which action of the court the plaintiff excepted, and thereupon the jury rendered a verdict for the defendant. The plaintiff then moved the court to set aside said verdict, which motion the court overruled, and the plaintiff excepted, and tendered a bill of exceptions, setting out all of the evidence of the plaintiff, and the plaintiff applied for and obtained this writ of error.

The facts shown by the evidence are, in substance, as follows: At the east end of the Big Bend Tunnel, in said county of Summers, and about eighty yards from the eastern portal of said tunnel, the defendant had constructed a switch, which diverged from the main track of the defendant to the right, passing along near the bank of the Greenbrier river; and that immediately on the bank of said river, and between said switch and the river, the defendant had erected a small building, fourteen by sixteen feet in size, for its own convenience as a telegraph office, the front part of which building rested on the bank, and the back rested on perches. Those living in the immediate vicinity of this telegraph office were employés of the defendant, who compose the tunnel hands. The plaintiff's intestate was a telegraph operator on the Norfolk & Western Railroad, and was at home on a visit to his parents who lived about two miles from the tunnel; and on the evening of the 6th day of February, 1890, he paid a visit to this office, being an acquaintance of Bryant, the operator. At the time of this visit the train which was used for working in the tunnel was standing in front of the telegraph office, on the side track, which was seven feet from the front of said office, and had been so standing for one hour and fifteen minutes, and it appears that Joe Towns, one of the employés, whose duty it was to close the switch after the tunnel train came in on the side track, had failed to do so, and a freight train, coming east through the tunnel, ran into this open switch on to the side track, and wrecked the tunnel train, throwing some of its cars against said office, knocking it over the river bank into the river, thereby causing the death of the plaintiff's intestate, who had entered said telegraph office about twenty-five minutes before and at the time of the accident was lying on a table in the said office. It appears that the plaintiff's intestate had, about a year previous to that time, been employed by said Bryant, and worked a week in his place as operator in said office; and the natural inference is that he called on this occasion, as is natural for persons engaged in the same business, to pay Bryant a friendly visit. So far as is disclosed by



See also 17 L. R. A. 697.

the evidence, he had no business to transact of any character with the office, although it appears that messages had occasionally been sent and received from this office by parties having no connection with the railroad, but that the office was maintained by the defendant for its own convenience, as is shown by the plaintiff's testimony. No one could presume from anything that appears in the case that any employé of the defendant left this switch open with the intent of injuring the plaintiff's intestate, A. D. Woolwine. On the contrary, it appears that said Woolwine did not come to said telegraph office for more than an hour after the tunnel train ran in on the side track, and said switch was accidentally left open by Joe Towns, whose duty it was to have closed it after said tunnel train came on to the siding. No one appears to have been aware of said Woolwine's intention to visit said telegraph office, and, if they had, it does not appear that any employé of the defendant had any ill feeling or spite against said Woolwine; and we cannot say that any person so employed would intentionally wreck two trains and demolish the telegraph office for the purpose of injuring Woolwine. And again, no one could possibly have foreseen that the freight train, by leaving the main track, and running out on this siding, would have thrown the tunnel cars against the telegraph office, which stood seven feet from the side track, and knocked it down the river bank and into the river. This, however, appears to have been one of the possibilities.

The evidence in the case shows that said Woolwine was fully acquainted with the telegraph office and its surroundings, as he had during the previous year been employed for a week as operator in said office by said Bryant. Counsel for the plaintiff in error, in their brief, assert that "the general principle is that trespassers and licensees going upon the premises of another take the premises as they find them, and run such risks as are incident to the existing condition of such premises, and therefore cannot complain of their needing repairs, and cannot recover for injuries resulting from the condition in which they find the premises; but the distinction is that they can recover for injuries resulting from the subsequent actual negligence of the defendant while the licensee is on the premises." This, we believe, states correctly the law where parties go upon the premises of another under the circumstances that Woolwine did in this case. If we apply this law to the facts of this case, we find that the switch was open when he went to the telegraph office, and so remained for an hour and twenty minutes before the accident happened; and Woolwine had been in the office about twenty-five minutes when the collision occurred. There was no change in the switch after the arrival of said Woolwine, and he took upon himself the risk of the premises in the condition he found them. We may next inquire whether the circumstances of this case are such as to entitle the plaintiff to complain of a breach of duty on the part of the defendant towards his intestate. 1 Shearm. & Redf. Neg. § 316, under the head of "Who may complain of a breach of duty," says: "The plaintiff must show a breach of some duty owing to him, or which was imposed for his benefit." It is not every one who sustains an injury by reason of some act or omission on the part of an employé of a railroad company that entitles a person injured by reason thereof to demand and recover damages from said company by reason thereof. See Bishop, Non-Cont. Law, § 446; *People* v. *Fairchild*, 67 N. Y. 336. We find that 1 Shearman & Redfield, Negligence, § 97, says: "The injury which a stranger does to the railroad company by entering upon its way is infinitesimal, while the risk to himself is great. The injury which he does to his neighbor by secretly entering his bedroom is great, while the risk to himself, if undiscovered, is infinitesimal. In each case, it is true, the effect upon the trespasser's right to sue for damages may be the same, but this will be for very different reasons. If he walks along the track he knowingly takes the risk of fatal injuries, and should not recover for that reason. If he secretes himself in the bedroom, he knowingly engages in a gross invasion of his neighbor's rights, and should not recover for that reason. Most of the reported cases which appear at first sight inconsistent with this proposition, and all of them which are not inconsistent with other and better considered decisions, will prove upon examination to be cases which turned, not upon contributory negligence, but upon the question whether the defendant owed any duty to persons in the plaintiff's situation, which he had neglected to perform."

Now, let us inquire what duty the defendant owed to this unfortunate young man under the circumstances detailed by the evidence. He went upon the defendant's premises, and into its telegraph office, not for the purpose of sending a message, or transacting any business of any kind whatever with any of the agents or employés of the company, but for the purpose of paying a social visit to the operator, who was an old acquaintance. In the case of *Sweeny* v. *Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644, Bigelow, *Ch. J.*, in delivering the opinion of the court, said: "In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault, or negligence, or breach of duty, where there is no act, or service, or contract, which a party is bound to perform or fulfill. All the cases in the books, in which a party is sought to be charged on the ground that he has caused a way or other place to be incumbered or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated. Thus a trespasser who comes on the land of another without right cannot maintain an action if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrong-doers. So a licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the

owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure." In the case of *Diebold* v. *Pennsylvania R. Co.* 50 N. J. L. 478, 12 Cent. Rep. 799, it was held that, "where a railroad company provides offices for the transaction of its business, accessible from the public streets, the presence in the freight yard of the company of a person having business with such offices is not a necessary incident of his business with the company. He is at best a licensee, towards whom the company owes no special duty." There appears to be a marked distinction as to the liability incurred by property owners to persons who go upon their premises as trespassers, or as licensees or volunteers, and those who go there upon business, and we find in a note on page 697 in "Leading Cases on the Law of Torts," by Bigelow, it is said, in commenting upon this distinction that "*Sweeny* v. *Old Colony & N. R. Co.* [10 Allen, 368, 87 Am. Dec. 644] and *Indermaur* v. *Dames* [L. R. 1 C. P. 274, L. R. 2 C. P. 311] have settled the distinction between the duty which a man owes to persons who come upon his premises as bare volunteers or licensees, and those who come as customers or otherwise in the course of business, upon the invitation, express or implied, of the occupier. As to the latter, the occupier is bound to exercise reasonable care, to prevent damage from unusual danger, of which the occupier has or ought to have knowledge; and this, though the transaction had already been completed, and the plaintiff had returned only for some incidental (if proper and usual) purpose connected with it. As to the former, the party takes his own risk, and, so long as there is no active misconduct towards him, no liability is incurred by the occupier of the premises by reason of injury sustained by a visitor on his premises."

"Upon careful examination of the above and other cases, however, it will be found that the authorities may be classed under three heads, to wit: (1) Bare licensees or volunteers; (2) those who are expressly invited or induced by active conduct of the owner to go upon his premises; (3) customers and others, who go there on business with the occupier. The general rule will then be that in those cases which fall under the first head the party injured has no right of action against the occupant of the premises, and the contrary in cases falling under the second and third heads." The case of *Indemaur* v. *Dames*, above referred to, was a case in which the defendant was a sugar refiner, and there was a hole or hatchway through the floors of the different stories for the purpose of raising and lowering sugar to and from the different stories, which hatchway was level with the floors, and might have been, but was not, fenced. The plaintiff was a gas-fitter, and went upon the premises for the purpose of examining some gas jets, with the view of applying a patent gas regulator, and while on the premises the plaintiff accidentally fell through said hatchway while thus engaged upon an upper floor. "Held that, inasmuch as the plaintiff was upon the premises on lawful business in the course of filling a contract in which he (or his employer) and the defendant both had an interest, said hatchway or hole was, from its nature, unreasonably dangerous to persons not usually employed upon the premises, but, having a right to go there, the defendant was guilty of a breach of duty towards him in suffering the hole to be unfenced." The testimony of Bryant in the case under consideration shows that he had not seen said Woolwine for a month or two; that his business was that of a telegraph operator on the Norfolk & Western Railroad, and when asked what was said Woolwine's business there, (meaning at the time of the accident), answered: "I do not know. I am sure. I supposed he just came in to speak to me;" and, in answer to the question whether said Woolwine had any business there that night, answered: "He did not transact it, if he did;" and he also stated that he left said Woolwine lying on the table where his instruments were placed when he went out of the office, in reply to the question, "Where was Woolwine when the accident occurred?" So far, then, as the presence of said Woolwine at the time of the accident is concerned, it appears that he was not invited there by Bryant, the operator in charge of the office, as he had not seen him for a month or two previous to that evening. He was not there on business, as he had been there for nearly a half hour, and had not intimated that he had any business of any description with the operator, and had produced the impression on Bryant that he had merely called to see him; and his attitude on the table at the time of the accident would not indicate that he was there on business, but rather for the purpose of passing a little idle time with an old acquaintance. If he had been there for the purpose of sending or receiving a telegram, he might properly have been regarded as a licensee, as the evidence shows that telegrams were occasionally sent for persons not in any manner connected with the railroad company, and messages so sent had been charged for; but, under the circumstances, we can but regard him as a mere volunteer, going to this office for his own pleasure.

In the case of *Gillis* v. *Pennsylvania R. Co.*, 59 Pa. 129, 98 Am. Dec. 317 (section 4 of the syllabus), it was held that "a trespasser may maintain an action for wanton or intentional injury by the owner of the land," and in section 5: "The owner of property is not liable to a trespasser, or to one who is on it by mere permission or sufferance, for negligence of himself or servants, or for that which would be a nuisance in a public street or common." In that case the facts were as follows: A large crowd had congregated on the platform at the depot for the purpose of seeing the president of the United States, who was to pass the depot at a certain hour. The platform fell by reason of the unusual weight, and the plaintiff was thereby injured; and Sharswood, *J.*, in delivering the opinion of the court, said: "The platform was open. There was a general license to pass over it, but he was where he had no legal right to be. His presence there was in no way connected with the purposes for which

the platform was constructed. Had it been the hour for the arrival or departure of a train, and he had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by authority of defendants, as much as if he was actually a passenger; and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. As to all such persons to whom they stood in such a relation as required care on their part, they were bound to have a structure strong enough to bear all who could stand on it; as to all others they were liable only for wanton or intentional injury. The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity, or to give vent to his patriotic feelings. The defendants had nothing to do with that." He further says: "I am bound to have the approach to my house sufficient for all visitors on business or otherwise, but if a crowd gathers upon it, to witness a passing parade, and it breaks down, though it may be shown not to have been sufficient even for its ordinary use, I am not liable to one of the crowd; I owe no duty to him." And in that case the court held that the court below was right in directing the jury to find a verdict for the defendant. In the case of *Pittsburgh, Ft. W. & C. R. Co.* v. *Bingham*, 29 Ohio St. 364, it was held that "a railroad company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station house, where, at the time of receiving the injury, such person was at such station house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or any business connected with the operation of the road." While I am disposed to regard the plaintiff in this case as a mere volunteer, going upon the premises of the defendant for the purpose of pleasure or pastime, yet, giving the circumstances the most favorable construction that can be given for the plaintiff, we can consider him as nothing more than a licensee; that is (as defined by Patterson in his Railway Accident Law, p. 176, § 184), "persons who be neither passengers, servants, nor trespassers, and not standing in any contractual relations to the railway, are permitted by the railway to come upon its premises for their own interests, convenience, or gratification." In the case of *Sutton* v. *New York Cent. & H. R. R. Co.*, 66 N. Y. 243, the railway was held not to be liable to licensees for a failure to set the brakes on the cars stored on a siding, or otherwise block them to prevent their moving by force of the wind or by gravity. So, also, Pierce on Railroads, p. 275, says: "But the duty and liability to keep its premises safe for public use do not arise out of a bare license or permission to use its premises. Still less do they exist in favor of a trespasser, although the company will be liable even to him for a wanton injury." And in the case of *Parker* v. *Portland Pub. Co.*, 69 Me. 173, the court held that "no duty is owed to a mere licensee, and he has no cause of action for negligence in the place he is permitted to enter." In the case at bar there is no controversy about the facts, the only witnesses introduced being those called by the plaintiff. It was held in the case of *Gonzales* v. *New York & H. R. Co.*, 38 N. Y. 440, that "a question of negligence is one of law, where facts are uncontroverted." In the case of *Phœnix Ins. Co.* v. *Doster*, 106 U. S. 30, 27 L. ed. 65, the court held, in its opinion, delivered by Harlan, *J.*, that, "where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury under proper directions as to the principles of law involved;" and in section 1 of syllabus: "A case should not be withdrawn from the jury unless the facts are undisputed, or the testimony is of such conclusive character that a verdict in conflict therewith should be set aside." So, also, in the case of *Randall* v. *Baltimore & O. R. Co.*, 109 U. S. 478, 27 L. ed. 1003, it was held (first point of syllabus) that "when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant." This court, in the case of *Johnson* v. *Baltimore R. Co.*, 25 W. Va. 571, while it holds, in the third point of the syllabus, that "negligence is in most cases a mixed question of law and fact, and generally what particular facts constitute negligence is a question for the determination of the jury from all the evidence before it bearing on the subject, rather than a question of law for the determination of the court," yet, in the fifth clause of syllabus, in the same case, this court holds that, "if the facts are unambiguous, and there is no room for two honest and apparently reasonable conclusions, the court should not be compelled to submit the question to the jury as one in dispute."

Now, taking the entire evidence that was introduced in this case, there is nothing that indicates that the plaintiff was either directly or indirectly induced by the defendant to visit this office; but, on the contrary, it is clear from all the circumstances that he went there without invitation, either express or implied, and, while no one objected to his visiting the place, yet the law fixes the liability of either a corporation or an individual towards a party who comes upon its premises as the plaintiff did in this case; and, as we have said above, he cannot be regarded in a more favorable light than an ordinary licensee. In the case of *Nichols* v. *Washington, A. & W. R. Co.*, 83 Va. 102, the court says: "Now, it is agreed on all hands that there is a wide difference between the obligations which a person or a corporation owes to a mere licensee and the duty which the same person or corporation owes to one who comes upon his premises by an invitation, either express or implied. In the first case it is generally admitted that the party comes at his own risk, and enjoys the license subject to its concomitant risks or perils, and that in such case no duty is imposed upon the owner or occupant to keep his premises in safe and suitable condition for his use, and the owner or occupant is only liable for any wanton injury that may be done to the licensee."

Numerous authorities have been cited by counsel for the plaintiff in error seeking to show that the defendant in this case under consideration owed some duty to the plaintiff; but, having arrived at the conclusion that the plain-

tiff in error stood upon the footing of a mere licensee, we are of the opinion that the defendant owed no duty to the plaintiff other than that it was its duty not to willfully or wantonly injure the plaintiff, and that in going upon said premises under the circumstances of this case he enjoyed the license, subject to the risks and perils attendant thereon, and for these reasons we are of the opinion that *there is no error in the judgment complained of, and the same must be affirmed*, with costs and damages to the defendant in error.

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## UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

GANDOLFO
*v.*
HARTMAN *et al.*

(49 Fed. Rep. 181.)

**A covenant not to rent property to a Chinaman is void** as against public policy, as violating the 14th Amendment to the United States Constitution providing for equal protection of the laws, and as an infraction of the treaty with China guaranteeing to Chinamen in the United States all the rights, privileges, and immunities accorded to citizens and subjects of the most favored nation.

(January 25, 1892.)

SUIT to enjoin the making of a lease in alleged violation of a covenant in the deed under which the property sought to be leased was held. On demurrer to the bill. *Sustained.*

The facts are stated in the opinion.

*Messrs.* **Blackstock & Shepherd** and **Bicknell & Denis** for complainant.

*Messrs.* **J. Marion Brooks, J. Hamer** and **E. S. Hall** for defendants.

**Ross,** *District Judge,* delivered the following opinion:

The amended bill in this case shows that on the 22d of March, 1886, one Steward, for a valuable consideration, conveyed to the complainant a portion of lot 2, block 47, fronting on East Main street in the town of San Buena Ventura, Ventura county, of this state, together with a perpetual right of way over an adjoining alley. The deed also contained the following: "It is also understood and agreed by and between the parties hereto, their heirs and assigns, that the party of the first part shall never, without the consent of the party of the second part, his heirs or assigns, rent any of the buildings or ground owned by said party of the first part, and fronting on said East Main street, to a Chinaman or Chinamen. This agreement shall only apply to that part of lot 2, block 47, aforesaid, lying north of the alleyway hereinbefore described, and fronting on said East Main street. And said party of the second part agrees for himself and heirs that he will never rent any of the property hereby conveyed to a Chinaman or Chinamen."

The deed was duly recorded in the county in which the property is situate, and subsequently the portion of the lot retained by Steward was purchased of him by the defendant Hartman, who was thereafter about to lease it to the defendants Fong Yet and Sam Choy, who are Chinamen, when the present suit was commenced to enjoin him from so doing.

The Federal courts have had frequent occasion to declare null and void hostile and discriminating state and municipal legislation aimed at Chinese residents of this country. But it is urged on behalf of the complainant that, as the present does not present a case of legislation at all, it is not reached by the decisions referred to, and that it does not come within any of the inhibitions of the 14th Amendment to the Constitution of the United States, which, among other things, declares that no state shall "deny to any person the equal protection of the laws." This inhibition upon the state, as said by *Mr. Justice* Field, in the case of *Ah Kow* v. *Nunan*, 5 Sawy. 552, "applies to all the instrumentalities and agencies employed in the administration of its government to its executive, legislative, and judicial departments; and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one whilst within the United States, from whatever country he may come, or of whatever race or color he may be, implies that not only the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others. . . ."

It would be a very narrow construction of

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NOTE.—*Treaty guaranties to aliens.*

The guaranty by treaty to aliens of a certain nation of all the "rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation" is properly construed in the light of the decisions on the constitutional guaranty of equal privileges and immunities to citizens, although this does not itself extend to aliens. Such treaty guaranty would likewise seem to be equally effective as against a denial of such rights, privileges, and immunities by citizens, states or any other party or body except Congress.

As a protection against a denial of rights or a discrimination by Congress it is of no efficacy. 16 L. R. A.

See also 21 L. R. A. 617.

Chae Chan Ping v. United States, 130 U. S. 581, 32 L. ed. 1068; Edye v. Robertson, 112 U. S. 580, 28 L. ed. 798; North German Lloyd S. S. Co. v. Hedden, 43 Fed. Rep. 17; Thingvalla Line v. United States, 5 L. R. A. 135, 24 Ct. Cl. 255.

But a state law contrary to a treaty is void. Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Ware v. Hylton, 3 U. S. 3 Dall. 199, 1 L. ed. 568.

That aliens are within the constitutional guaranty of the equal protection of the laws, see *note* to Louisville, S. V. & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579, which *note* includes also the constitutional equality of citizens in respect to equal privileges and immunities.

R. A. R.

the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other. This would seem to be very clear.

Moreover, it is by the treaty between the United States and China of November 17, 1880, provided that, "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." Article 2, Treaty Nov. 1880, (22 U. S. Stat. at L. p. 13.)

"The intercourse of this country with foreign nations and its policy in regard to them," said the Supreme Court, speaking through *Chief Justice* Taney, in *Kennett* v. *Chambers*, 55 U. S. 14 How. 49, 14 L. ed. 321, "are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all governments, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to the citizens of the United States. For, as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And, when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without the breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. And, if he does so, he cannot claim the aid of a court of justice to enforce it. The appellants say, in their contract, that they were induced to advance the money by the desire to promote the cause of freedom. But our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limit of its constitutional power."

This was said in a case where it was sought to enforce a contract made in this country after Texas declared itself independent, but before its independence had been acknowledged by the United States, whereby the complainants agreed to furnish, and under which they did furnish, money to a general in the Texan army, to enable him to raise and equip troops to be employed against Mexico. But the principle governing the case is, in my opinion, equally applicable here, where it is sought to enforce an agreement made contrary to the public policy of the government, in contravention of one of its treaties, and in violation of a principle embodied in its Constitution. Such a contract is absolutely void, and should not be enforced in any court,—certainly not in a court of equity of the United States.

For the reasons stated *an order will be entered sustaining the demurrer, and dismissing the bill*, as amended, at complainant's cost, without reference to other points made and argued by counsel.

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## LOUISIANA SUPREME COURT.

STATE of Louisiana, *ex rel.* H. N. MIZE,
*v.*
J. P. McELROY, *Appt.*

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

***1. The language of the statute relative to printed ballots** expresses the legislative will. It is mandatory.

**2. The legislative intent must be taken as expressed** by the words which the Legislature has used.

**3. The name of a candidate written on the face of an election ticket** in lieu of the name of another candidate printed in the

*Head notes by BREAUX, *J.*

NOTE.—The denial of the right of an elector to vote for any person whose name is not on the official ballot may be more or less of a practical disfranchisement of voters according to the liberality of the provisions for allowing names to be placed on the official ballot. What those provisions are in the Louisiana statute does not appear from the above case, but in the nature of things there must



See also 17 L. R. A. 364, 382; 19 L. R. A. 171.

ticket should not be counted in ascertaining the result of the election.

4. **The Legislature has imposed a positive and absolute duty** on the voter to cast a printed ballot.

5. **The statute in that respect is not subject to liberal construction.**

6. **Where the meaning of the statute is clear,** those upon whom compliance devolves have no right to ingraft exceptions, or make modifications, or depart from its plain letter.

7. **A fair consideration** of the statute leads to the conclusion that the Legislature intended compliance with the provisions in relation to printed ballots.

(May 18, 1892.)

APPEAL by defendant from a judgment of the District Court for the Parish of De Soto in favor of plaintiff in a proceeding by mandamus to compel respondent, returning officer of DeSoto Parish, to exclude from his return certain votes cast at an election for relator's opponent as candidate for the office of justice of the peace. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **William Goss,** for appellant:

The purpose of voting is to ascertain the intention of the voter and the will of the majority, and where this is done without violating any prohibitory law, the votes must be counted.

Cooley, Const. Lim. 5th ed. pp. 769, 770.

Statutes being designed to preserve the secrecy of the ballot, and to prevent fraud, intimidation, and bribery, will generally be considered mandatory, and this will be so in all cases where the statutes provide that a ballot varying from the requirements of the law shall not be counted; but if this provision is lacking, they should not be rejected if the variations are but trifling.

6 Am. & Eng. Encyclop. Law, pp. 348, 349, § 8, *note 1;* McCrary, Elections, §§ 190–193.

A ballot may be defined as "a paper ticket upon which the voter expresses his preference upon the question submitted at the election, by printing, writing, or signs, or a combination of these methods of expression."

6 Am. & Eng. Encyclop. Law, p. 342, § 12, *note 2.*

Where the Constitution provides that all ballots should be fairly written, the term "written" means expressed by means of letters, and printed ballots come within this definition.

6 Am. & Eng. Encyclop. Law, p. 344, *note 1;* Cooley, Const. Lim. 5th ed. pp. 960, 761; McCrary, Elections, § 512.

A ballot cast by an elector, in good faith, should not be rejected for failure to comply with the law in matters over which the elector had no control.

McCrary, Elections, §§ 503–511; *Augustin* v. *Eggleston,* 12 La. Ann. 366; *Andrews* v. *Saucier,* 13 La. Ann. 301; *Burton* v. *Hicks,* 27 La. Ann. 507; *Webre* v. *Wilton,* 29 La. Ann. 614.

*Messrs* **E. W. Sutherlin** and **Charles W. Elan,** for appellee:

All the names of persons voted for shall be printed on one ticket of white paper of uniform size and quality.

La. Act 101 of 1882, § 4.

The state has the legislative power to prescribe the mode of its exercise; and when a specific mode is so prescribed, the right must be exercised pursuant to that mode, and not otherwise. Written ballots are without legal effect, and should not be counted.

6 Am. & Eng. Encyclop. Law, p. 349, *notes,* and cases cited.

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

The relator sued out a mandamus against the returning officer of the parish of De Soto to compel him to exclude sixty-seven votes cast for his opponent from his return to be made to the secretary of state of the result of the election held on April 19, 1892; also from his count and compilation; and he prays that the said votes be decreed illegal and void. The facts admitted are that the relator, Mize, was a candidate for the office of justice of the peace of ward 8 of De Soto parish at the said election; that his name was printed, as a candidate for said office, on all the ballots cast in said ward, and he received fifty-nine votes; that his name as printed was erased from sixty-seven other ballots cast, and the name of W. R. Crosby was written across the face of these ballots where his (relator's) name was printed; that the relator, at the time, objected to the counting of these written votes for Crosby, and that, notwithstanding his written protest filed with the commissioners, these written votes were counted for Crosby, and count thereof was kept on the tally sheets, and returns thereof were made to the returning officer. It is also admitted that the office of justice of the peace of said ward involved in this suit is worth $2,000.

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be some restriction on the right to place names thereon else the size of the ballot might become too great for practical use. It seems doubtful in the light of the above decisions whether or not printed pasters could be regarded as "printed on one ticket or ballot of white paper of uniform size and quality to be furnished by the secretary of state." Unless such pasters are allowable it would seem that some voters are actually denied the right to vote and that the law in Louisiana, while it does not add to the constitutional qualification of the voter, does deny to small minorities the right to vote at all unless they vote for candidates who are not their choice.

In Pennsylvania where an express provision is made for "inserting" names in official ballots, it is held that the name need not be written but that a "sticker" may be used. De Walt v. Bartley (Pa.) 15 L. R. A. 771.

For *note* as to marks or devices to distinguish ballots, see Rutledge v. Crawford (Cal.) 13 L. R. A. 761.

For other recent cases concerning official ballots, see *Re* Ballot Act, 6 L. R. A. 773, 16 R. I. 766; Price v. Lush, 9 L. R. A. 467, 10 Mont. 61; Talcott v. Philbrick, 10 L. R. A. 150, 59 Conn. 472; Detroit v. Rush, 10 L. R. A. 171, 82 Mich. 532; Fields v. Osborne, 12 L. R. A. 551, 60 Conn. 544; Fisher v. Dudley (Md.) 12 L. R. A. 586; Cook v. State (Tenn.) 13 L. R. A. 183; Shields v. Jacob, 13 L. R. A. 760, 88 Mich. 164; People v. Onondaga County Canvassers (N. Y.) 14 L. R. A. 624; State v. Russell (Neb.) 15 L. R. A. 740; Allen v. Glynn (Colo.) 15 L. R. A. 743; Parvin v. Wimberg (Ind.) 15 L. R. A. 775.

The question for our determination is, Should a ballot cast be counted, in ascertaining the result of an election, on the face of which the printed name of a candidate was erased, and the name of another candidate substituted in writing? Under the Act of 1877, to regulate and maintain the freedom and purity of elections, and to punish persons for false, fraudulent, or illegal voting, the names of persons voted for were required to be written or printed on one ticket.

The statute applying: Section 23 of the said Act was amended by Act 101 of 1882, as follows: "That all the names of persons voted for shall be printed on one ticket or ballot of white paper, of uniform size and quality, to be furnished by the secretary of state."

Legislative power over the forms of the ballot and manner of voting: The right of suffrage being a political, and not a natural, right, it is within the power of the state to prescribe how it shall be exercised. The manner of voting provided by statute is one of the reasonable regulations. The limitations imposed for the purpose of guarding against fraud, undue influence, and oppression, and of maintaining a secrecy of the ballot, are within the legislative and police powers. That the ballot shall be printed does not add to the constitutional qualification of the voter, and therefore falls within the general authority of legislative laws.

The legislative intent is clearly expressed. In the first Act, that of 1877, the words were, "the ballot shall be written or printed;" in the amending Act, "it shall be printed." The legislative will cannot be misunderstood. The intention of the Legislature should control absolutely. When that intention is clearly ascertained, those upon whom it devolves to execute the statute have no other duty to perform than to follow the legislative will. While all the minute details of the statutes relating to elections are not mandatory, they are mandatory in requiring that the ballot shall be printed. The positive requirement of the statute does not admit of it being treated as merely directory. By qualifying a statute as directory, its requirement is avoided; the intention of the Legislature, however plain, is defeated. It is desirable that the Legislature should declare in what respect they mean any particular provision to be void, in event of noncompliance with its terms, and what consequence they intend shall result from noncompliance. In the absence of this, great difficulties arise. We are not willing, however, in the absence of such a declaration, to hold a law as directory in cases in which the intention of the Legislature is clearly and emphatically expressed. We prefer a strict construction to the "extensive and comprehensive;" each has able advocates and many authorities in its support. The grounds of objection urged on the part of the respondent, such as that the purpose of voting is to ascertain the intention of the voter and the will of the majority, and that a ballot cast by an elector, in good faith, should not be rejected, for failure to comply with the law in matters over which he had no control, if broadly and liberally applied, would defeat the object of the statute relating to the printing of the tickets on a ballot of white paper furnished by the secretary of state, and would render ineffectual the provisions applying to the throwing out and not counting folded tickets, and even those relative to the required certificate of registration, although the purpose of the law is well defined and clear.

Authorities: Constitutional and statutory provisions for the conduct of elections are either mandatory or directory, and a violation of mandatory provisions will avoid the election, without regard to the nature or the person guilty of the violation and without reference to the result. 6 Am. & Eng. Encyclop. Law, p. 325. In Rhode Island the law required that each ballot shall be so printed as to give each voter a clear opportunity to designate by cross mark, in a sufficient margin, at the right of the name of each candidate, his choice of candidates, and that each voter shall prepare his ballot by marking in the appropriate margin or place a cross opposite the name of the candidates of his choice, and that no voter shall place any mark upon his ballot by which it may be afterwards identified. The court decided that no mark other than the cross can be used; that it must be placed in the margin opposite the name of the candidate. Am. Dig. 1891, p. 1419. In many of the states there are statutes prescribing the form of the ballots, the kind of paper, and prohibiting any marks, figures or devices by which one can be distinguished from the other. These statutes, being designed to preserve the secrecy of the ballot, and to prevent fraud, intimidation, and bribery, will generally be considered mandatory. 6 Am. & Eng. Encyclop. Law, p. 349. Directions given by a sovereign in regard to a matter over which his power is conceded would, according to the ordinary use of language, be held to involve, as its correlative, obedience. Sedgw. Stat. & Const. Law, p. 318, *note*. These decisions maintain the principle that mandatory provisions, not complied with in an election, will result in its avoidance without reference to motive or person; that in those states in which the ballots must be printed and the name of the candidate designated by a cross mark the required marginal notes must be placed as required by statute; that the voter should readily comply with the legislative will clearly expressed. The voters who cast the sixty-seven ballots did not comply with the statute. In an organized state of society, the majority binds the minority by complying with mandatory laws in expressing the popular will.

*Judgment affirmed*, at appellant's cost.

## MINNESOTA SUPREME COURT.

Elizabeth L. WILLIS, *Respt.*,
*v.*
ST. PAUL SANITATION CO. *et al.*, and E. L. MABON, *Appts.*

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

*1. **Article 10, § 3, of the Constitution,** providing that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him," is self-executing, and creates an individual liability on the part of the stockholder for corporate debts to an amount equal to the amount of stock held or owned by him.

2. **The subject of chapter 30, Laws 1889,** amending the Insolvent Law of 1881, is sufficiently expressed in its title.

3. **The provision in section 1** of this Amendatory Act, "that the release of any debtor under this Act shall not operate to discharge any other party liable as surety, guarantor, or otherwise for the same debt," includes stockholders who are liable for the debts of the corporation.

4. **This provision is not unconstitutional,** as applied to cases where the liability of the stockholder was incurred before, but the proceedings under the Insolvent Act were had and the corporation discharged subsequent to, its passage.

(January 18, 1892.)

*Head notes by MITCHELL, *J.*

APPEAL by defendant, Mabon, from an order of the District Court for Ramsey County overruling a motion for a new trial after verdict in favor of plaintiff in an action brought to enforce the alleged personal liability of the stockholders in defendant corporation for its debts. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **James H. Foote** for appellant.

*Mr.* **Horace G. Stone,** for appellants in the *Meagher Case*, made the following contentions:

As to affirmative provisions of a Constitution, *i. e.*, those which say what "shall be" as distinguished from those which say what shall not be, the presumption is that the Legislature, instead of the courts, is to carry them out by proper laws which shall cover the details and which shall change as to such details as the best interests of the people of the state shall, from time to time, require.

I am aware of the fact that this court has, in three cases, assumed that section 3, article 10, of the Constitution, was self-executing.

But it is a universal and a familiar rule in all courts of appeal, that all action of the lower courts will be assumed to be correct, except only as to those points about which the appealing party claims there has been error.

*State* v. *Brachvogel*, 38 Minn. 265; *Meyer* v. *Berlandi*, 39 Minn. 438; *Pond Mach. Tool Co.* v. *Robinson*, 38 Minn. 272; *Jordan* v. *Board of Education of Taylor's Falls*, 39 Minn. 298.

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NOTE.—*Self-executing constitutional provisions.*

A constitutional provision that any city of more than 100,000 inhabitants "may frame a charter for its own government" is self-executing. People v. Hoge, 55 Cal. 612.

A constitutional provision that the secretary of state and auditor of state shall indorse on bonds issued for railroads or other internal improvements, the words "issued pursuant to law" requires no legislation in order to permit such indorsement in a proper case. State v. Babcock, 19 Neb. 230.

A constitutional provision that a shareholder of a corporation may cast the whole number of his votes for one candidate or distribute them upon two or more candidates as he may prefer" takes effect without the aid of legislation. Pierce v. Com. 104 Pa. 150.

A constitutional provision that the recorder's court of Chicago shall be continued and called the "criminal court of Cook county" defining its jurisdiction and making the judges of another court *ex officio* its judges, is self-executing. People v. Bradley, 60 Ill. 398.

A constitutional provision that "all other courts of common pleas shall cease to exist at the expiration of the present terms of office of the several judges" virtually repeals an Act attempting to substitute another court in place of a court of common pleas before the expiration of the terms of such judges. *Ex parte* Snyder, 64 Mo. 58.

In Rothermel v. Ziegler, decided in the Pennsylvania court of common pleas and reported in the statement of the case in Rothermel v. Meyerle, 9 L. R. A. 366, 136 Pa. 250, it is said that the 14th Amendment of the Federal Constitution is not retrospective and has no self-executing efficacy as against a prior statute and therefore a state statute cannot be held to be repealed by it, but that it simply established a principle which no state Legislature would thereafter be at liberty to disregard or violate.

The 15th Amendment to the Constitution of the United States which prevents discrimination in respect to the right of suffrage between citizens of the United States on account of race, color, or previous condition of servitude, does not confer the right of suffrage upon any one, but does invest citizens with a new constitutional right of exemption from discrimination as to the elective franchise. United States v. Reese, 92 U. S. 214, 23 L. ed. 563. This decision however does not deny that the amendment is self-executing so far as to prevent the prohibited discrimination.

A constitutional provision which enjoins upon the Legislature to "encourage internal improvements by passing liberal general laws of incorporation for that purpose" is a command to the Legislature which cannot be enforced by a court. Gillinwater v. Mississippi & A. R. Co. 13 Ill. 1.

A constitutional provision that "the Legislature shall provide by law for determining contested elections" is addressed solely to the Legislature and the failure of the Legislature to provide for contesting an election, will not make a statute authorizing an election invalid. Schulherr v. Bordeaux, 64 Miss. 59.

A constitutional provision that "suits may be brought against the state in such courts as may by law be provided" does not give a right to sue which cannot be defeated by the Legislature, but gives a mere discretionary power. *Ex parte* State, 52 Ala. 231.

A constitutional provision that public printing shall be performed under a contract given to the lowest responsible bidder below a maximum price and under such regulations as shall be prescribed by law, is not self-executing but requires legisla-

16 L. R. A.

See also 24 L. R. A. 284; 29 L. R. A. 798; 31 L. R. A. 399; 33 L. R. A. 137, 554; 34 L. R. A. 393; 46 L. R. A. 860.

To make section 3, article 10, self-executing it must be shown—

1st. That the constitutional convention put into it all the details of legislation necessary to define its exact limit and extent, through all the various changes and circumstances which might arise in all future time.

2d. That the people who ratified the Constitution understood that all these details were incorporated in this article and that by their votes they were fixing an inflexible rule for all time to come.

3d. That by this article not only the members of the convention but the people who ratified the Constitution understood that they were entirely ignoring the Legislature and that they were giving a direct command to the courts to enforce a double liability in all cases and under all circumstances.

4th. That by this article they were creating *de novo* a debt from one private individual to another.

5th. That this creation of a private debt was not to take effect until some future time.

Section 36 of the Constitution of California provides that each stockholder of a corporation "shall be liable" for his "proportion" of its debts.

The court, in an elaborate opinion covering the question in nearly all its bearings, decided that the Constitution was not self-executing.

*French* v. *Teschemaker*, 24 Cal. 518. See also *Fusz* v. *Spaunhorst*, 67 Mo. 256; *St. Joseph & D. C. R. Co.* v. *Buchanan County Ct.* 39 Mo. 485; *Jerman* v. *Benton*, 79 Mo. 148; *Groves* v. *Slaughter*, 40 U. S. 15 Pet. 499, 10 L. ed. 819; *Fairfield* v. *Gallatin County*, 100 U. S. 47, 25 L. ed. 544; *Mississippi Mills* v. *Cook*, 56 Miss. 40; *Bowie* v. *Lott*, 24 La. Ann. 214; *Coatesville Gas Co.* v. *Chester County*, 97 Pa. 476; *Lehigh Iron Co.* v. *Lower Macungie Twp.* 81 Pa. 482; *Cairo & F. R. Co.* v. *Trout*, 32 Ark. 17; *Lamb* v. *Lane*, 4 Ohio St. 167; *Chahoon* v. *Com.* 20 Gratt. 733; *Doddridge Suprs.* v. *Stout*, 9 W. Va. 703; *Missouri, K. & T. R. Co.* v. *Texas & St. L. R. Co.* 10 Fed. Rep. 503; *Steacey* v. *Little Rock & Ft. S. R. Co.* 5 Dill. 348; *Morley* v. *Thayer*, 3 Fed. Rep. 739.

The framers of the Constitution did not intend to make section 3, article 10, self-executing.

Minnesota Constitutional Debates; Democratic Wing, pp. 175, 176; Republican Wing, pp. 315, 316.

Double liability did not exist at common law.

*Johnson* v. *Fischer*, 30 Minn. 175.

The Constitution did not repeal the common law except in certain cases.

*Dutcher* v. *Culver*, 24 Minn. 584.

There are few persons who would consent to take stock in such enterprises, if subject to the double liability provision. Although willing to risk the loss of their stock, they would be unwilling to involve their estates beyond it.

*Ochiltree* v. *Iowa R. Contract Co.* 88 U. S. 21 Wall. 249, 22 L. ed. 546.

Courts cannot enforce laws which the Legislature ought to make, but does not make.

*Gillinwater* v. *Mississippi & A. R. Co.* 13 Ill. 1.

Embodying the details of legislation into a Constitution would defeat the Constitution.

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tion to carry it into effect. Brown v. Seay, 86 Ala. 122.

A constitutional provision that "it shall be a crime the nature and punishment of which shall be prescribed by law" for a bank officer to receive deposits knowing the bank to be insolvent, and that he "shall be individually responsible for such deposits," is not self-enforcing so as to make such officer civilly liable to a depositor in such a case, since legislation is necessary to prescribe the particular details of the crime and of the civil liability. Fusz v. Spaunhorst, 67 Mo. 256.

A constitutional provision that "all lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres" is not self-executing and needs legislative action to make it operative. Bowie v. Lott, 24 La. Ann. 214.

A constitutional provision that the general assembly shall not authorize municipal loans or subscriptions to corporations without a two-thirds vote of the inhabitants, does not take effect so as to permit such a vote without further regulations by the Legislature. St. Joseph & D. C. R. Co. v. Buchanan County Ct. 39 Mo. 485. But this does not decide that the prohibitory part is not self-executing.

The constitutional provision that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad" is not self-executing. Missouri, K. & T. R. Co. v. Texas & St. L. R. Co. 10 Fed. Rep. 497.

*Prohibitions generally.*

In Law v. People, 87 Ill. 385, it is said that the doctrine must be regarded as settled that all negative or prohibitory clauses in a Constitution are self-executing. In that case it was decided that a constitutional limitation of the amount of municipal indebtedness that may be incurred is self-executing.

A constitutional limitation on the amount of taxation in school districts is self-executing although there is a provision for a larger amount in some cases by vote of the people. St. Joseph Bd. of Public Schools v. Patten, 62 Mo. 444.

A constitutional provision that there shall be no sale of property for taxes except by certain officers upon an order and judgment of a court of record, takes effect immediately and annuls all laws conferring power on other officers to make such sales. Hills v. Chicago, 60 Ill. 86.

A provision that no public work or improvement shall be done or made in a city street unless an estimate is made and an assessment levied and collected before the work is commenced or the contract let therefor, is self-executing. Oakland Pav. Co. v. Hilton, 69 Cal. 479; McDonald v. Patterson, 54 Cal. 245; Donahue v. Graham, 61 Cal. 276.

A constitutional provision that no corporation shall issue stock except for certain purposes is prohibitory, but a provision that stock and bonded indebtedness of corporations shall not be increased except in pursuance of a general law, or without consent of the meeting called on sixty days' notice, as may be provided by law, is not self-executing as it does not itself form a complete mode of proceeding. Ewing v. Oroville Min. Co. 56 Cal. 649.

A constitutional prohibition against any officer of the United States holding a state office, is self-operative and may be enforced without legislative aid. DeTurk v. Com. 129 Pa. 151.

A constitutional provision that the Legislature "shall pass laws to prohibit the sale of lottery tickets" is itself a prohibition of lotteries. Bass v. Nashville, Meigs (Tenn.) 421.

So a constitutional declaration that "no lottery shall be authorized nor shall the sale of lottery

The Federalist, Jan. 25, 1788.

A legal right does not exist without a remedy.

Section 3, article 10, either created a right to be enforced under the rules of the common law, or else no right was created at that time.

Broom, Legal Maxims, p. 192; *Edwards* v. *Kearzey*, 96 U. S. 595, 24 L. ed. 793; *United States* v. *Quincy*, 71 U. S. 4 Wall. 535, 18 L. ed. 403.

If section 3, article 10, created the right, then we have the startling novelty of a constitutional right without force or life, unless the Legislature subsequently created the remedy. It would be idle to argue any such proposition.

The question at bar is not as to whether this court could guess the meaning of section 3, article 10, if it was a statute, but whether, in the distribution of power, section 3, article 10, directed the Legislature to enforce a double liability, or whether it directed the courts to do so, to the exclusion of the Legislature. Admitting for the sake of argument that the courts could carry out section 3, article 10, if commanded to do so, so could the Legislature. The question is, To whom was this command directed?

*St. Joseph Board of Public Schools* v. *Patten*, 62 Mo. 444; *Bass* v. *Nashville*, Meigs (Tenn.) 421; *People* v. *Bradley*, 60 Ill. 390; *Miller* v. *Marx*, 55 Ala. 322; *Pierce* v. *Com.* 104 Pa. 150; *State* v. *Weston*, 4 Neb. 216; *Johnson* v. *Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779; *People* v. *Hoge*, 55 Cal. 612; *Rowan* v. *Runnels*, 46 U. S. 5 How. 133, 12 L. ed. 85; *Rothermel* v. *Meyerle*, 9 L. R. A. 366, 136 Pa. 250; *Oakland Pav. Co.* v. *Hilton*, 69 Cal. 479; *French* v. *Teschemaker*, 24 Cal. 518.

*Messrs.* **J. C. Michael** and **W. H. Michael** for respondent.

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

1. This was an action brought by a creditor of an insolvent corporation to recover from certain of its stockholders on their individual liability for the corporate debts, under what is commonly called "the double liability clause" of the Constitution, which provides that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him." Article 10, § 3. The principal question in the case is whether this provision of the Constitution is self-executing or whether it requires legislation to carry it into effect. The same question is also involved in the cases of *McKusick* v. *Seymour and Meagher* (Minn.) 50 N. W. Rep. 1114, (submitted at a later day of the present term,) and has been exhaustively argued in both cases. Some points were made by counsel in one case that were not urged in the other; but as the question is common to both cases, and as there was an understanding among counsel that all arguments presented in either should be considered in both, we shall endeavor to fully determine the question in the present opinion. In addition to this main question, counsel for the appel-

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tickets be allowed" is self-executing so far as to take away any pre-existing right of authority to conduct a lottery or sell lottery tickets. State v. Woodward, 89 Ind. 110, 46 Am. Rep. 160.

The United States Supreme Court in two early cases set it itself against the whole current of authorities on this question of the effect of a prohibitory clause in a Constitution. It decided that a provision in the Constitution of Mississippi that "the introduction of slaves into this state as merchandise or for sale shall be prohibited from and after the 1st day of May, 1833," with a certain exception, does not become operative without legislation but was addressed to the Legislature. Groves v. Slaughter, 40 U. S. 15 Pet. 449, 10 L. ed. 800; Rowan v. Runnels, 46 U. S. 5 How. 134, 12 L. ed. 85.

The temptation to comment on these decisions is almost irresistible but might seem out of place in this connection. Considering that they stand alone among decisions on constitutional prohibitions, and that they were made in opposition to the decisions of the Supreme Court of Mississippi in interpreting its own Constitution they are at least remarkable. But it must be noticed further that the opinion of the court in the first of the cases did not even refer to one of the Mississippi cases which were cited in argument while it referred to the other at some length in an attempt to show that it had not actually decided the question. The Mississippi cases which had decided that the constitutional prohibitions were self-operative were Green v. Robinson, 5 How. (Miss.) 80; Glidewell v. Hite, Id. 110.

These decisions were re-affirmed in Brien v. Williamson, 7 How. (Miss.) 14, in which the court refused to follow the decision of the United States Supreme Court.

The Supreme Court of Tennessee followed these Mississippi decisions as against that of the United States Supreme Court in Yerger v. Rains, 4 Humph. 259.

*Cases as to taking property for public use.*

A constitutional provision that private property shall not be taken or damaged for public use without compensation, becomes operative without any further legislation although the Constitution also provides that compensation shall be ascertained in such manner as may be prescribed by general law. Johnson v. Parkersburg, 16 W. Va. 402, 37 Am. Rep. 779; Householder v. Kansas City, 53 Mo. 488; McElroy v. Kansas City, 21 Fed. Rep. 257.

The same rule applies to a provision that property taken for public use shall not be distributed or the proprietary rights of the owner therein devested until compensation shall be paid to the owner or into court for him. Blanchard v. Kansas City, 16 Fed. Rep. 444.

An injunction was based in Chambers v. Cincinnati & G. R. Co. 69 Ga. 320, on a constitutional prohibition against taking private property without compensation. It did not appear that any statute had been enacted in aid of the constitutional provision.

*As to jury.*

In Ohio it is held that a constitutional requirement that compensation shall be assessed by a jury when private property is taken for public use is not self-executing, but provision must be made by law for a jury before property can be condemned. Lamb v. Lane, 4 Ohio St. 167; Watson v. Pleasant Twp. 21 Ohio St. 666.

So in West Virginia a constitutional provision that compensation for land condemned for public use shall be ascertained "as may be prescribed by general law provided that when required by either of the parties such compensation shall be ascer-

lants in the *Meagher Case, supra*, urged that this constitutional provision is not intended to impose any "double liability" upon stockholders, but simply means that they shall be bound to pay for their stock once its "face amount," any device or agreement to the contrary notwithstanding, and that having once paid for their stock in full they are not further liable. Except for the eminence of the counsel who have advanced this view we would not deem it entitled to serious consideration. While no fixed form of words has been adopted to express the idea, yet provisions couched in more or less similar language have been frequently incorporated into Constitutions and statutes, and have been uniformly understood and construed as providing for an individual liability of stockholders for corporate debts in addition to this risk of losing the amount of their stock. This is the meaning which has been invariably attached to this provision of our Constitution. It is the one attributed to it by this court in numerous cases, although never in the form of a direct and authoritative decision; and we do not believe that the construction now sought to be placed upon it ever occurred to, or was ever advanced by, any one until suggested by counsel in the present case. Any such construction would render the provision meaningless and useless for all that would be accomplished by it was already fully covered by the law. If a person had subscribed for stock and had not paid for it the amount agreed of course he was liable to the corporation and through it to its creditors; and if the stock had been issued to him as paid-up stock when not in fact paid for under such circumstances as to operate as a fraud upon creditors he was upon well-settled principles liable to them as for unpaid stock subscriptions. The construction contended for would give the public no security beyond what they already had under the existing law. Its absurdity is rendered apparent when considered in connection with the amendment of November 5, 1872, inclosed in parentheses; for then the whole section would mean that, while the stockholders in all other corporations should be liable to pay once for their stock at its face amount, yet stockholders in manufacturing corporations need not be required to do so. The obvious intention of the provision was to add to the ordinary liability of a corporation for its debts the individual liability of the stockholders to a limited amount, and that the measure of that liability should be a sum equal to the amount of stock owned or held by them. This stock is not the subject of the liability, but the measure of it; in other words, the stockholders are liable, not for the stock, but, in addition thereto, for a sum measured by the amount of the stock.

2. This brings us to the main question, viz., whether this provision of the Constitution is self-executing. That such has been the general understanding of the bench, bar, and business men in this state is conceded. This court has, in a long line of cases, assumed that such was the fact. *Dodge* v. *Minnesota P. S. Roof Co.* 16 Minn. 373, (Gil. 327); *Allen* v. *Walsh*, 25 Minn. 543; *State* v. *Minnesota Thresher Mfg. Co.* 40 Minn. 213; *Mohr* v. *Minnesota Elevator Co.* 40 Minn. 343; *Arthur* v. *Willius*, 44 Minn. 409; *Densmore* v. *Red Wing L. & S. Co.* (Minn.) 48 N.

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tained by an impartial jury of twelve free-holders," is held to be inoperative until statutory provisions are made to give it effect, and that until that time the prior statute on the subject must govern. Doddridge Suprs. v. Stout, 9 W. Va. 703.

So in Arkansas a constitutional provision that compensation for a right of way "shall be ascertained by a jury of twelve men in a court of record as shall be prescribed by law" is not self-executing and does not repeal a statute providing for a commission of five men. Cairo & F. R. Co. v. Trout, 32 Ark. 17.

But in Illinois, on the other hand, it is decided that a constitutional prohibition against taking or damaging private property for public use without just compensation to be ascertained by a jury "as shall be prescribed by law" is self-executing and annuls a statute providing for commissioners in such cases. People v. McRoberts, 62 Ill. 38; Kine v. Defenbaugh, 64 Ill. 291.

And that it also annuls an act authorizing the entry upon land in such cases before trial by jury. Mitchell v. Illinois & St. L. R. & Coal Co. 68 Ill. 286.

So in Alabama a clause in a Constitution expressly prohibiting the General Assembly from depriving any person of an appeal from any preliminary assessment of damages in condemnation proceedings and declaring that the amount of damages in all cases of appeal "shall on demand of either party be determined by a jury according to law," is so far self-executing as to entitle an appellant on demand to a trial by jury on appeal. Woodward Iron Co. v. Cabaniss, 87 Ala. 328.

A constitutional provision that "all persons entitled to vote and hold office and none others shall be eligible to sit as jurors" is not self-executing so as to prevent a valid jury from being summoned under a prior law making free-holders only eligible in the absence of any new statute. Chahoon v. Com. 20 Gratt. 733.

*Exemptions may be regarded as prohibitions.*

The constitutional exemption of a homestead not exceeding a certain value is effective without legislation. Beecher v. Baldy, 7 Mich. 488.

So a constitutional provision that "every homestead not exceeding eighty acres . . . shall be exempted from sale . . . for any debt" is self-executing. Miller v. Marx, 55 Ala. 322.

And a constitutional exemption of merchants from taxation on capital used in the purchase of goods sold to nonresidents and sent out of the state, is self-executing. Friedman v. Mathes, 8 Heisk. 488.

*Taxation.*

See also St. Joseph Board of Public Schools v. Patten and Hills v. Chicago, *supra*.

A constitutional provision that "all taxes shall be uniform upon the same class of subjects . . . and collected under general laws is not self-executing, but simply mandatory to the Legislature. Erie County v. Erie, 4 Cent. Rep. 305, 113 Pa. 360.

A constitutional requirement that the Legislature shall provide a uniform rule of taxation is not operative without legislation. Williams v. Detroit, 2 Mich. 561.

So a constitutional provision that all taxes shall be uniform in the same class of subjects is mandatory on the Legislature, but does not itself repeal an inconsistent statute. In this case the conclu-

W. Rep. 528. And, so far as we are aware, the correctness of this view has never been questioned or doubted in any court, until one of the counsel in this case interposed a brief in *Arthur* v. *Willius*, *supra*, in which he took the position for which he now contends. Of course it is true, as counsel suggests, that this court has never before been called on to decide the question, and that mere assumption on the part of either bench or bar does not make a thing law; but, on the other hand, it is also true that a construction which has for a third of a century been accepted by every one as so obviously correct as never to have been questioned or doubted is much more likely to be right than a newly discovered one, suggested at this late day by the emergencies of present litigation. The fact that no such view ever before suggested itself to the minds of court or counsel in the numerous cases where the point might have been made, and where it was to the interest of counsel on one side or the other to make it, certainly raises a strong presumption against it. Moreover, as the generally accepted view has doubtless long been the basis of the credit of corporations, it ought not now to be disturbed, unless clearly wrong. But if the question was entirely one of first impression, we have no doubt as to how it should be determined. A constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so desire, to incorporate into it self-executing enactments. These are much more common than formerly, the object being to put it beyond the power of the Legislature to render them nugatory by refusing to enact legislation to carry them into effect. Prohibitory provisions in a Constitution are usually self-executing to the extent that anything done in violation of them is void. But instances of affirmative self-executing provisions are numerous in almost every modern Constitution. For instances of this, see *State* v. *Weston*, 4 Neb. 216; *Thomas* v. *Owens*, 4 Md. 189; *Reynolds* v. *Taylor*, 43 Ala. 420; *Miller* v. *Marx*, 55 Ala. 322; *People* v. *Hoge*, 55 Cal. 612.

Without stopping to specify, it will be found on examination that our own Constitution abounds in provisions that are unquestionably self-executing, and require no legislation to put them into operation. The question in every case is whether the language of a constitutional provision is addressed to the courts or the Legislature,—does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed are fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts. In almost every case cited by appellants in which a constitutional provision has been held not self-executing, it will be found either that its language indicated an intention that legislation should be had to carry

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sion was aided by the context in which there was an express declaration that laws exempting property otherwise than as therein provided shall be void. Lehigh Iron Co. v. Lower Macungie Twp. 81 Pa. 482; Coatesville Gas Co. v. Chester County, 97 Pa. 476.

*Appropriations.*

A constitutional provision that an officer "shall receive" a certain salary is a sufficient appropriation without legislative action. Thomas v. Owens, 4 Md. 189.

A Constitution fixing the salary of an officer and providing that the "auditor shall draw warrants of the state quarterly therefor" is self-executing. State v. Weston, 4 Neb. 216.

But a constitutional provision that judges shall "severally during their continuance in office receive for their services compensation to be paid out of the treasury" does not dispense with the necessity of a legislative appropriation in order to permit payment. Myers v. English, 9 Cal. 341.

A constitutional provision that no money shall be paid out of the treasury of the state except in pursuance of "an appropriation by law" annuls a statute by which money is "appropriated annually" for the salary of an officer, especially when the schedule of the Constitution provides that all laws inconsistent with it shall cease at its adoption. Under a provision that the Legislature shall meet once in two years there must be an appropriation at least once in two years in order to permit the payment of the salary. State v. Holladay, 64 Mo. 526; State v. Holladay, 66 Mo. 385.

*Stockholders' liability.*

The decision in the main case is a departure from other decisions as to the effect of constitutional provisions as to the liability of stockholders. But the provisions construed differ.

A constitutional provision that "dues from a corporation shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder and such other means as shall be provided by law" is not operative without the aid of legislation and statutes passed in fulfillment of it furnish the only basis of judicial action. Morley v. Thayer, 3 Fed. Rep. 737.

So in Jerman v. Benton, 79 Mo. 148, it was held that the double liability clause of a Constitution did not take effect until the enactment of appropriate legislation. That clause was as follows: "Dues from private corporations shall be secured by such means as may be prescribed by law, but in all cases each stockholder shall be individually liable over and above the stock by him or her owned and any amount unpaid thereon in a further sum at least equal in amount to such stock.

A constitutional provision that "dues from corporations shall be secured by such individual liability of the corporation and other means as may be prescribed by law," and another that "each stockholder of a corporation or joint-stock association shall be individually and personally liable for his proportion of all its debts and liabilities," must be construed together, and the latter cannot be held self-executing, as in that case the former would have no meaning. French v. Teschemaker, 24 Cal. 518. B. A. R.

it into effect, or that the nature of the provision itself was such as to render such legislation necessary. To the first class may be referred the provision in the Constitution of Missouri (quite different from that in ours) considered in the case of *Morley* v. *Thayer*, 3 Fed. Rep. 739, although that case really only decided that the plaintiff could not recover because he had not followed the remedy provided by statute. To the same class belongs the case of *Jerman* v. *Benton*, 79 Mo. 148, although it seems to have been assumed, without argument or consideration, that the constitutional provision there considered required legislation to carry it into effect.

To the second class belongs *Bowie* v. *Lott*, 24 La. Ann. 214, in which it was held that a constitutional provision that "all lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres," required legislation to carry it into effect. This is plain from the very nature of the provision. It furnishes no *modus operandi*, and does not provide how or by whom the land was to be divided, nor determine the exact size of the tract. It was evidently a mere general direction to the Legislature. To the same class may be referred the case of *Missouri, K. & T. R. Co.* v. *Texas & St. L. R. Co.*, 10 Fed. Rep. 503, involving a provision in the Constitution of Texas that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," although all that was decided in that case was that the defendant railway company could not, on its own motion, make the crossing without the consent of the defendant, or without resort to legal proceedings in which the conditions and limitations under which such rights should be exercised should be judicially fixed and determined. *Groves* v. *Slaughter*, 40 U. S. 15 Pet. 499, 10 L. ed. 819, cited by appellant, perhaps goes further than any other case in holding a constitutional provision not self-executing; but its weight as an authority is much weakened from the facts that it was not considered by a full bench, and was decided by a divided court, *Justice* Story being one of the dissenters. Moreover, it seems difficult to reconcile the decision in that case with the rule that prohibitory constitutional provisions are self-executing to the extent that anything done in violation of them is void; or the further rule, which that court has always professed to follow, that it would adopt the construction given to the Constitution and laws of a state, not conflicting with those of the Union, by the highest court of that state.

Of all the cases cited by appellant, the one most relied on is that of *French* v. *Teschemaker*, 24 Cal. 518. The Constitution of California provided: "Sec. 32. Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law." "Sec. 36. Each stockholder of a corporation or joint-stock association shall be individually and personally liable for his proportion of all its debts and liabilities." The court held that section 36 was not self-executing. But the decision was mainly based upon two considerations. The first was that, while this section provided that each stockholder should be liable for his proportion of the corporate debts, yet it did not determine what that proportion should be, nor prescribe any rule by which it should be ascertained. The second was that section 36 was to be read in connection with section 32, which was evidently addressed to the Legislature. No such considerations exist here, and hence we do not think that the case is in point. The language used in our Constitution is positive and mandatory. There is nothing in it indicative of an intention that ancillary legislation should be had to carry it into effect; neither is there anything in the nature of the liability imposed such as to render any such legislation necessary. It is in the form of a present, complete enactment, which, although elliptical in form, definitely fixes the nature and amount of the liability, and to whom the liability is incurred. As remarked in *Allen* v. *Walsh*, *supra*, "it declares the creation of a liability to the extent named in the cases referred to." It is true that a question might arise as to whether it is the person who holds the stock when a debt is contracted, or the one who holds it when the action is brought, or any one who held it at any time while the debt existed, that is liable. But this is a mere question of construction, which would exist if the same or similar language were used in a statute, as has sometimes been the case. But questions of construction, whether of a Constitution or a statute, are for the courts, and not for the Legislature. In fact, all the criticisms of the appellant upon this article of the Constitution refer merely to supposed obscurities in its meaning, or doubts as to its construction; and the logic of their argument is that it is for the Legislature to construe it, and determine its true meaning. According to their view, it means anything or nothing, according as the Legislature see fit to construe it. But the people meant something by this provision, and, when that meaning is judicially determined by legitimate rules of construction, it is as obligatory on the Legislature as on any one else.

Much stress is laid upon the fact that this provision contains no remedy for enforcing the liability, as indicating that it was not intended to be self-executing. We fail to perceive any force whatever in this line of argument. The maxim *ubi jus ibi remedium*, is as old as the law itself. As was said by *Lord* Holt: "If a man has a right, he must have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." The maxim referred to gave occasion for the invention of that form of action called "an action on the case." The principle adopted by the courts accordingly was that the novelty of the particular complaint in an action on the case was no objection, provided an injury cognizable by law be shown to have been inflicted on the plaintiff. Every statute made against an in-

jury, mischief, or grievance impliedly gives a remedy, for, if no remedy be expressly given, a party has his action upon the statute. For example, "if a penalty be given by statute, but no action for the recovery thereof be named, an action of debt for the penalty will lie." 2 Dwar. Stat. 677. So where a statute requires an act to be done for the benefit of another, or forbids the doing of an act which may be to his injury, though no action be given in express terms by the statute for the omission or commission, the general rule of law is that the party injured shall have an action; for, where a statute gives a right, there, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right follows as an incident. *Ashby* v. *White*, 2 Ld. Raym. 938. Hence in the present case it was not necessary that the Constitution should have expressly given a remedy by which a creditor of the corporation might enforce the liability of a stockholder. If it in fact created such a liability of the latter in favor of the former, there would not be the least trouble in framing a proper complaint in an action to enforce it. Of course, the remedy is always within the control of the Legislature, and may be changed as they see fit, provided only it remains adequate. It is entirely competent for them to provide a new and statutory remedy, and make it exclusive, if they see fit. An inference in favor of appellant's contention is sought to be drawn from the history of this provision in the constitutional convention. In the form in which it is now found, this provision was the one adopted by the Democratic wing of the convention. The provision first adopted was that "provision shall be made making each stockholder individually liable to the amount of stock held or owned by him." Counsel say, and doubtless correctly, that this would not have been self-executing, as its language was directed to the Legislature, and evidently contemplated legislation to carry it into effect. In this form it was adopted by the committee of the whole, and then referred to the committee on phraseology and revision, who reported it back in its present form, ("every stockholder shall be liable," etc.,) when it was adopted by the convention. To our minds, the material change which that committee made in the language indicates very strongly that the purpose of the change was to put the provision in the form of a self-executing enactment, and thus place it beyond the power of the Legislature to defeat the object sought to be accomplished.

An argument is also sought to be drawn from subsequent legislative construction. We attach little or no importance to this. An argument either way might be made, for the legislation upon the subject of the individual liability of stockholders has been variable, and not uniformly consistent either with the theory that the Constitution itself created such a liability or that it did not. Upon the theory that it did, it must be confessed that some of this legislation was superfluous, and its repeal unavailing. On the other hand, it may be said that, in passing chapter 56, Laws 1878, making stockholders in manufacturing or mechanical corporations liable for corporate debts to the amount of stock held or owned by them, the Legislature must have assumed that the Constitution itself created such a liability in the case of other corporations, for it is not to be supposed that they would have singled out manufacturing corporations as the only ones where such a liability should exist. Moreover, the Legislature in submitting, and the people in adopting, the amendment of 1872, excepting corporations organized for a manufacturing or mechanical business from the operation of section 3, art. 10, of the Constitution, must have supposed that this section *ex propria vigore* created an individual liability on the part of stockholders, for otherwise the amendment was useless and unnecessary, unless it was to relieve the Legislature from a sort of moral obligation to legislate on the subject.

3. The answer in this case alleges that in July, 1889, the defendant corporation was, upon petition of creditors under the Insolvent Law of 1881, adjudged insolvent, and a receiver of its property appointed by the court, who had fully administered the corporate assets, and distributed the proceeds among those creditors who executed releases to the corporation as required by statute; that plaintiff in January, 1890, executed and filed such a release, and accepted her dividend from the receiver. It is claimed, under the doctrine of *Mohr* v. *Minnesota Elevator Co.*, 40 Minn. 343, that this release of the corporation had the effect of also releasing the stockholders. The plaintiff, on the other hand, claims that the rule of that case was changed by chapter 30, Laws 1889, entitled "An Act to Amend an Act Entitled 'An Act to Prevent Debtors from Giving Preference to Creditors, and to Secure the Equal Distribution of the Property of Debtors among Their Creditors, and for the Release of Debts against Debtors;'" section 2 of the Amendatory Act providing "that the release of any debtor under this Act shall not operate to discharge any other party liable as surety, guarantor, or otherwise for the same debt." The point is made that this Amendatory Act is invalid, because the subject is not sufficiently expressed in its title. There is nothing in this. It recites *verbatim* the title of the original Act, which sufficiently expresses the subject of that Act. It is true that the title of the Amendatory Act does not refer to the chapter or year when the original Act was passed, but this is unimportant, especially as there was no other Act of the same title. Similar titles have been invariably sustained in this and other jurisdictions having the same constitutional provision. The title of this Act is not materially different from that sustained by this court in *Winona* v. *Winona County School Dist. No. 82*, 40 Minn. 13.

It is further claimed that the amendment is inapplicable because its terms will not include the liability of stockholders for corporate debts; the argument being that, where words of specific import are followed by a general term, the general term is to be taken

to apply only to persons or things *ejusdem generis* with the specific terms; that the words "or otherwise" must therefore be limited to those whose liability for the debt is of the same kind as that of surety or guarantor; and that the liability of a stockholder for the debts of a corporation is different from that of either a surety or a guarantor, and therefore not within the terms of the Act The Act of 1889 was passed about two weeks after the decision of the *Mohr Case*, and the proviso referred to was doubtless enacted for the very purpose of changing the rule laid down in that case. That it had that effect was assumed in *Tripp* v. *Northwestern Nat. Bank*, 41 Minn. 400, (decided August 12, 1889). Even under the strict doctrine of *ejusdem generis*, we have no doubt that the term "or otherwise" would embrace those liable as stockholders for corporate debts; for, while that liability is *sui generis*, yet it is in many respects sufficiently analogous to that of surety or guarantor to fall within the same general class. But the doctrine of *ejusdem generis* is but a rule of construction to aid in ascertaining the meaning of the Legislature, and does not warrant a court in confining the operation of a statute within narrower limits than intended by the lawmakers. The general object of an Act sometimes requires that the final general term shall not be restricted in meaning by its more specific predecessors. Thus the expression, "any bond or other specialty," has been held to comprehend every kind of specialty including a statute. The evident intention was that this amendment should embrace all cases where some one else was liable, in whatever capacity, for the same debt with the insolvent debtor.

The insolvency proceedings against the corporation were instituted and its discharge granted after the passage of the Act of 1889, but the debt for which plaintiff sues was contracted prior to that date; and it is claimed that the Act is, as to stockholders whose liability had been already incurred, unconstitutional, because impairing the obligation of contracts. We confess our inability to appreciate the force of this argument. The liability of a stockholder is fixed and measured by the Constitution alone. The Insolvent Law neither increases nor affects that liability, but has reference solely to the remedy of the creditor against the insolvent debtor. An existing creditor would have as much right to object to the passage of a Bankrupt Act, or a debtor to its subsequent repeal, as would this appellant to object to the amendment of this Insolvent Law. Bankrupt laws, either by express provision or by construction, generally provide that the discharge of the bankrupt shall not release another person who is liable for the same debt. This has been held indiscriminately in cases where the debt was contracted before, as well as where it was contracted after, the passage of the Bankrupt Act, and it was never suggested that as to such other person the Act was invalid, as impairing the obligation of his contract. The discharge of the insolvent or bankrupt in such cases, as we have repeatedly held, is not the voluntary act of the creditor, but purely by operation of law, which, like the act of God, hurts nobody.

*Order affirmed.*

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William MILLER *et al.*, *Respts.*,
*v.*
James STODDARD *et al.*, *Defts.*,
and
Henry M. LITTLE & Wife, *Appts.*

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

***1. The owner of a lot which was subject to an unrecorded mortgage contracted for the construction of a building upon the premises.** After materials had been furnished for the construction of the building, but before the claims for liens therefor had been filed, the mortgage was placed on record. *Held*, that the Recording Act (Gen. Stat. chap. 40, § 21), imposes no obligation upon a mortgagee to record his mortgage, as against mechanics' liens.

**2. But even if that statute could be held to apply to such cases, the lien claimants in this case would not come within the protection of its provisions,** because—*First*, their liens were not filed until after the mortgage was recorded; and, *second*, there was no evidence that they did not have actual notice of the mortgage when they furnished the material. *Held*, *also*, that, in the absence of any provision to that effect in the Lien Law, a mechanics' lien cannot be preferred to a prior unrecorded mortgage, unless in cases where, upon general equitable principles, the mortgagee would be estopped by his conduct from asserting the lien of his mortgage, as against the other lien claimants.

(June 22, 1892.)

APPEAL by defendants, Henry M. Little and wife, from an order of the District Court for Hennepin County overruling a motion for new trial in an action brought to foreclose a mechanics' lien, in which the order of priority of several claims against the same property was determined, and a mortgage held by the female appellant postponed to certain mechanics' liens. *Reversed.*

The material portions of *Miller* v. *Shepard*, referred to in the opinion are as follows:

Defendant Shepard and one Little were severally the owners of contiguous lots. Each contracted with one Stoddard for the erection of a dwelling-house on his lot, and about the same time the two agreed to jointly erect a barn on the line between the lots, so that part of it would be on each lot, and appurtenant to the dwelling-house being erected thereon. Pursuant to this arrangement, they contracted with Stoddard for the erection of the barn. Stoddard built the two houses, and also the barn, the latter being so located that five feet more of it was on one lot than on the

*Head notes by MITCHELL, J.

NOTE.—For *note* on the question of superiority between mechanic's liens and earlier mortgages, see Wimberlay v. Mayberry (Ala.) 14 L. R. A. 305.

other, and one end of it better finished inside than the other; but on which lot the larger part of the barn was situated, or which end was the better finished, does not appear. Neither does it appear what the dimensions of the barn were. The defendants Smith & Co. furnished to Stoddard material for the construction of each house, and also of the barn. Shepard and Little paid Stoddard in full, but the latter failed to pay Smith & Co. Thereupon Smith & Co. filed separate claims for liens on the two houses, and also a claim for a lien on the barn and both lots jointly for the material furnished for the barn. The plaintiffs, who had furnished material to Stoddard for Shepard's house, having commenced this action to enforce their lien on his house and lot, and having made Smith & Co. defendants, the latter interposed an answer alleging the foregoing facts, and also that the amount due them for material for Shepard's house was $559.42, and for material for the whole barn $424.02. They further alleged that the matter as to the material for the barn was set up "so as to protect their rights in the premises on the said claim, and that they intended to bring a separate action to enforce said lien if the same cannot be fully enforced herein." They then asked for judgment against Stoddard for $559.42, and that said judgment be declared a lien on Shepard's house and lot, and that, if the court could not give full relief upon the last claim, (material for the barn), it may make such order and decree as may protect their rights in the premises, and that they might have such other and further relief as to the court might seem proper. Shepard appeared and answered, but Stoddard, the original contractor, failed to appear. The court ordered personal judgment in favor of Smith & Co. against Stoddard for the full amount due for material furnished for Shepard's house, and one half of the amount due for material furnished for the barn, and adjudged the same to be a lien on Shepard's house and lot, and directed the premises to be sold to satisfy the same. Shepard, the appellant, concedes the correctness of this decision, so far as it relates to the material for his house, but contests it in so far as it allows a lien on his premises for half ($212) the material for the barn. . . . Smith & Co. had a right to file a single claim for a lien on the barn and both lots. But we are also of opinion that, notwithstanding their having done so, they might sever their claim so as to obtain judgment against each lot for the amount of material which went into the part of the barn situated thereon, provided they were able to show, and did show, what part or proportion of the material entered into the construction of each part of the building, and provided the rights of third parties are not thereby prejudiced. . . . But while Smith & Co. had the right to sever the lien for material for the barn, yet, if they did so, it was incumbent on them to show affirmatively what part or proportion of the material entered into Shepard's part of the building; that is, the part which stood on his lot. Had it appeared that both parts of the barn were built and finished alike, and that half stood on each lot, then the court would have been fully justified in adjudging one half the amount of Smith & Co's claim to be a lien on Shepard's premises. But it appears not only that the two parts were finished differently, but also that five feet more of the building (which for anything that appears might have been a very considerable part of it) stood on one lot than on the other, and there is no evidence as to what part or portion of the material went into either. Consequently there was no basis whatever furnished by the evidence for the court's apportionment. It was mere guess work.

*Mr.* **C. J. Cahaley,** for appellants:

Charging the property owned by one individual, for the improvements made on the property of another, when he receives no benefit from it, is so unjust that nothing less than very clear expressions would warrant it.

*Gorgas* v. *Douglas*, 6 Serg. & R. 512; *Kerbaugh* v. *Henderson*, 3 Phila. 17; *Davis* v. *Farr*, 13 Pa. 167; *Skyrme* v. *Occidental Mill & Min. Co.* 8 Nev. 219; *Butler* v. *Rivers*, 4 R. I. 38; *Edwards* v. *Edwards*, 24 Ohio St. 402; Phillips, Mechanics' Liens, 702.

The Mechanics' Lien Act only gives a lien to the extent of the interest of the owner at the time the materials were furnished. At that time the property was subject to the purchase money mortgage of this appellant. It was in effect the continuation of her vendors' lien. The principle that an unrecorded purchase-money mortgage is a lien prior to that of a mechanic or judgment creditor is so well established that it may be said to be elementary.

*Oliver* v. *Davy*, 34 Minn. 292; *Rees* v. *Ludington*, 13 Wis. 308; *Spring* v. *Short*, 90 N. Y. 538; *Guy* v. *Carriere*, 5 Cal. 511; *Campbell's App.* 36 Pa. 247; *Rose* v. *Munie*, 4 Cal. 173; *Banning* v. *Edes*, 6 Minn. 402; *Bohn Mfg. Co.* v. *Kountze*, 30 Neb. 719.

*Mr.* **Willis McDowell,** for respondents, Miller *et al.*:

Conceding that mechanics' liens are not within the Recording Act and that an unrecorded purchase-money mortgage has precedence over a lien, of what avail would it be to these appellants, as against these respondents. She has voluntarily allowed another mortgage to be placed upon the property, which is a lien ahead of her mortgage and the lien of these respondents is ahead of this other mortgage. She has selected her place in the procession and cannot now hope to change it.

*Reilly* v. *Williams* (Minn.), Dec. 28, 1891.

*Messrs.* **Reed & Kerr,** for respondents, Frazer & Shepard:

Time was, perhaps, when under certain circumstances, as, for instance, those which exist in the case of *Oliver* v. *Davy*, 34 Minn. 292, the claims of laborers and materialmen would be postponed to the right of the holder of an unrecorded purchase-money mortgage, but the facts in this case, taken in connection with the Lien Law of 1889, do not lead to such a conclusion.

By allowing the intervention of the mortgage of the North Side Building & Loan Association she has brought herself clearly within the rule established in *Reilly* v. *Williams* (Minn.) Dec. 28, 1891. She has taken her place in the procession and must abide by her choice.

*Messrs.* **Ueland & Holt** for respondents, C. A. Smith & Co.

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

This may be termed the companion case of that of the same plaintiffs against Shepard and others (just decided), to the statement of facts in which, as far as it goes, reference may be made for the facts in this case. This action was brought to enforce a lien for labor and material performed and furnished to the contractor, Stoddard, for the erection of the Little house. The defendants Esther B. Little and the North Side Building & Loan Association were mortgagees of the premises. The other defendants, Frazer & Shepard and Smith & Co., were lien claimants for material also furnished to Stoddard,—the former for the house, and the latter for both the house and the barn. As the building and loan association took no appeal, and is not made a party to this appeal, the correctness of the decision of the trial court as to the rank or position of the lien of its mortgage is not before us, and cannot be considered. The answer of Smith & Co., and the evidence in support of their claims, is substantially the same as in the *Shepard Case*, and what was said there is equally applicable here. There is the same failure to show what part or proportion of the material furnished for the barn entered into the construction of that part of it situated on the Little lot.

2. The principal question in the case is as to the rights of Esther B. Little under her mortgage. The lot on which the buildings are situated formerly belonged to her. On May 13, 1890, before any contract was made with Stoddard, and before any work had been done or materials furnished for the buildings, and consequently before any of the liens of the respondents had attached, she conveyed the lot to Henry B. Little, and at the same time took back a mortgage from him on the premises. It does not appear whether the deed to Henry B. Little has ever been recorded, but it does appear, and is so found, that the mortgage to Esther B. Little was not recorded until November 22, 1890, which was after all of the respondents had furnished the material for the buildings, but before any of them had filed their claims for liens. The trial court held that the liens of the respondents were superior to that of Mrs. Little's mortgage, on the ground, as we presume, that it was not recorded until after respondents had furnished the material, and consequently after their liens therefor had attached.

Appellants' counsel rests the claim of priority for the mortgage mainly on the ground that as appears, or at least as they offered to prove, it was given for the purchase money of the lot. Under the facts, we do not see that this, even if true, is at all material. What counsel has in mind, and all that the cases cited by him hold, is that where the interest of a vendee, in possession under an executory contract of sale, has become subject to a lien for material or labor furnished or performed for him for the construction of a building thereon, and subsequently the vendor, in performance of the executory contract, executes a conveyance to the vendee, and at the same time takes back a mortgage for the unpaid purchase money, the mechanics' lien will not displace or take precedence of the mortgage, which is but a continuation in another form of the vendors' lien. But in the present case Mrs. Little's mortgage, in point of time, in fact antedated the liens of the respondents. Hence the only question is whether, notwithstanding that mortgage was first in time, the liens of the materialmen should be given precedence, because at the time they attached the mortgage had not been recorded. We have approached this question with a desire, in the interests of apparent justice, to give the mechanics' liens the precedence, if it could be done consistently with legal principles; but we have been unable to find anything, in the Lien Law or elsewhere, that would justify us in doing so. It cannot be done by virtue of the statute relating to the registration of conveyances, for two reasons: First, under that statute (Gen. Stat. chap. 40, § 21) there is no obligation resting on a mortgagee to record his mortgage as against mechanics' liens. Its provisions do not apply to or extend to such liens. In the absence of any statute on the subject, we are relegated to the common law, by which a registry was not required, and would be unavailing for any purpose; the law imposing upon every one the burden of ascertaining, at his peril, the actual condition of the title. *Oliver* v. *Davy*, 34 Minn. 292; *Rose* v. *Munie*, 4 Cal. 173. But even if the Recording Act could be held to apply to mechanics' liens, the facts of this case would not bring the respondents within the protection of its provisions—*First*, because their claims for liens were not filed until after the recording of Mrs. Little's mortgage; and, *second*, because there is neither evidence nor finding that the respondents did not have notice of the mortgage when they furnished the material for the buildings. The Lien Law is equally defective in not making any provision for such cases. Had the statute contained the provisions, found in many of the lien laws of other states, to the effect that mechanics' liens shall be preferred to any mortgage or other incumbrance, of which the lien-holder had no notice, and which was unrecorded at the time such liens attached, all difficulty would have been avoided. But our statute contains no such provision. It merely provides that the claim of the laborer or materialman shall be a lien "on the right, title, and interest of the owner in the land." There is no chance for giving respondents' liens a preference, under section 5 of the Act, for that section expressly excepts bona fide prior mortgagees. Under this state of the law, we see no way by which the decision of the trial court can be sustained giving the respondents' liens a preference over the Little mortgage. Of course, there may be cases where the holder of the unrecorded mortgage might be estopped by his conduct from asserting it as against lien claimants, but no such state of facts appears here. It is surprising, in view of all that has been said by the real or pretended friends of labor as to the importance of a lien law, that a carefully prepared statute on the subject has never been gotten up. Most of the enactments

have been crude and imperfect affairs, often including some drastic provisions in utter disregard of the rights of owners and mortgagees, but at the same time lacking some very important provisions necessary for the proper protection of mechanics and materialmen. Many of their provisions have also often been so obscure and ambiguous that their construction involved much litigation, the cost of which usually falls on the very class for whose benefit such statutes are designed. The result has been that the courts have been often blamed for not doing what they have no power to do, but what the Legislature ought to have done, viz., to enact a better law. Inasmuch as the case was evidently tried and decided upon a wrong theory of the law, we shall merely order a new trial of the issues between respondents and Esther B. Little, instead of directing judgment in her favor upon the present findings.

3. The court below held that plaintiffs' lien was superior, and the liens of the other respondents inferior, to the mortgage of the building and loan association, and ordered two sales of the property,—one subject to the lien of that mortgage, and the other free of all incumbrances, including that mortgage. This is assigned as error. As the building and loan association is not a party to this appeal, of course nothing can be done that would affect its rights under the decision of the trial court; but inasmuch as in any event there has to be a sale of the entire property free of the lien of the mortgage, its rights will not be affected by a modification of the order of the court directing two sales. Two sales of the property are wholly unnecessary, and will only lead to confusion worse confounded. There should be but one sale, and that of the entire property, and the proceeds distributed among all lienholders, including the building and loan association, according to their priority. For the reason already suggested, the correctness of the decision of the district court as to order of priority of respondents' liens, either as between themselves or as to the building and loan association, is not involved in this appeal. It may be remarked, however, that if our statute contained a provision similar to that found in many other states, as, for example, California (Code Civ. Proc. § 1186), it would obviate a very embarrassing question, which might have been raised in this case, and which was somewhat discussed in *Finlayson* v. *Crooks* (Minn.) 49 N. W. Rep. 398, 645.

*Order reversed*, and new trial ordered as to the second claim of Smith & Co., (material for the barn), and also as to the issues between the respondents and the appellant Esther B. Little.

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## ALABAMA SUPREME COURT

### GERMAN AMERICAN INSURANCE CO., *Appt.*, *v.* COMMERCIAL FIRE INSURANCE CO.

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

1. **The existence of brick partitions extending above the roof and dividing a building into stores or sections will not constitute each section a separate building** or the goods therein a separate risk within the meaning of a reinsurance contract limiting the amount of insurance to be placed on any one "building or risk," if all the sections are inclosed by a common exterior wall and are all under one management and devoted to the same use while the floors of the different stories are on the same level and connected by large doors through the partitions.

2. **There is no presumption of knowledge on the part of an insurance company** doing a general business throughout the United States of a custom or usage as to what constitutes a "building" or "risk" which is peculiar to a city in a state foreign to its domicil, so as to make the custom an element of its contracts relating to property in such city without proof that it had such knowledge.

3. **Failure of one insurance company to object to risks contained in schedules sent to it by another company,** a certain amount of whose risks it has made a compact to reinsure, will not amount to an acquiescence on which the latter can rely in case they are not covered by the compact, since reliance may be placed on the good faith of the other company and its acting within the contract without the necessity of making a personal investigation of the property covered by each schedule.

4. **Notice that three stores belonging to the same person are all located at the foot of the same street** is not notice that they are all in the same building.

5. **Claiming exemption from liability for a loss on one ground** will not prevent an insurance company from subsequently setting up another defense based upon facts of which, solely through the negligence of the insured, it was ignorant at the time of making its first defense.

(May 17, 1892.)

APPEAL by plaintiff from a judgment of the Montgomery City Court in favor of defendant in an action brought to recover the amount alleged to be due upon a contract reinsuring certain fire risks which had been taken by the plaintiff. *Affirmed.*

The facts are stated in the opinion.

*Messrs.* **Watts & Son** for appellant.

*Messrs.* **Tompkins & Troy,** for appellee:

The agent for placing the liability upon the principal owed to that principal the highest degree of good faith. It was the duty of appellant to disclose all of the facts affecting the risk.

*Sun Mut. Ins. Co.* v. *Ocean Ins. Co.* 107 U. S. 485, 27 L. ed. 337; *Morgan* v. *Hardy*, 16 Neb. 427.

NOTE.—For notes on custom as part of contract, see Newhall v. Appleton (N. Y.) 3 L. R. A. 859; Smith v. Clews (N. Y.) 4 L. R. A. 392; MacCluskey v. Klosterman (Or.) 10 L. R. A. 755; Conestoga Cigar Co. v. Finke (Pa.) 13 L. R. A. 438.



See also 36 L. R. A. 742; 38 L. R. A. 514.

Storerooms situate as these were constitute one and the same risk.

*Hochstadler* v. *State*, 73 Ala. 24; *Carr* v. *Hibernia Ins. Co.* 2 Mo. App. 466; *Sampson* v. *Security Ins. Co.* 133 Mass. 49; *Cargill* v. *Millers & Mfrs. Mut. Ins. Co.* 33 Minn. 90; *Blake* v. *Exchange Mut. Ins. Co. of Philadelphia*, 12 Gray, 265; *Fair* v. *Manhattan Ins. Co.* 112 Mass. 320.

The evidence wholly fails to make out a case in which a custom changes the meaning of the word "warehouse" from its ordinary and legal signification:

1st. It does not show how long the alleged custom had existed.

2d. It shows a custom confined to the city of New York.

3d. The intention of the parties to the contract in limiting the risk of appellee to a maximum line of $5,000 on goods in any one warehouse is clear and not indeterminate, therefore there is no need to introduce evidence of such a custom to explain that intention; and

4th. No custom can be established to vary or explain the terms of a contract the effect of which would be to tempt parties to acts of dishonesty, wrong, or bad faith as this would in such a case as the one at bar.

*Montgomery & E. R. Co.* v. *Kolb*, 73 Ala. 396; *Wilkinson* v. *Williamson*, 76 Ala. 163; *East Tennessee, V. & G. R. Co.* v. *Johnston*, 75 Ala. 596, 51 Am. Rep. 489; *Smith* v. *Rice*, 56 Ala. 417; *Herring* v. *Skaggs*, 73 Ala. 446; *Eager* v. *Atlas Ins. Co.* 14 Pick. 141, 25 Am. Dec. 363; *Susquehanna F. Co.* v. *White*, 66 Md. 444, 59 Am. Rep. 186; *Higgins* v. *Moore*, 34 N. Y. 417; *Walls* v. *Bailey*, 49 N. Y. 464; *Fuller* v. *Robinson*, 86 N. Y. 306; *Bradley* v. *Wheeler*, 44 N. Y. 495; *Paine* v. *Howells*, 90 N. Y. 660.

The burden of proving notice was on appellant.

*Robinson* v. *Levi*, 81 Ala. 184.

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

This is an action by the German American Insurance Company against the Commercial Fire Insurance Company on a contract by which, it is alleged, the defendant reinsured certain risks taken by plaintiff on property in New York city. The property was destroyed by fire, the loss paid by plaintiff, and reimbursement to the *pro rata* extent of reinsurance is now sought to be enforced from defendant. Trial below was had by agreement without jury, the issues of fact were found for defendant, and judgment went accordingly. This appeal presents for review the conclusions of the city judge on the evidence and the judgment rendered. There is no material controversy as to what the facts are. The contracts of reinsurance sued on were made in this way: The Commercial Fire Insurance Company, on May 26, 1887, signed, and mailed to the German American Insurance Company what is known as a "reinsurance compact," which was duly received and acknowledged by the latter. This compact, with its attached lists and schedules, authorized the German American Company to reinsure itself in the Commercial Company, within certain limitations as to classes and amounts of risks, by entries thereon or therein, followed by certain *ad interim* and final reports to the reinsuring company, setting forth the term, amount, and class of risk, rate of premium, and location of property insured. Among other risks which the compact, as modified by subsequent correspondence, authorized the German American Company to reinsure in or "cede" to the Commercial Company were nonfiber goods in brick stores or warehouses, in amounts not to exceed $5,000 in any one building or risk. Claiming to proceed under this authorization, and within its limitations, the German American Company made and reported entries on the compact aggregating $12,500 on nonfiber goods stored in Rossiter's stores Nos. 1, 2, and 3, severally. The first entry and report was of $2,000 of reinsurance on goods in "Rossiter's store No. 2, foot W. 60th St., N. Y. city;" the next, of $3,000 on goods in "Rossiter's store No. 1, N. Y. city;" third, of $2,000 on goods in "Rossiter's store No. 1, N. Y. city;" fourth, of $3,000 on goods to "Rossiter's store No. 2, N. Y. city;" and last, of $2,500 on goods in "Rossiter's store No. 3, N. Y. city." Previous to these entries and reports, plaintiff, for the purpose of inducing defendant to increase its maximum limit on amount of reinsurance on storage stores, had sent the latter a schedule showing the amounts of net risks it carried on a number of such stores in New York city and elsewhere, and among the other items in this list is the following: "Rossiter's stores, ft. 60th St., N. Y. city, $30,000."

On proof of loss, defendant paid plaintiff about $5,000, and refused to pay the balance claimed under the reinsurance contracts, amounting to something over $6,000, on the ground that, as it insisted, Rossiter's stores Nos. 1, 2, and 3 constituted but one building or risk, within the meaning of the said reinsurance compact, and, in consequence, plaintiff was without authority to bind defendant beyond the maximum limit of $5,000 on goods stored in said stores, and its entries and reports as to and of all reinsurance in excess of this limitation were abortive and invalid. It cannot be doubted, on the evidence found in this record, consisting of minute descriptions and diagrams of Rossiter's stores Nos. 1, 2, and 3, that they, in the ordinary sense of the term, constituted "one building." It appears that the building was five stories in height; that the outer wall was common to each of the stores; that the several floors were, respectively, on the same level; that, while two partition walls divided the building into three rooms or compartments on each floor, there were doors about eight feet square in each of these walls between the several compartments in each of the five stories; that the whole structure was under one management, and devoted to the same uses, the storage of nonfibrous merchandise; and that the partition doors were used for the purposes of the passage of persons and the removal of goods from one store to another or others on each floor. It was also shown that double iron shutters were provided for closing these apertures in the partition walls; that these were generally closed; and that the partition walls extended five feet above the roof. It is not seriously, and cannot be successfully, contended that, upon this

showing the three stores in question were distinct buildings, or that they did not constitute "one" and the same building, as that word is commonly understood. *Fair* v. *Manhattan Ins. Co.* 112 Mass. 320; *Blake* v. *Exchange Mut. Ins. Co.* 12 Gray, 265; *Cargill* v. *Millers & Mfrs. Mut. Ins. Co.* 33 Minn. 90; *Sampson* v. *Security Ins. Co.* 133 Mass. 49; *Carr* v. *Hibernia Ins. Co.* 2 Mo. App. 466; *Hochstadler* v. *State*, 73 Ala. 24.

It is equally manifest, we think, that these stores, or the goods stored therein, constituted but "one" risk, in the sense of the compact under consideration, unless the word is to take on a different significance from the usage and custom proved in this case, and to be presently considered. It is most clear from the record before us that the Commercial Company conceived it to be of the utmost importance to it that its exposure to loss under the reinsurance compact should in no case exceed $5,000. When the German American Company advised and requested it to raise its maximum list from $2,500 to $7,500 or $10,000 on nonfibrous storage, it replied that "we think that the line suggested by you is rather too large for us. We have, however, concluded to authorize an increase on the 'nonfiber' stores to $5,000; that on 'fiber' to remain $2,500, as heretofore." And the purpose of the company evidently was to guard against the possibility or probability, in case of any loss, of losing in any one fire more than it could afford to lose, having in view its relatively small capitalization and assets. The means adopted to effectuate this purpose was the stipulation of the compact against being bound beyond a stated sum on any one building or risk. How this means could accomplish the end to which it was addressed, if the stipulation be construed so as to admit of reinsurance to three times the maximum limit, upon the mere circumstance that there are three rooms, stores, or compartments in the building proposed to be insured, while the probable consequence of a fire in any one of these stores would be the destruction of the contents of all three of them, and where the risks arising from the possibility of misconduct on the part of the insured would, of course, be equally incident to the goods in all and each one of the stores, it is difficult to perceive. With the probability that a fire starting in either of the stores would consume the contents of the others, and the certainty that incendiarism by the owner for the purpose of collecting insurance money—a risk which must be reckoned in all fire insurance—would go to the destruction of all the property kept by him in the building, there is every reason for the conclusion that the Commercial Fire Insurance Company intended the limitation to $5,000 to obtain with respect to property stored in different compartments, rooms, or stores in the same building, as in the case at bar; and we accordingly hold that plaintiff was without authority to reinsure itself in the defendant corporation on merchandise stored in Rossiter's stores in any sum beyond $5,000, if the reinsurance compact is be interpreted according to the ordinary significance of the term "building or risk."

It is proved in this case, however, that, according to an established and universal usage or custom of the business of insurance in the city of New York, each one of Rossiter's stores, numbered 1, 2, and 3, was a distinct building for all the purposes of insurance, and that risks taken upon goods in them severally are distinct and separate risks. So that, if this usage is to obtain in respect of the compact of reinsurance involved here, as claimed for plaintiff, the several contracts of reinsurance entered and reported to the defendant, being each within the latter's maximum list when measured separately as to each store, are within the limitation of $5,000 stipulated for, and therefore valid and binding on the Commercial Company. While it is well settled at this day that the existence of a usage in respect of the subject-matter of a contract may have the effect of giving to its terms definitions which would not otherwise attach to them, the doctrine rests, except in particular instances, solely upon the theory that the parties in entering into the compact had such usage in mind, stipulated with reference to it, and hence made it a part of their contract; and whether a usage, in a given case, is thus to be taken as a part of the contract, whether the parties had it in view in their negotiations, and intended that their agreement should be read and construed with reference to and in the light of such usage, is always a question of fact. And as, in the nature of things, no man can be said to have contracted with reference to a fact—to have had a fact in mind—of which he was ignorant, usage relied on by one party to give color to the obligations of another, or to impose a liability which does not arise on the ordinary meaning of the terms of their contract, must be shown to have been known to such other party. This is usually done by proof of an established usage, certain, uniform, and reasonable in character, and of such general acceptance, and consequent notoriety, as that a prima facie presumption of knowledge of it on the par of him who is sought to be affected by it arises, and, unrebutted, affords the predicate for the further presumption, of a conclusive nature, that he considered it in the particular dealing to which it is incident, and made it as much a part of his contract as if it had therein been specifically referred to. In the case at bar the *onus* was on plaintiff to prove, not only that the usage relied on had been established and existed at the time of the contract, but also that the defendant had knowledge of it, and therefore is to be holden to have contracted with reference to it. There is no direct evidence of such knowledge. The inference of knowledge is sought to be rested alone on proof of the establishment, existence, and prevalence of the usage in the city of New York. Had both contracting parties been domiciled in that city, and entered into a reinsurance compact solely with reference to risks located there, there would be some ground to say that defendant would be held prima facie to a knowledge of the usage. But the domicil of defendant was in Alabama, and the reinsurance compact contemplated and provided for the taking of risks, not only in the city of New York, but throughout the country. Not only so, but the correspondence between the parties demonstrates that risks were actually incurred under the compact in a number of other towns

and cities. It cannot be supposed that the Commercial Company had knowledge of the local usages incident to the business of insurance in each of these numerous localities, and so contracted with reference to them that its obligations, expressed in clear and unambiguous terms, imported a liability for one sum on a given state of facts in New York city, another sum on the same facts in Brooklyn, another in Litchfield, Conn., yet another in Chicago, and so on *ad infinitum*. The law to the contrary is well settled that proof of such local usages will not raise up a presumption of a knowledge of their existence on the part of one engaged generally in the business to which they pertain in a certain city, at least where the domicil of the party sought to be charged is elsewhere; or, in other words, that, in order to create even a prima facie presumption that a party has knowledge of a usage incident to a particular business about which he is engaged, the usage must be shown to be a general one in that business, in such sort as that it would be unreasonable to suppose he was ignorant of it. This plaintiff has failed to do. No general usage is proved, or attempted to be proved, and the defendant cannot be held beyond the terms of its compact dissociated from any effect the alleged usage is claimed to have upon those terms. *Cobb* v. *Lime Rock F. & M. Ins. Co.* 58 Me. 326; Lawson, Usages & Customs, §§ 17, 25–27; *Hill* v. *Hibernia Ins. Co. of Ohio*, 10 Hun, 26; *East Tennessee V. & G. R. Co.* v. *Johnston*, 75 Ala. 596, 51 Am. Rep. 489; *Smith* v. *Rice*, 56 Ala. 417; *Herring* v. *Skaggs*, 73 Ala. 446; *Bradley* v. *Wheeler*, 44 N. Y. 495; *Child* v. *Sun Mut. Ins. Co.* 3 Sandf. 26; *Walls* v. *Bailey*, 49 N. Y. 464; *Higgins* v. *Moore*, 34 N. Y. 417.

The presumption of knowledge of an established usage, which arises upon proof of its generality in the business or trade to which it is incident, is, as we have indicated, generally speaking, only prima facie, and hence rebuttable by direct evidence of a want of such knowledge. *Walls* v. *Bailey*, *supra*. With reference to contracts of insurance, there is this exception to the doctrine just stated: that insurance companies are under such a duty to inform themselves of the usages of the particular business insured as that they will not be heard to deny such knowledge. This only means, however, that where a general usage in business is proved, a usage of the character that raises up the prima facie presumption of knowledge in ordinary cases, the insurer, in view of the duty resting on him to acquaint himself with the general usages of the business, will not be let in to rebut the presumption, which, in consequence, becomes a conclusive one as to him. But an insurer is no more bound than any other party by proof of usages obtaining to a greater or less extent, territorially or otherwise, in respect of the business insured, which are not general in their nature, but obtain only in certain localities, or not substantially in all instances of the particular business. So that if it were conceded here that, had the proof established the New York City usage in question as incident to the insurance business generally throughout the territory contemplated in this reinsurance compact, the defendant would not be heard to assert its ignorance of it, or to deny that it contracted with reference to it, yet the predicate for this quasi estoppel is wholly lacking, in that the proof adduced is not of such general usage, but only of one that is local and peculiar to the city of New York,—a particular usage or custom, the existence of which raises no presumption at all that defendant had knowledge of it. Lawson, Usages & Customs, §§ 17, 19, 26.

It is further contended for plaintiff that, conceding the reinsurance compact did not authorize more than $5,000 of insurance on Rossiter's stores, yet the defendant acquiesced in, and thus ratified, plaintiff's entries, involving a risk of $12,500, and thereby validated these entries. Of course, this contention must be rested on the assumption that defendant was advised of the location and character of Rossiter's three stores, and knew or must be held to have known, that they in fact constituted but one building, since acquiescence from which ratification may be inferred can only be predicated of a failure to disaffirm a transaction after the party is advised or put on notice in respect of the facts which entitled him to repudiate it. We do not find from this record that the Commercial Fire Insurance Company had knowledge or notice of the fact that these several stores constituted one and the same building until after the loss had occurred and demand had been made on it for its *pro rata* of the insurance. The relations existing between the two companies were of a fiduciary character. The German American Company was, in a sense, the agent of the Commercial Company for the purpose of reinsuring itself in the latter. The utmost candor and good faith on the part of the former were of the essence of the relations created by the compact. The Commercial Company was justified in the assumption that the German American Company, in fixing liabilities on the former to inure to its own benefit, would not abuse the confidence incident to the relation existing between them, but would strictly adhere to and be guided by the terms of the compact, and not exceed the limits of liability thereby imposed. It had a right, therefore, to assume that it would not be entered in a sum greater than $5,000 on any one building or risk, and to act upon this assumption until it was advised to the contrary. It was not incumbent on the insurer to seize upon pretexts or slight indications to indulge suspicions leading to inquiries as to the good faith of its quasi agent; and it does not lie in the mouth of the German American Company to say that, "notwithstanding the trust and confidence inherent in our contractual relations, you should have been on the alert, as if anticipating malversation on our part, to institute minute inquiry into the transactions between us, with a view to discovering that we had violated the instructions you had laid down for our guidance." Conceding, therefore, that the Commercial Company must be held to notice that Rossiter's stores Nos. 1, 2, and 3 were located at the foot of Sixtieth street, from the casual mention of them as being there situated in the list of July 31, 1888, (which was forwarded to defendant for a purpose entirely distinct from that of giving advice of the location of any

one of the numerous buildings mentioned therein,) and this notwithstanding there is what seems to be a pregnant omission from the reports of reinsurance of all specification as to the location of two of these stores, yet we do not conceive that, under the circumstances, this notice that these stores were at the foot of a certain street carried either constructive or actual knowledge to defendant that the stores were in and constituted a single building. They might well have been the three stores next the end of the street, and yet have also been distinct buildings; and the defendant, in view of the stipulations of the compact which it had a right to suppose plaintiff would observe, was justified in assuming that they were in fact separate buildings and risks, although it may have known they were all at the foot of Sixtieth street. On the same considerations, our further conclusion is that defendant is not prejudiced in this case by the fact that it at first placed its exemption in part from the asserted liability on another ground. This could not have been a waiver of the defense now relied on, because the Commercial Company, at the time of advancing the other defense, was not advised of the facts on which this one depended, and its ignorance of them was due, not to its own negligence, but to that of the plaintiff. We find no error in the record, and *the judgment of the City Court is affirmed.*

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## VERMONT SUPREME COURT

MT. MANSFIELD HOTEL CO.
*v.*
William P. BAILEY.

(.....Vt.....)

**The liability of the indorser of a note for annual interest** which becomes due before the maturity of the note, is dependent upon a prior demand of the maker.

(March 5, 1892.)

EXCEPTIONS by plaintiff to rulings of the Lamoille County Court in favor of defendant in an action brought to compel defendant as indorser of a promissory note to pay annual interest which had accrued and remained unpaid upon the note. *Overruled.*

The facts are stated in the opinion.

*Mr.* **P. K. Gleed** for plaintiff.

*Mr.* **George Wilkins** for defendant.

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

It appears by the statement of facts that George Doolittle and Mrs. E. J. Doolittle promised to pay the defendant, William P. Bailey, or order, $5,000, as their five promissory notes should respectively become due, and the interest thereon annually. The notes are dated April 1, 1886, are for $1,000 each, and payable 16, 17, 18, 19, and 20 years from their date. The plaintiff, as the indorsee of the notes, seeks to recover of the defendant, as indorser, the first three years' interest upon them, without demand of the makers, and notice to the defendant of the makers' default of payment. The defendant's counsel contends (1) that the indorser cannot in any event be compelled to pay the interest as it annually falls due; that his conditional liability does not become absolute until the notes respectively mature, and then only after demand and notice; (2) that, if the interest is collectible of the indorser as it annually accrues it is after the usual measures have been taken to make him chargeable. The general rule of law relative to the respective liabilities of the maker and indorser of a promissory note is well defined. The promise of the maker is absolute to pay the note upon presentment at its maturity. The promise of the indorser is conditional that if, when duly presented, it is not paid by the maker, he, the indorser, will, upon due notice given him of the dishonor, pay the same to the indorsee or other holder. It seems clear that the indorser is not liable for the annual payment of the interest without performance of the conditions by the holder. If he were thus liable, his relation to the note would be like that of a surety or a joint maker, and his promise, instead of being conditional, would be absolute as to the payment of the interest. This is contrary to the general statement of the law that his liability is conditional. The relation of principal does not exist between him and the maker. They are not coprincipals. Their contracts are separate, and they must be sued separately, at common law. Randolph, Com. Paper, § 739. The maker has received the money of the indorser, and in consideration thereof promises to repay it according to the terms of the note; and, if he fails to pay, his contract is broken, and he is liable for the breach. The contract of the indorser is a new one, made upon a new consideration moving from the indorsee to himself. His undertaking is in the nature of a guaranty that the maker will pay the principal and interest according to the terms of the note. His liability is fixed upon the maker's default upon demand, and notice to him of such default. This new contract cannot be construed as an absolute one to pay the interest without default of or demand upon the maker. The promise cannot be absolute as to the payment of interest when it is clearly conditional as to the payment of the principal. It is held that, though the annual interest upon a promissory note may be collected of the maker as it falls due, it is not separated from the principal, so that the recovery of it is barred by the Statute of Limitations, until the recovery of the principal is thus barred. *Grafton Bank* v. *Doe,* 19 Vt. 463, 47

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NOTE.—The above decision of an important question in the law of negotiable paper seems to be the first adjudication upon it notwithstanding the innumerable indorsements of negotiable instruments which are annually made. The case must be regarded accordingly as one of leading importance.



See also 35 L. R. A. 381.

Am. Dec. 697. The holder of a note with interest payable annually loses no rights against the parties to it, whether makers or indorsers, by neglecting to demand interest; and he has the election to do so, or wait and collect it with the principal, for it is regarded as an incident of the principal. *National Bank of North America* v. *Kirby*, 108 Mass. 497. But it is so far an independent debt that he may maintain an action against the makers for it as it annually accrues, or allow it to accumulate, and remain as a part of the debt until the note matures. *Catlin* v. *Lyman*, 16 Vt. 44. In the latter course the makers would be chargeable with interest upon each year's interest from the time it was due until final payment. *Rules of the Court*, 1 Aiken, 410; *Austin* v. *Imus*, 23 Vt. 286. It was said by the court in *Taliaferro* v. *King*, 9 Dana, 331: "The interest, by the terms of the covenant, is made payable at the end of each year, and is as much then demandable as if a specific sum equal to the amount of interest had been promised, and, in default of payment, as much entitles the plaintiff to demand interest upon the amount so due and unpaid. The fact that the amount so promised to be paid is described as interest accruing upon a larger sum, which is made payable at a future day, cannot the less entitle the plaintiff to demand interest upon the amount, in default of payment, as a just remuneration in damages for the detention or nonpayment." "It is true that at the maturity of the notes the defendant would be liable, as indorser, for both principal and interest, upon due demand and notice, although these measures had not been taken to make him chargeable as the interest fell due each year. Notice of the maker's default of payment of interest need not be given annually to the indorser in order to charge him with liability for interest when the note matures. This is so stated by the court in *National Bank of North America* v. *Kirby*, *supra*. In *Howe* v. *Bradley*, 19 Me. 31, it is held that when a note is made payable at some future period, with interest annually till its maturity, and no demand is made for the annual interest as it becomes due, or, if made, no notice thereof is given, the indorser, if duly notified of the demand and nonpayment when the note falls due is liable for the whole amount due, both principal and interest, that the obligation imposed by the law upon the holder is only to demand payment and give the required notice when the bill or note becomes payable. It is not held in this country that interest is subject to protest and notice, according to the law-merchant, in order to charge indorsers with it when the note matures. The usual consequence of omission to notify the indorser of the maker's default, namely, the release of the indorser, would not follow the omission to give him an nual notice of such default. A note is not dishonored by a failure of the maker to pay interest. *First Nat. Bank of St. Paul* v. *Scott County Comrs.* 14 Minn. 77 (Gil. 59), 100 Am. Dec. 196, *note*.

The defendant's counsel argues that it would be inconsistent to hold the indorser liable for interest, which is a mere increment of the principal, until his liability is established to pay the sum out of which the interest springs; that there may be defenses to the note at its maturity which will release the maker, and consequently the indorser, or that the indorser may then be released by neglect of demand and notice. On first impression it might seem inconsistent that the maker should be compelled to pay interest before his liability has been fixed to pay the principal; but that is his contract. It is also argued that the fact that the interest, when uncollected, is an incident of the debt, so that, as it annually falls due, demand and notice are not necessary in order to charge either the maker or the indorser with liability to pay it when the note matures, is ground for holding that the indorser is not liable for interest until he is made liable for the principal. The question is whether the indorser, by the act of indorsement, promises to pay anything on the note till its maturity, at which time he clearly may be made liable for both principal and interest. The note bears upon its face an absolute promise by the maker to pay the principal when it becomes due, and the interest thereon annually. His promise is twofold. It is as absolute to pay the interest at the end of each year as to pay the principal at the end of the time specified. Now, what is the nature of the contract which the indorser makes with the indorsee? His contract is not in writing, like that of the maker, but his name upon the note is evidence that he has received value for it, and also of an undertaking on his part that it shall be paid according to its tenor. When he indorses it and delivers it to the indorsee he directs the payment to be made to the latter, and, in effect, represents that the maker has promised to pay certain sums of money according to the terms of the note,—that is, the principal at maturity and the interest annually; that, if the maker fails to pay on demand, he, the indorser, will pay on due notice. His conditional promise is concurrent with the absolute promise of the maker. His liability to pay interest and principal, as each respectively falls due, arises from his contract. It is his contract that he will make payment whenever the maker is in default, and he, the indorser, is duly notified thereof.

It is true that interest is an incident, an increment of the principal, and that the holder may wait for it until his note matures, and then collect it with the principal. He may, however, by the contract, collect it as it falls due of the maker, and, upon the latter's default, of the indorser. The courts of England have never recognized the American doctrine that interest is a mere incident, an outgrowth of the principal, and in many cases follows and is recoverable as such without an express contract. Until 37 Hen. VIII. chap. 9, it was unlawful to demand interest even upon a contract to pay it. Since the case of *De Havilland* v. *Bowerbank*, 1 Campb. 50, interest has been allowed in England upon express contracts therefor, and not otherwise. Where there is such a contract, interest stands like the principal in respect to the rights and liabilities of an indorser. Sedgw. Damages, 283; *Selleck* v. *French*, 1 Conn. 32, 6 Am. Dec. 185, *note*. In *Jennings* v. *Brush Co.*, reported in 20 Can. L. J. 361, in a learned opinion by McDowgall, *J.*, it was held that, where there was an express contract to pay interest, annually or semi-annually, it was not different from a contract

to pay an installment of the principal itself, and that notice to the indorser of the maker's default was necessary to charge the indorser with it. In that case the indorser was released from payment of the first two half-yearly installments of interest for want of demand and notice. While we adhere to the doctrine laid down in *Grafton Bank* v. *Doe, supra*, that interest is, in general, an incident of the debt, it is consistent to hold that, where the indorser is himself a party to the original contract to pay interest annually, as in the case at bar, by his indorsement he guarantees the performance of that contract. Any other holding would make the indorser liable for only a part of the maker's contract. The case of *Codman* v. *Vermont & C. R. Co.*, 16 Blatchf. 165, has been brought to our attention. The trustees and managers of the Vermont Central Railroad Company and the Vermont & Canada Railroad Company issued notes to the amount of $1,000,000, in sums of $1,000 each, payable to the defendant company in twenty years from their date, with interest semi-annually, on presentation of the interest coupons, made payable to bearer and attached to the notes. On each note was this indorsement, signed by the treasurer of the defendant, under its seal: "For value received, the Vermont and Canada Railroad Company hereby guaranty the payment of the within note, principal and interest, according to its tenor, and order the contents thereof to be paid to the bearer." The coupons were not indorsed. The notes were put on the market, and the plaintiff purchased fifty of them, and subsequently, after due demand, notice and protest, brought this suit to recover the amount of two coupons on each of his notes, the notes themselves not having matured. Without passing upon the question whether the guaranty was negotiable and available to the plaintiff as a remote holder, Wheeler, *J.*, among other questions that arose in the case, decided that the indorsement was a contract of indorsement running to the bearer, and that demand, notice and protest fixed the liability of the indorser to pay the coupons, and gave judgment for plaintiff for the amount of the coupons. The Supreme Court of the United States has repeatedly held that the Statute of Limitations begins to run upon interest coupons payable annually or semi-annually from the time they respectively mature, although they remain attached to the bonds which represent the principal debt. *Amy* v. *Dubuque*, 98 U. S. 470, 25 L. ed. 228. Where the indorser is the payee on the note, there would seem to be no difference in his liability in respect to interest, whether the maker's promise to pay it is contained in the body of the note or in interest coupons not indorsed, the notes to which they are attached being indorsed, and the coupons being mentioned in the notes; but it is unnecessary to decide that question here. Upon the facts found by the county court this action cannot be maintained, for the reason that the plaintiff never fixed the defendant's liability to pay the three years' accrued interest. It does not even appear that the makers refused payment of it or that they were requested to pay it before this suit was brought; therefore nothing is due from the defendant to the plaintiff.

*Judgment affirmed.*

**Ross,** *Ch. J.:*

I concur in the disposal made of this case, and in most of the grounds and reasoning of the opinion. But I do not see my way clear to concur in holding that an indorser upon a promissory note, payable on time, with the interest annually, can be made chargeable for the payment of the interest before he can be and is charged with the payment of the principal. By placing his name on the back of the note as an indorser, without making any limitation upon his indorsement, he guarantees its payment upon condition that the indorsee, when the time named in the note for its payment arrives, shall present it to the maker and demand its payment, and, if the maker fails to make payment, shall seasonably notify him of such failure. When this is done, the indorser promises to pay whatever of principal and interest is then due upon the note. This condition attaches primarily to the principal of the note. I think it attaches to the interest only as it becomes a part of the principal. It seems to me to be illogical, and pressing the indorser's conditional undertaking beyond its proper scope and office, to hold that he can have his liability fixed to pay for the use or legal rental of the principal before his liability to pay the principal is fixed. Interest is legal damage, fixed usually by statute, for the detention and use of money. As soon as the money is due and payable the law implies damage for its detention and use. It may also arise from the contract for the detention and use of the principal before it is payable by the terms of the contract. When stipulated to be paid annually, it may be collected from the maker of the note at the end of each year, because such is his contract. It is an incident and outgrowth from the principal. The promise to pay it, whether implied or expressed, is a dependent promise. It is attached to and arises from the promise to pay the principal. When the interest is stipulated to be paid annually, and before the principal is payable, the maker, when sued for the annual interest, because his promise to pay it is dependent upon his promise to pay the interest, may set up any defense to the suit for recovering the annual interest which he could if the suit were for the recovery of the principal, such as fraud in the inception of the note, or want or failure of consideration, or duress, or that his liability for the principal is conditional, the terms of which have not been complied with. If he defeats the action, it will estop the holder from recovering the principal when due, and *vice versa*. In 1 Herman, Estoppel, 231, it is said: "So, in an action for interest due on a bond, a judgment for the plaintiff for the amount of interest claimed will be conclusive evidence in an action on the bond, and estop the defendant from alleging fraud, for the reason that it was a defense which was available in the former suit and the presumption is that it was so used,"—citing *French* v. *Howard*, 14 Ind. 455; *Van Dolsen* v. *Abendroth*, 11 Jones & S. 470; *Preble* v. *Portage County Supvrs.* 8 Biss. 358; *Edgell* v. *Sigerson*, 26 Mo. 583; *Cleveland* v. *Crewiston*, 93 Ind. 31, 47 Am. Rep. 367.

The opinion recognizes this intimate, attached, and dependent relation of the promise to pay the interest annually to the promise to

pay the principal, from which the interest springs. It recognizes that the Statute of Limitations does not begin to run on such promise to pay interest annually until the principal falls due, in accordance with *Grafton Bank* v. *Doe*, 19 Vt. 463. This must be because, until severed by enforced collection or payment, interest is but an incident and dependent of the principal. It also recognizes this relation in holding that the indorsee may allow the interest to accumulate, and may fix the indorser's liability to pay it, by a proper demand, default, and notice in regard to the principal when that falls due. This is because liability for the principal carries its dependencies. I concur in these holdings. They are supported by the decisions cited in the opinion. But they rest, and, in my judgment, can rest, only on the basis that the promise to pay the interest annually, both for its consideration and enforcement, is dependent upon the promise to pay the principal. The opinion also holds that the liability incurred by the indorsement is conditional; that that condition attaches to the entire note; and that the liability of the indorser must be fixed by demand, default, and notice in regard to the interest payable from the maker yearly, as well as in regard to the principal. It then seems to conclude that, because the indorsee can lawfully demand and collect of the maker, whose promise to pay the principal is absolute, upon his dependent but yet absolute promise to pay the interest annually, he can, by proper demand, default, and notice, collect such annual interest of the indorser whose promise and liability to pay the principal is conditional, and cannot as yet be made absolute, and whose promise to pay the annual interest it has already held is dependent upon his promise to pay the principal, and, therefore, in my judgment, takes the condition attached to his liability to pay the principal. It is at this point that I fail to follow the reasoning of my associates. Here they assume—as I think—and proceed upon the basis that the indorser's implied promise to pay the annual interest is not dependent, but independent, like what it would be if it were an installment of the principal. The holdings in the opinion that the indorser's liability for the accrued annual interest may be made absolute by a proper demand, default, and notice in regard to the principal when it falls due, and that it may also be made absolute by a proper demand, default, and notice yearly, result in holding that the maker's promise to pay the interest annually which he indorses is both dependent upon and independent of his promise to pay the principal. I do not think that it has this double and inconsistent character, but only the former. If it be independent, must not demand and default be made, and notice given yearly, or the indorser become discharged? And if demand and default be made, and notice given annually, must not the Statute of Limitations begin to run from date of such demand? I think so. The result of giving this double character to the promise to pay interest annually will lead, I think, to some difficult legal problems. If the note is to mature at the end of twenty years, and the payee holds it, and allows the interest to accumulate for ten years, and then, having indorsed it, sells it, the indorsee must wait for the accumulated interest until the note falls due, because the maker's promise and the indorser's liability in regard to that interest is dependent upon the indorser's liability for the maker's promise to pay the principal, which is still conditional, and for that reason the indorser's liability to pay the accumulated interest is conditional, and will remain so until it is made absolute for the principal; but when the eleventh year's annual interest falls due, the indorsee may at once, by due demand, default, and notice, fix the indorser's liability to pay that year's interest, and may enforce its payment by suit, while the indorser's liability for the payment of the principal from which the year's interest springs, cannot for years be made absolute, and may never be. After the indorser's liability for the payment of the year's interest has thus become fixed by suit, on what legal principles governing *res judicata* could the indorser defend, in a suit brought, without further demand, default, and notice, at the maturity of the note; for the enforcement of the payment of the principal and the ten years' accumulated interest? The only decision relied upon for the holding of my associates is from 16 Blatchf. *supra*. I do not regard that in point. The guaranty was written, instead of implied. The relation of the indorser to the obligation was exceptional, it having been given by its receivers and managers. The interest was expressed in separate coupons, which, for some purposes, are treated as independent obligations. The Statute of Limitations runs on them generally from their maturity. *Amy* v. *Dubuque*, 98 U. S. 470, 25 L. ed. 228. In this respect they are unlike the promise in the note to pay the interest annually, as held in *Grafton Bank* v. *Doe*, 19 Vt. 463. I do not think that the indorsee has the election to fix the indorser's liability for and recover of him annually such yearly interest, or to wait and fix it by proper demand, default, and notice in regard to the principal. I think his liability can only become absolute for the payment of the incident or outgrowth of the debt, when it becomes absolute for the payment of the principal from which that incident or outgrowth springs. The opinion on this branch of the case is made to rest upon the ground that the indorser's undertaking, on due demand and notice, is to make good to the indorsee any failure of the maker to perform the contract, and in that the maker has promised to pay the interest at the end of each year the indorser has likewise so undertaken upon proper demand and notice. But his implied contract, being conditional in regard to the payment of the principal, I think is conditional also as to any incident or outgrowth of the principal, so long as it is conditional in regard to the payment of the principal; and that he only becomes absolutely bound to pay the interest at the end of each year when he becomes bound absolutely to pay the principal. When so bound for the payment of the principal, then his obligation to pay the interest at the end of each year attaches, in respect both to the interest then accrued and the interest which may thereafter accrue. I would modify the opinion in the particular indicated.

## PENNSYLVANIA SUPREME COURT.

HENDERSON, HULL & CO., Limited,
*v.*
PHILADELPHIA & READING R. CO.,
*Appt.*

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

**Evidence that fires were repeatedly set out by sparks of unusual size from defendant's engines** on that part of the line where the property was situated is admissible in an action to recover the value of property alleged to have been destroyed by fire set out by engines which cannot be identified, as tending to show general carelessness on the part of the company, when it has been shown that from the location of the destroyed property and the circumstances of the case the fire probably originated as alleged; but such proof must be confined to conditions existing at or about the time of the loss.

(October 26, 1891.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 3, for Philadelphia County in favor of plaintiff in an action brought to recover damages for the loss of some of plaintiffs' property which was alleged to have been destroyed by fire negligently set out by defendant's engines. *Reversed.*

The facts sufficiently appear in the opinion.

*Mr.* **Gavin W. Hart,** for appellant:

In order that the case may be given to the jury, there must appear affirmatively at least one of the following facts: (*a*) that the engine attacked as the cause of the fire threw unusual sparks at the time of passing; (*b*) such a state of facts in the absence of direct evidence as to its action when passing, that the only reasonable conclusion is that the engine caused the fire; (*c*) that the engine in fact had no spark-arrester, or one that was defective, such defect causing the fire; (*d*) there must be evidence, not only of a fire, but that the fire was caused by some negligent act, which act must be shown affirmatively, or be the only reasonable inference from the facts so shown.

*Huyett* v. *Philadelphia & R. R. Co.* 23 Pa. 373; *Lackawanna & B. R. Co.* v. *Doak*, 52 Pa. 379, 91 Am. Dec. 166; *Frankford & B. Turnp. Co* v. *Philadelphia T. R. Co.* 54 Pa. 345; *Pennsylvania R. Co.* v. *Stranahan*, 79 Pa. 405; *Philadelphia & R. R. Co.* v. *Hendrickson*, 80 Pa. 182, 21 Am. Rep. 97; *Pennsylvania Co.* v. *Watson*, 81* Pa. 293; *Pennsylvania & N. Y. Canal & R. Co.* v. *Lacey*, 89 Pa. 458; *Lehigh Valley R. Co.* v. *McKeen*, 90 Pa. 122, 35 Am. Rep. 644; *Philadelphia & R. R. Co.* v. *Schultz*, 93 Pa. 341; *Albert* v. *Northern Cent. R. Co.* 98 Pa. 316; *Gowen* v. *Glaser* (Pa.) 3 Cent. Rep. 109.

When the engines alleged to be in fault are seen, the inquiry is limited to them and them alone. If seen, their actions at any other time are immaterial, and the testimony must be confined to the time in question. Even evidence that the spark arresters are defective is immaterial, if there be no evidence that their action caused the fire.

*Philadelphia & R. R. Co.* v. *Yeiser*, 8 Pa. 366; *Philadelphia & R. R. Co.* v. *Yerger*, 73 Pa. 121; *Erie R. Co.* v. *Decker*, 78 Pa. 293; *Jennings* v. *Pennsylvania R. Co.* 93 Pa. 337; *Reading & C. R. Co.* v. *Latshaw*, 93 Pa. 449; *Albert* v. *Northern Cent. R. Co.* 98 Pa. 318; *Pennsylvania R. Co.* v. *Page*, 21 W. N. C. 52.

The engines in the present case were identified.

*Erie R. Co.* v. *Decker*, *supra*.

*Mr.* **P. P. Rothermel, Jr.,** for appellee:

Negligence in the use of defective spark-arresters may be shown by evidence that the sparks thrown or emitted by the engine or engines were unusually large in size, or were the cause of unusual and frequent fires along the line of the road.

*Huyett* v. *Philadelphia & R. R. Co.* 23 Pa. 373; *Pennsylvania R. Co.* v. *Stranahan*, 79 Pa. 405; *Philadelphia & R. R. Co.* v. *Hendrickson*, 80 Pa. 182, 21 Am. Rep. 97; *Pennsylvania Co.* v. *Watson*, 81* Pa. 293; *Pennsylvania & N. Y. Canal & R. Co.* v. *Lacey*, 89 Pa. 458; *Lehigh Valley R. Co.* v. *McKeen*, 90 Pa. 122, 35 Am Rep. 644; *Philadelphia & R. R. Co.* v. *Schultz*, 93 Pa. 341; *Gowen* v. *Glaser* (Pa.) 3 Cent. Rep. 109.

When the identity of the engine which caused the fire is known to the plaintiff, such evidence of negligent construction or management must be confined to the particular engine in question, and no evidence is admissible as to the construction or management of other engines.

*Erie R. Co.* v. *Decker*, 78 Pa. 293; *Jennings* v. *Pennsylvania R. Co.* 93 Pa. 337; *Albert* v. *Northern Cent. R. Co.* 98 Pa. 316.

When the identity of the engine which caused the fire is not known to the plaintiff, and he cannot therefore prove it defective by direct evidence, the negligence of the defendant and inferentially the defect of the locomotive causing the fire may be shown by evidence tending to prove the habitual use of defective spark-arresters on the engines of the defendant road.

*Pennsylvania R. Co.* v. *Stranahan* and *Gowen* v. *Glaser*, *supra*.

These last two cases are sustained by rulings in every state of the Union, where the subject has come before the courts for consideration.

Shearm. & Redf. Neg. § 675; Wharton, Neg. § 871; Thomp. Neg. p. 159; *Grand Trunk R. Co. of Canada* v. *Richardson*, 91 U. S. 454, 23 L. ed. 356; *Piggot* v. *Eastern Counties R. Co.* 3 C. B. 229; *Sheldon* v. *Hudson River R. Co.* 14 N. Y. 218, 67 Am. Dec. 155; *Field* v. *New York Cent. R. Co.* 32 N. Y. 339; *Webb* v. *Rome, W. & O. R. Co.* 49 N. Y. 420, 10 Am. Rep. 389; *Cleveland* v. *Grand Trunk R. Co. of Canada*, 42 Vt. 449; *Illinois Cent. R. Co.* v. *McClelland*, 42 Ill. 358; *Smith* v. *Old Colony & N. R. Co.* 10 R. I. 22; *Longabaugh* v. *Virginia City & T. R. Co.* 9 Nev. 271.

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

This action was brought to recover dam-

NOTE.—The extensive review in the opinion of the court of the authorities on the question involved in the above case makes any further examination of them by annotation seem wholly superfluous.

16 L. R. A.

See also 26 L. R. A. 254.

ages for the destruction by fire of the plaintiff's sash and door mill at Montgomery, in Lycoming county. The mill was situate between the Pennsylvania and Philadelphia & Reading Railroads; the former passing in front, and the latter in the rear, of the mill. The plaintiff alleges that the fire, which occurred on the 10th day of August, 1888, was communicated from sparks emitted by the defendant's engines. The fire was discovered about 6:15 o' clock P. M., in the upper part of the ventilator in the side next the defendant's road. The ventilator was about thirty feet high, and was within twenty-two feet of defendant's road. The watchman testifies that he came on duty that evening about fifteen minutes before shutting down time, and that the mill shut down at about 5:30 P. M. mill time, or 5:15 railroad time; that after he came on duty, and before the fire, two trains passed,—the first a coal train, going north, drawn by an engine which he could not identify; and, about fifteen minutes later, a freight train, drawn by engine No. 72. The defendant's evidence, however, showed that two other engines, drawing passenger trains, passed this point, one at 5:21 and the other at 5:22 P. M., neither of which engines was identified; indeed, it would seem that the plaintiff did not know they had passed the mill until the fact was developed in the defendant's testimony. The watchman testifies, further, that it was his duty to take notice of the engines as they passed, to see whether they threw fire from the stacks; that he did watch the engine in front of the coal train, and also engine No. 72, and that he saw no sparks; but that, as it was only 6 o' clock, and the sun was shining brightly, there may have been sparks emitted which he did not see. The only engine known and identified was No. 72. The defendant's contention was that the fire occurred in the pit containing the shavings and *débris* of the mill, which was immediately underneath the ventilator, and from which the shavings, etc., were supplied as fuel to the furnace. There is a large volume of testimony bearing upon the origin and cause of the fire, upon consideration of which the jury found the fire to have been caused by sparks from the defendant's locomotive engines.

The Philadelphia & Reading Railroad Company, at the time of the injury complained of, was an incorporated company, entitled to the right of way for its engines, etc., upon its track, as located in the rear of the plaintiff's mill. The company, in the proper use of its road, was therefore in the lawful pursuit of a legitimate business, and, if injury resulted to the plaintiff, it is *damnum absque injuria*. The company cannot be mulcted in damages except upon proof of negligence. *Frankfort & B. Turnp. Co.* v. *Philadelphia & T. R. Co.* 54 Pa. 345; *Philadelphia & R. R. Co.* v. *Hendrickson*, 80 Pa. 182, 21 Am. Rep. 97. No person is answerable in damages for the reasonable exercise of a right, when the act is done with a cautious regard for the rights of others, and where there is no ground for the charge of negligence, unskillfulness, or malice. For the ordinary risks the land-owner is compensated in the damages for right of way. Negligence therefore, is the gist of the action, and the burden of proof is upon the plaintiff to establish it. And as all engines, whether provided with spark-arresters or not, emit sparks, the mere existence of a fire along the line of the road, caused by sparks from the company's engines, is not enough to fasten upon the company the charge either of negligence or want of skill. *Philadelphia & R. R. Co.* v. *Yeiser*, 8 Pa. 366.

In *Jennings* v. *Pennsylvania R. Co.*, 93 Pa. 340, this court, in a *per curiam* opinion, said: "To hold that the fact of the fire having taken place was prima facie evidence that the spark-arrester was defective, and therefore that the case ought to have been submitted to the jury, would be practically to hold railroad companies liable for all fires; for it is notorious that no spark-arrester has yet been invented to prevent all sparks, and a little spark may kindle as large a conflagration as a large one, it depending very much on the dryness or humidity of the atmosphere whether a spark will go out before reaching the ground, and whether what it reaches is in a condition to be easily ignited." See also *Philadelphia & R. R. Co.* v. *Schultz*, 93 Pa. 344; *Reading & C. R. Co.* v. *Latshaw*, 93 Pa. 449. While any ordinary fuel may be used in a locomotive engine for the generation of steam, the exercise of this right is subject to the restriction that the latest improvements in its management in general use shall be applied to it. *Frankfort & B. Turnp. Co.* v. *Philadelphia & T. R. Co.* 54 Pa. 345.

It is the duty of the railroad company in the use of an engine, to use such reasonable precaution as may prevent damage to the property of others. Hence in *Lackawanna & B. R Co.* v. *Doak*, 52 Pa. 379, 91 Am. Dec. 166, where, although there was no direct evidence that the building was fired by the engine, or that sparks were emitted from it at the time, yet the building was near the railroad, and was discovered to be on fire when the train passed and it was shown that the engine had no spark-arrester, it was held the question of negligence was properly submitted to the jury. The effect of this ruling was to establish the principle in Pennsylvania that in case of loss by fire, fairly attributable to sparks from a railroad company's locomotive engine, the absence of a spark-arrester is prima facie evidence of negligence on the part of the company. It is the duty of railroad companies to adopt the best precautions against danger in general use, and which experience has shown to be superior and effectual, and to avail themselves of every such known safeguard or generally approved invention to lessen the danger. But mechanical invention and skill have all provided a merely partial protection against the emission of sparks. The mere fact that sparks are thrown from the stack of an engine is not, therefore, evidence in itself of negligence. Where, however, sparks of large size are emitted, which carried to a long distance set fire to fields, fences, or buildings, it may, in the present condition

of this branch of mechanical invention, well be inferred that the engine is not provided with a sufficient spark-arrester. *Philadelphia & R. R. Co.* v. *Hendrickson, supra; Pennsylvania Co.* v. *Watson*, 81* Pa. 293; *Pennsylvania & N. Y. Canal & R. Co.* v. *Lacey*, 89 Pa. 458; *Philadelphia & R. R. Co.* v. *Schultz*, 93 Pa. 341. Therefore, in an action for the recovery of damages for the destruction of a dwelling seventy-seven feet distant from the railroad, where it was shown that sparks were seen flying from engines to a distance of more than fifty yards, and fences and fields were set on fire in several places about the same time, and at considerable distance from the road, the question of negligence, it was held, should have been submitted to the jury. Although the company gave evidence to the effect that their engines were in good order, and were all provided with good spark-arresters, the unusual distance to which the sparks were borne and the numerous fires they created, were held to be such evidence to the contrary effect as to have carried the case to the jury. *Huyett* v. *Philadelphia & R. R. Co.* 23 Pa. 373.

Where the injury complained of is shown to have been caused, or, in the nature of the case, could only have been caused, by sparks from an engine which is known and identified the evidence should be confined to the condition of that engine, its management and its practical operation. Evidence tending to prove defects in other engines of the company is irrelevant, and should be excluded. *Erie R. Co.* v. *Decker*, 78 Pa. 293. In the case cited, the house of the plaintiff, which stood near the track of the defendants' railroad, was destroyed by fire on the 6th of March, 1872. The plaintiff alleged that the fire originated from sparks thrown from locomotive engine No. 458, belonging to the defendants, which passed his house about the time the fire commenced, and that the throwing of the sparks was from the negligence of the defendants in not having their apparatus in proper order.

*Mr. Justice* Gordon, in the opinion of the court, says: "It appears from the evidence, and it was conceded in the argument, that the only locomotive that could have fired the premises in question was that numbered 458, in charge of Alfred Carpenter as engineer. It follows, therefore, that the condition of this engine and its management were all that were legitimately before the court. If it was properly constructed as to its furnace and smoke-stack, and was furnished with a spark-arresting grate of the proper character, the company would not be liable, though the building were burned by fire accidentally issuing from it. *Lackawanna & B. R. Co.* v. *Doak*, 52 Pa. 379, 91 Am. Dec. 166. If, then, this engine was in a proper condition, it mattered not that every other engine owned by the company was without the proper appliances for preventing the ejection of coals and sparks. On the other hand, if this engine was dangerous in this respect, it was of no consequence that all others upon the road were safe. Such being the case, it is manifest that all evidence going to prove defects in engines belonging to this company, other than the one alleged to have produced the injury complained of, was irrelevant to the issue pending, and should have been excluded."

So, in *Albert* v. *Northern Cent. R. Co.*, 98 Pa. 316, where it appeared that the plaintiff's loss, if indeed it was caused at all by the defendant's negligence, was attributable entirely to the escape of sparks at a particular time from one of two particular engines, both of which were identified, evidence was held inadmissible on the part of the plaintiff, in order to prove defendant's negligence, to the effect that sparks of unusual size had been emitted for some time prior to the fire by defendant's engines generally. "The evidence below," said our Brother Paxson in that case, "established the fact that, if the plaintiff's property was destroyed by fire communicated by defendant's locomotive, it was done by engine No. 21 or engine No. 126, and by no others. Hence it is entirely clear that evidence that other engines, upon some other day, threw out an unusual amount of large sparks and live coals, was immaterial, and, if received, could only have confused, and might have misled, the jury; nor would it have been evidence to show that the spark-arresters on engines 21 and 126 were out of order." That is to say,—for the last sentence is, perhaps, a little obscure,—the fact that other engines, at other times, threw out an unusual amount of large sparks and live coals, would not have been evidence to show that the spark-arresters on engines 21 and 126 were out of order. To the same effect is *Jennings* v. *Pennsylvania R. Co.*, *supra; Annapolis & E. R. Co.* v. *Gantt*, 39 Md. 124; and other cases that might be cited.

Of course, the inquiry in all such cases is as to the existence or condition of the spark-arrester at the precise time of the injury; but, in order to make this practicable by proof that it was defective, or threw out sparks of unusual size, a reasonable latitude must be allowed to show its management and operation both before and after. The evidence, however, must be confined to its operation at or about the time of the occurrence. In *Philadelphia & R. R. Co.* v. *Schultz*, *supra*, it was shown that every day for two weeks a particular engine had been observed to throw out quantities of unusually large sparks, and had fired property along the line of the railroad. In *Albert* v. *Northern Cent. R. Co.*, *supra*, it was shown that both engines then in question had done this for some time before the occurrence. To the same effect, also, is *Lehigh Valley R. Co.* v. *McKeen*, 90 Pa. 122, 35 Am. Rep. 644. Testimony tending to show that other fires were set by the same engine about the same time, however, is the proper rule, and is undoubtedly competent. *Boyce* v. *Cheshire R. Co.* 43 N. H. 627; *Grand Trunk R. Co. of Canada* v. *Richardson*, 91 U. S. 454, 23 L. ed. 356. But when the loss or injury is shown to have been caused, or, according to the proof, may have been caused, by sparks from an engine unknown and unidentified, or by one of several engines, some of which are unknown and unidentified, then the rule

of evidence is necessarily somewhat enlarged. The burden of proof in all such cases, in the first instance, is upon the plaintiff to show that the fire in question was communicated from the defendant's engines. "It devolves upon the plaintiff to prove by a preponderance of the evidence that the fire was communicated by sparks or cinders from the railway engines. It need not be shown that any particular engine was at fault, but it will be sufficient if the fire is proved to have been set by any engine passing over defendant's railway, and the evidence may be wholly circumstantial; as—*First*, that it was possible for fire to reach the plaintiff's property from the defendant's engines; and, *second*, facts tending to show that it probably originated from that cause, and from no other." 8 Am. & Eng. Encyclop. Law, 7. And, although the rule is otherwise in England and in many of the states, in Pennsylvania, as we have said, the additional burden is upon the plaintiff to prove negligence in the construction or management of the engine. It is not required that the fact be established by direct or positive proof. It, like any other fact, may be established by circumstantial evidence; and, on account of the great difficulty in proving negligence in such cases, any proper evidence from which negligence may be inferred is sufficient to throw the burden on the defendant. "A slight presumption of negligence, however, raised by the plaintiff's case," says Mr. Wharton in his Law of Evidence, (sec. 871,) "is sufficient to throw the burden of disproving negligence on the defendant. It is a mistake, as has been elsewhere shown, to suppose that negligence can be only proved by positive and affirmatory evidence. There may be no direct proofs of negligence, yet the way in which an injury is done may be such that negligence is the most probable hypothesis by which it can be explained; and when this is so, the defendant must disprove negligence by showing that he exercised care."

In Thompson on Negligence (p. 159) it is said: "The business of running railroad trains suggests a unity of management, and a general similarity in the construction of the engines. For this reason, and on account of the difficulty of proving negligence in these cases, as before pointed out, the admission of evidence as to other and distinct fires from the one alleged to have caused the injury is permitted. The rule is adopted in England, and prevails in all the states, with one, or possibly two, exceptions. More particularly, it may be stated as follows: That, in actions for damages caused by the negligent escape of fire from locomotive engines, it is competent for the plaintiff to show that, about the time when the fire in question happened, the trains which the company were running past the location of the fire were so managed, in respect to their furnaces, as to be likely to set on fire objects in the position of the property burned, or to show the emission of sparks or ignited matter from other engines of the defendant passing the spot upon other occasions, either before or after the damage occurred, without showing that they were under the charge of the same driver, or were of the same construction as the one occasioning the damage."

The rule is more precisely stated in Shearman & Redfield on Negligence, (sec. 675,) as follows: "When the particular engine which caused the fire cannot be fully identified, evidence that sparks and burning coals were frequently dropped by engines passing on the same road upon previous occasions is relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter. If the engine which emitted the fire is identified, then evidence on either side as to the condition of other engines, and of their causing fires, has been held irrelevant, but not so if it is not fully identified."

In our own case of *Pennsylvania R. Co.* v. *Stranahan*, 79 Pa. 405, the evidence was that, between 2 and 3 o'clock in the afternoon, the plaintiff's barn, which was about 150 feet from the railroad, was discovered to be on fire. Two trains had passed about noon. The fire appeared to have commenced at the fence on the road, and burned over the field to the barn. The sparks falling set fire in many other places along the road. The engine from which the sparks were alleged to have been thrown was unknown and unidentified, and the plaintiff proposed to show by a witness, who lived nineteen miles distant on the line of the railroad, the extent to which the locomotives on that road going east, on or about the time of the occurrence, threw sparks from the smoke-stacks. The testimony was admitted. The witness testified that it was "a common occurrence for the engines to throw sparks, and set fire, for rods from the railroad track. They were from a pea to a walnut in size. It appeared worse sometimes than others. They were usually freight trains; sometimes passenger trains," etc. The admission of this testimony was assigned for error here. In a *per curiam* opinion, this court said: "This was not a case where a certain engine had thrown out the sparks which set fire to plaintiff's barn; but it was where the engine was unknown, yet the cause of the fire was clearly traced to the railroad track, and left the belief that some one of the engines of the defendants had emitted the coals which set the barn on fire. It therefore became necessary to establish the fact by such proof as rendered the belief a certain fact. This could be done, not by the proof that a certain engine emitted the sparks incessantly; for *non constat* that this particular engine had passed the plaintiff's premises that day. Hence it was necessary to permit the party to show that the emitting of coals and sparks in unusual quantities was frequent, and permitted to be done by a number of engines."

In *Gowen* v. *Glaser* (Pa.) 3 Cent. Rep. 109, the action was for damages for the destruction by fire of the plaintiff's rags, which were scattered in a field adjoining the defendant's road. The allegation was that they were set on fire by sparks from the defendant's engines, but it was not known by

what engine. The offer made was as follows: To show that several engines on this road had insufficient sparks-catchers; that the engines of this road had repeatedly set fire to property and to vegetation along that part of the track very shortly before and very shortly after this occurrence; that sparks as large as a hickory nut escaped in large quantities from the engines, causing these fires; that, after this fire, what remained of the rags, and what was saved, were spread on the field, and watched day and night, and that they were set on fire repeatedly by the engines passing on this road. This offer was received to show by circumstantial evidence that the damage was done by some engine with an insufficient spark-arrester. The jury were to infer from the fact that many of the company's engines, about the time of this occurrence, shortly before and shortly after, emitted sparks of unusual size and quantity; that they were without sufficient spark-arresters; and that, upon consideration of all the evidence, the injury complained of resulted from some one of the engines thus imperfectly constructed. The offer was subsequently enlarged by adding to it a proposition to prove, not that the whole number of defendant's engines were defective, but that the defendant habitually used engines with defective spark-arresters. The offer, as a whole, was admitted, and in this court was assigned for error. In a *per curiam* opinion, this court held that there was no error in the admission of this offer.

In *Pennsylvania R. Co.* v. *Page* (Pa.) 11 Cent. Rep. 424, the action was for burning the plaintiff's barn, 150 feet distant from the track. The evidence was that the company's trains had passed the barn shortly before the fire broke out, emitting cinders, smoke, and small sparks about the size of a pea. There was no evidence, direct or circumstantial, to justify the jury in finding that the sparks were of any larger size. It was further shown that the wind was blowing from the track towards the barn and that sparks had been known to have been blown that distance. It was not shown that any spark-arrester in use would effectually prevent the emission of sparks of this size. While the evidence was, perhaps, sufficient to satisfy the jury that sparks from the engine had caused the fire, there was no proof of any defect in the spark-arresters; on the contrary, it was shown they were in perfect condition. There was therefore no proof of negligence or mismanagement; and it was upon this ground that we said it would have been the duty of the court below, if a proper request had been made, to have instructed the jury to find a verdict for the defendant.

The same rule of evidence is announced in *Grand Trunk R. Co. of Canada* v. *Richardson*, 91 U. S. 454, 23 L. ed. 356. The saw-mill, etc., of Richardson, the plaintiff, was burned on the 7th of June, 1870. The evidence tended to show that the fire was communicated from one of two engine belonging to the company,—the first, drawing a passenger train westerly, passing the mill about half past 1 o'clock in the afternoon; the other drawing a freight train easterly, passing it about 4 o'clock the same afternoon. One half to three fourths of an hour after the last-mentioned train passed by the mill, the fire was discovered burning on the westerly end of a covered railroad bridge from which it was communicated to the saw-mill. The evidence of the plaintiff in error tended to show that the fire was not communicated by either of the engines complained of, but, on the contrary, from a constant fire at the end of their tram-way, about 163 feet down the stream, on the same bank of the river, maintained at the westerly end of the railroad bridge for the purpose of burning edgings, sticking, slabs, and other waste material from the saw-mill. After the company had rested its case, Richardson was allowed to prove that at various times during the same summer, before this fire occurred, some of the company's locomotives in an unusual manner scattered fire in passing the mill and bridge, without showing either that those which it was claimed communicated the fire in question were among the number, or that they were similar in their make, state of repair, or management to said locomotives. The engines were unknown and unidentified. *Mr. Justice* Strong, in ruling upon this question, said: "The third assignment of error is that the plaintiffs were allowed to prove, notwithstanding objection by the defendant, that at various times during the same summer, before the fire occurred some of defendant's locomotives scattered fire when coming past the mill and bridge, without showing that either of those which the plaintiffs claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair, or management to those claimed to have caused the fire complained of. The evidence was admitted after the defendant's case had closed. But whether it was strictly rebutting or not, if it tended to prove the plaintiffs' case, its admission, as rebutting, was within the discretion of the court below, and not reviewable here. The question, therefore, is whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiffs' property, were caused by any of defendant's locomotives. The question has often been considered by the courts in this country and in England, and such evidence has, we think, been generally held admissible, as tending to prove the possibility and the consequent probability that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company;" citing *Piggot* v. *Eastern Counties R. Co.* 3 C. B. 229; *Sheldon* v. *Hudson River R. Co.* 14 N. Y. 218, 67 Am. Dec. 155; *Field* v. *New York Cent. R. Co.* 32 N. Y. 339; *Webb* v. *Rome, W. & O. R. Co.* 49 N. Y. 420, 10 Am. Rep. 389; *Cleveland* v. *Grand Trunk R. Co. of Canada*, 42 Vt. 449; *Illinois Cent. R. Co.* v. *McCleland*, 42 Ill. 358; *Smith* v. *Old Colony & N. R. Co.* 10 R. I. 22; *Longabaugh* v. *Virginia City & T. R. Co.* 9 Nev. 271.

In *Sheldon* v. *Hudson River R. Co.*, 14 N. Y. 218, 67 Am. Dec. 155, the plaintiff gave

evidence which tended to show that the engines used by the defendants lacked some apparatus which was in use upon some other locomotive engines, and which rendered the latter less liable to communicate fire to substances at the side of the road than those which were without that apparatus; that shortly before the fire, sparks and fire had been thrown from the engines used by the defendants, in running their trains through the witness's premises, a greater distance than this building stood from the track of the railroad; and that he had picked up from the track, after the passage of trains, lighted coals more than two inches in length. It was argued by the defendants' counsel that the evidence was too remote and indefinite; that it did not refer to any particular engine, etc. *Chief Justice* Denio, in delivering the opinion of the court, said: "This argument is not without force, but at the same time I think is met by the peculiar circumstances of this case. These engines run night and day, and with such speed that no particular note can be taken of them as they pass. Moreover, there is such a general resemblance among them that a stranger to the business cannot readily distinguish one from another. It will therefore generally happen that when the property of a person is set on fire by an engine the owner, though he may be perfectly satisfied that it was caused by an engine and may be able to show facts sufficient, legitimately, to establish it, yet may be utterly ignorant what particular engine did the mischief. It would be practically quite impossible, by any inquiries, to find out the offending engine, for a large proportion of those owned by the company are constantly in rapid motion. The business of running the trains on a railroad supposes a unity of management, and a general similarity in the fashion of the engines and the character of operation. I think, therefore, it is competent prima facie evidence for a person, seeking to establish the responsibility of the company for a burning upon the track of the road, after refuting every other probable cause of the fire, to show that, about the time when it happened, the trains which the company was running past the location of the fire were so managed in respect to the furnaces as to be likely to set on fire objects not more remote than the property burned. It is presumed to be in the power of the company which is intimately related with all its engineers and conductors, to controvert the fact sworn to if it is untrue, or, if true in a particular instance, that it was not so in respect to the engines which passed the place at a particular time before the occurrence of the fire. The effect of the evidence would only be to shift the *onus probandi* upon the company, and that, under the circumstances of this case, seems to me to be unavoidable."

We may also refer to the case of *Koontz* v. *Oregon R. & Nav. Co.*, 20 Or. 3, which was an action to recover damages for the destruction of plaintiff's mill by fire falling from one of defendant's locomotives. What particular engine this was the evidence did not disclose, nor was the plaintiff able to ascertain or make proof of its identification from other engines of the company; but, to strengthen the inference that the burning of the mill originated in sparks from this engine, and to show habitual negligence of the officers and agents of the railroad company, he introduced evidence to show that other engines, of like appearance and construction, frequently scattered fire in large quantities, and set other fires along the track, prior and subsequent to the burning complained of. *Mr. Justice* Lord, in delivering the opinion of the court, said: "On account of this difficulty of identifying a passing engine, especially at night-time, so as to make direct proof of such negligence, and also for the reason, as stated by Mr. Thompson, that the business of running railroad trains supposes a unity of management, and a general similarity in the construction of engines, the admission of evidence as to other and distinct fires from the one alleged to have caused the injury is permitted. Nor is it requisite that the testimony must also show that the engine which it is claimed caused the fire was one of those which had previously or subsequently scattered fire along defendant's track, but it is enough, as was shown, that it is similar in appearance and construction, and under the same general management. Hence it is quite generally held that evidence that sparks were frequently ejected from passing engines, causing fire along its track, on other occasions, is relevant and competent to show habitual negligence, and to strengthen and sustain the inference that the fire originated from the cause alleged. As the plaintiff must proceed with his evidence in the first instance, the fact that the defendant may be able to prove the identity of the engine cannot have the effect to make the admission of such evidence error."

In *Field* v. *New York Cent. R. Co.*, 32 N. Y. 339, the court in speaking of this quality of evidence, says: "At all events, it showed that a practice was indulged in on the part of the company, about the time and near the place, which would have injured the plaintiff's property, rendering it probable, to a certain degree, that the injury was attributable to that cause."

We have quoted extensively from these authorities to show that the rule of evidence referred to, although, perhaps, comparatively new in its application in Pennsylvania, is the rule generally recognized in this country, not only by the text-writers, but by the courts. It may therefore be considered as settled in cases of this kind, where the offending engine is not clearly or satisfactorily identified, that it is competent for the plaintiff to prove that the defendant's locomotives generally, or many of them, at or about the time of the occurrence, threw sparks of unusual size and kindled numerous fires upon that part of their road, to sustain or strengthen the inference that the fire originated from the cause alleged. And as, in the case at bar, it is not definitely ascertained to which of the four engines this fire was attributable, three of them being unknown and unidentified, we cannot see how

testimony of this character could be excluded. But the objective point of the inquiry is the condition of the passing engines at the time of the occurrence. It is a matter of little consequence what may have been their condition ten years or two years before that; for their precautions against fire, and the management of their engines, may have been greatly changed within that period. It does not follow because the company, in its official management, may have been negligent in this respect at a time so remote that it still remains so. The habits of individuals may, in some sense, be spoken of as fixed habits; but the official control and management of the affairs of a railroad company, as well as the various devices used as precautions against danger, are liable to frequent and radical changes. The line must be drawn somewhere. This class of testimony is exceptional in character at the best, and is only admissible because the ordinary sources of proof are inaccessible, and direct evidence impracticable. The rule should not, therefore, be carried beyond the necessity which justifies its admission. If at or about the time when fires are alleged to have been set by locomotive engines, unknown by number or other means of identification, the company is shown to have been habitually negligent in the equipment or management of its engines, or of many of them, this is a circumstance to be considered in connection with others, not only in determining the origin of the fire, but in deciding whether or not the company was, at the time, in this as in many other instances, negligent in failing to provide suitable precautions against danger. If many of the company's engines, at or about the time, are without sufficient spark arresters, and frequent fires are kindled in consequence, it may well be inferred, in view of the effectual character of mechanical inventions of its kind, not only that the fire in question originated from this cause, but that it occurred from the habitual negligence of the company in failing to provide sufficient spark-arresters. Reasonable latitude must, of course, be allowed. The purpose of such proofs would be defeated if they were confined to the exact or precise time of the occurrence. In *Stranahan's Case* the court admitted proof of the extent to which the various locomotives of the company threw sparks on or about the 9th (6th) of November, 1867, when the fire occurred. In *Gowen* v. *Glaser* the inquiry was as to sparks thrown and fires set very shortly before and very shortly after the occurrence. In *Sheldon* v. *Hudson River R. Co.*, *supra*, the inquiry was restricted to matters occurring about the time and near the place of the fire. In *Koontz* v. *Oregon R. & Nav. Co.* the offer was somewhat more extended in its effects, but we are of opinion that the rule should not be given greater latitude than we have given it.

In the case at bar, the first offer received, and which is the ground of the first specification of error, was as follows: "Plaintiff offers to prove that the property of persons along the line of defendant's road, which passed the property of plaintiff, destroyed by the fire in question on August 10, 1888, and within twelve miles of plaintiff's said property, was repeatedly set on fire by unknown and unidentified engines of the defendant, and that the sparks causing said fires, emitted by the said engines, exceeded a hickory nut in size, to be accompanied by evidence of experts showing that engines throwing sparks of the size of a hickory nut either did not use the most approved spark-arresters in general use, or if they did, the spark-arresters used were permitted to become defective and out of repair, or were negligently managed by those in charge of them." This offer, it will be seen, was wholly without limit as to time. The testimony received under it was, in some instances, confined to two or three months, in some to six months, and in some the testimony was general, and in such form as not to indicate to what period of time it referred. The second offer was: "To prove that many of the locomotive engines of the defendant, which it cannot identify, and which passed the plaintiff's mill frequently during a period of six months preceding the fire, habitually threw sparks of the size of a hickory nut, or larger," etc. We are of opinion that the admission of these offers was error. The examination should be confined to the negligent operation of the engines of the company at or about the time of the fire, with such reasonable latitude, before and after the occurrence, as is sufficient to enable such proofs to be practicable. What has been said disposes of the first, second, and third assignments of error. The remaining assignments are without merit and are dismissed.

*The judgment is reversed*, and a *venire facias de novo* awarded.

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## NEW YORK COURT OF APPEALS.

Bowers H. LEONARD, *Appt.*,
*v.*
Robie CLOUGH *et al.*, *Respts.*

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

**1. A parol reservation of a barn** when conveying the real estate of which it is a part by absolute warranty deed, is ineffectual to retain title in the grantor.

**2. A parol gift** is ineffectual to transfer title to a barn which is part of the real estate.

**3. A remote grantee connected with the immediate grantee by an unbroken chain of warranty deeds** has all the rights of the latter to sue the original grantor

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NOTE.—In addition to the authorities shown in the report of the above case, we call attention to the following *notes* on the general subject of the nature of the fixtures. Binkley v. Forkner (Ind.)



See also 29 L. R. A. 423.

for the removal from the real estate of a barn which passed under the original deed.

**4. A barn placed by its owner upon his own land becomes real estate** although supported by stones resting upon the surface, and it will pass by any conveyance of the real estate.

(May 24, 1892.)

APPEAL by plaintiff from a judgment at the General Term of the Supreme Court, Fifth Department, denying his motion for new trial on case and exceptions heard at General Term in first instance after verdict in favor of defendants, at a Circuit Court for Cayuga County in an action brought to recover damages for the alleged wrongful removal of a barn from the plaintiff's real estate. *Reversed.*

The facts are stated in the opinion.

*Mr.* **Amasa J. Parker,** for appellant:

The barn was real estate.

The barn was built by the person, who at the time of building the barn, owned the lot on which the whole of the barn stood; on its erection under such circumstances, it became and remained a part of realty.

1 Washb. Real Prop. 5; *Voorhees* v. *McGinnis*, 48 N. Y. 283; *Buckley* v. *Buckley*, 11 Barb. 63.

Between vendor and vendee the mode of annexation is not the controlling test.

*McRea* v. *Central Nat. Bank of Troy*, 66 N. Y. 495.

Everything annexed to the realty, whether by physical attachment, or by adaptation of the article to the proper use of the property, becomes a part of it, and cannot be removed without the consent of the owner.

Tyler, Fixtures, 104, 105; *McRea* v. *Central Nat. Bank of Troy*, 66 N. Y. 489; *Reid* v. *Kirk*, 12 Rich. L. 54; *Fisher* v. *Saffer*, 1 E. D. Smith, 611; *Ombony* v. *Jones*, 19 N. Y. 239.

By the common-law whatever is affixed to the freehold becomes a part of it, and cannot be removed by the vendor.

*Gardner* v. *Finley*, 19 Barb. 320; *Snedeker* v. *Warring*, 12 N. Y. 170; 2 Bouvier, Law Dict. 508, 509.

Every building is an accessory to the soil and is therefore real estate.

1 Cruise, Dig. title I, § 46; 1 Bouvier, Law Dict. 268.

Every grant of land carries by necessary legal construction buildings, houses, and trees standing thereon.

*McRea* v. *Central Nat. Bank of Troy*, 66 N. Y. 489; Boone, Real Prop. 306, 307; 3 Washb. Real Prop. 391; 3 Kent, Com. 401; 2 Bouvier, Law Dict. 40; *Warren* v. *Leland*, 2 Barb. 618; *Ombony* v. *Jones*, 19 N. Y. 240.

Every grant shall be conclusive against a grantor.

4 N. Y. Rev. Stat. 8th ed. § 143.

A grantor cannot be permitted to limit the effects of his deed by a proof of parol reservation of the fixtures.

*Elwes* v. *Mawe*, 3 East, 38, 2 Smith, Lead. Cas. 9th Am. ed. p. 1463; *Noble* v. *Bosworth*, 19 Pick. 314.

A building or permanent fixture attached to the freehold is not the subject of conveyance as personalty by the owner of the freehold.

1 Washb. Real Prop. 5, and cases cited.

The parol agreement of reservation was inconsistent with the warranty deed. It must be void.

*Taylor* v. *Millard*, 42 Hun, 364, aff'd 28 N. Y. S. R. 694; *Wiseman* v. *Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479; *Pierce* v. *Keator*, 70 N. Y. 419, 26 Am. Rep. 612; *Huntington* v. *Asher*, 96 N. Y. 604, 48 Am. Rep. 652.

The terms of the deed could not be changed by parol.

*Mott* v. *Palmer*, 1 N. Y. 572.

A contract for the sale of any interest in lands is void unless in writing.

4 N. Y. Rev. Stat. 8th ed. p. 2589, § 8.

The word "land" is comprehensive in its import, and includes many things besides the earth we tread on, as water, grass, stones, buildings, fences, trees, and the like.

1 Shep. Touch. by Preston, 91; 1 Inst. 4; 1 Preston, Estates, 3; 2 Bl. Com. 17, 18; 4 N. Y. Rev. Stat. 8th ed. p. 2461, § 10; *Green* v. *Armstrong*, 1 Denio, 554.

A parol sale or gift of buildings is a mere license.

1 Washb. Real Prop. 632; *Cronkhite* v. *Cronkhite*, 94 N. Y. 328; *People* v. *Fields*, 1 Lans. 244; *Fisher* v. *Saffer*, 1 E. D. Smith, 611; *Wiseman* v. *Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479.

A man will not be allowed to allege or prove a fact to be different from what he has asserted it to be in his own deed.

*The Duchess of Kingston's Case*, 3 Smith, Lead. Cas. 9th Am. ed. p. 2107; *Huzzey* v. *Hefferman*, 3 New Eng. Rep. 325, 143 Mass. 232; *Knight* v. *Thayer*, 125 Mass. 25; *Russ* v. *Alpaugh*, 118 Mass. 369, 19 Am. Rep. 464; *Gregory* v. *Peoples*, 80 Va. 355; 1 Greenl. Ev. § 275; Stephen, Dig. Ev. 260.

A reservation must be equal to a grant, that is, under the same form and solemnities.

3 Washb. Real Prop. 443.

A parol reservation of any part of the granted premises is void under the Statute of Frauds.

2 Washb. Real Prop. 441.

*Messrs.* **Payne & O'Brien,** for respondents:

Parties may, by agreement at the time of annexation, preserve the character of personalty to chattels annexed to the land.

*Mott* v. *Palmer*, 1 N. Y. 564; *Tifft* v. *Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Voorhees* v. *McGinnis*, 48 N. Y. 278.

The question whether property so annexed to the freehold or as under ordinary rules to a part of the realty, may be severed so as to become personalty, depends upon the intention of the parties.

Chase, Bl. Com. p. 224, *notes*; *Sheldon* v. *Edwards*, 35 N. Y. 279.

The parties may by agreement at any time re-impress the character of personalty on chattels already annexed to the land.

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3 L. R. A. 33; Hill v. Munday (Ky.) 4 L. R. A. 674; Collamore v. Gillis (Mass.) 5 L. R. A. 150; Hopewell Mills v. Taunton Sav. Bank (Mass.) 6 L. R. A. 249; Overman v. Sasser (N. C.) 10 L. R. A. 722.

As to the effect of an agreement between the parties, see especially the *notes* to Collamore v. Gillis and Overman v. Sasser, *supra*.

Such an agreement if executed is valid, although made by parol, and is binding upon all parties except the bona fide purchaser without notice.

8 Am. & Eng. Encyclop. Law, title *Fixtures*, pp. 58–62.

In all cases where courts have held such an agreement void as against a subsequent purchaser the *bona fides* of such purchaser has clearly appeared.

*Stevens* v. *Rose*, 13 West. Rep. 765, 69 Mich. 259; *Tyson* v. *Post*, 10 Cent. Rep. 712, 108 N. Y. 217; *McLauglin* v. *Lester*, 4 N. Y. S. R. 852.

Here was a completed gift by Mrs. Gilbert of her two thirds of the barn in question. The gift was executed because there was all the delivery of which the article was capable – a surrender of possession and dominion.

8 Am. & Eng. Encyclop. Law, title *Gift*, p. 1315; 2 Kent, Com. *439.

It was allowed to stand upon the lot in question, first by the license of Mrs. Gilbert and afterwards by the license of subsequent grantees. Under that license they could remove the barn.

*Dubois* v. *Kelly*, 10 Barb. 496.

The rule excluding parol evidence to contradict or vary a deed is only applied in controversies between the parties to the deed. It can have no application in suits by or against persons who are not parties to the deed, and in no way connected therewith.

1 Greenl. Ev. § 279, and cases cited; Abbott, Trial Ev. p. 464; *Austin* v. *Sawyer*, 9 Cow. 39; *McMaster* v. *North America Ins. Co.* 55 N. Y. 234; *Tyson* v. *Post*, 10 Cent. Rep. 712, 108 N. Y. 217.

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

The material facts in this case are as follows: Prior to March 29, 1884, Adaline Clough owned a lot of land in the city of Auburn, upon which there was a small barn, and on that day she conveyed the lot by an ordinary warranty deed to the defendant Robie Clough, who owned the adjoining lot on the northerly side of the lot thus conveyed. On the 1st day of April, 1884, Robie Clough, by an ordinary warranty deed, conveyed the same lot to her daughter, Mary Gilbert, with the exception of a strip six feet by twelve rods, reserved from the northerly side of the lot. About one third of the barn was upon the strip thus reserved, and thus the dividing line between the two lots after that conveyance ran through the barn, leaving about one third thereof upon the land of Robie Clough and two thirds thereof upon the land of Mary Gilbert. At the time of the execution of the deed by Robie Clough to Mrs. Gilbert, and immediately thereafter, she said to Mrs. Clough and her husband: "Now, pa and ma, the barn is yours. There can nobody interfere with you;" and Robie Clough and her husband have ever since been in the occupancy of the barn. On the 28th day of October, 1886, Mrs. Gilbert, by an ordinary warranty deed, conveyed the lot to Julia M. Sherwood, and at the time of that conveyance Mrs. Sherwood was informed that the barn belonged to Mrs. Clough, and there was a parol reservation of the same. On the 1st day of November, 1886, Mrs. Sherwood, by an ordinary warranty deed, conveyed the lot to Mrs. Eunice Nellis, and at the time of that conveyance Mrs. Nellis was informed by parol that Mrs. Clough owned the barn, and that it did not pass. On the 8th day of November, 1888, Mrs. Nellis, by an ordinary warranty deed, conveyed the lot to the plaintiff, and at the time of that conveyance he was informed by parol that the barn belonged to Mrs. Clough, and did not pass with the conveyance. After he had purchased the lot, Mrs. Clough informed him that she claimed the barn, and intended to move it from the lot, and he told her not to move it. After that the defendants moved the barn from the lot, and then the plaintiff brought this action to recover for the value of so much of the barn as stood upon his lot, and claimed to recover treble damages. The barn was a wooden structure, worth less than $200, and rested upon four large stones at the corners, and smaller stones at other places. Upon the trial the plaintiff objected to the parol evidence given by the defendants to show the parol reservation of the barn at the times of the several conveyances of the lot. But the court overruled the objections, and received the evidence. The court below held that the evidence was competent; that the barn, after the conveyance by Mrs. Clough to her daughter, became and remained personal property, and that she had a lawful right to remove the same, and judgment was entered upon the verdict in favor of the defendants.

We think a few plain principles of law require a reversal of this judgment. This barn, at the time of the conveyance by Mrs. Clough to Mrs. Gilbert, was a part of the realty, and there could be no parol reservation of it. The grantor could no more reserve the barn by parol than she could reserve trees growing upon the land, or a ledge of rocks, or a mine, or a portion of the soil. As between the grantor and grantee, it is very clear that the grantor would not have been permitted to show that the barn was reserved by parol, as that evidence would have contradicted the deed, which was absolute in form. If the grantor had removed the barn, the grantee could have sued her for trespass, and she could not have defended by showing a parol reservation of the barn. If it had been claimed in such a suit that it was part of an oral agreement or reservation that the barn should not pass, that fact could not have been shown, as it would have contradicted the deed. The deed contained covenants of warranty which covered the entire title to the real estate, and the grantor could not in such a suit have shown by parol that any part of the real estate was not covered by the covenants. So, too, if it be claimed that what was said by Mrs. Gilbert to Mrs. Clough immediately after the deed was delivered constituted a parol gift of the barn to her father and mother, the gift could not be operative, because the barn at that time was a part of the realty. It had never been severed from the realty, and had never been, by any acts of the parties or the owners, made personal property; and the parol gift could not be upheld of a portion of the real estate without violating the Statute of Frauds. The one third of the barn which rested upon the lot owned by

Mrs. Clough was and remained realty, and it is impossible to perceive how by mere words the other two thirds could be converted into personalty. Can trees and other portions of real estate be converted into personalty by a mere parol gift, and without severance? It is clear that, after the conveyance from Mrs. Clough to Mrs. Gilbert, the barn remained a part of the realty, and was covered by the deed and the covenants of warranty therein contained; and so the barn passed to each successive purchaser, and no grantor could dispute that the grantee took title to the barn, and thus the title to so much of the barn as stood upon this lot was finally vested in the plaintiff. All the deeds contained covenants of warranty. Those covenants run with the land, and each successive grantee could have the benefit of all the prior covenants. The plaintiff is in privity of estate with Mrs. Clough, and his rights are the same as they would have been if he had been her immediate grantee. He holds under her deed, and in an action by him for a breach of her covenants she could not dispute that the barn was a part of the realty, and in this action against her for removing the barn she cannot dispute that it passed under her deed. His rights are the same as Mrs. Gilbert's would have been if she had disputed Mrs. Clough's right to the barn, and, before she conveyed, had sued her for removing it. A careful scrutiny of the cases cited on behalf of the defendants shows that there is absolutely no authority for their contention in a case like this. If at the time of the conveyance of Mrs. Clough the barn had been personal property in the ownership of some other person, and the grantees had been notified of that fact, the title to it would not have passed by the successive conveyances. If this barn had been placed upon the lot by some third person with the consent of the owner, and with the understanding that such third person could at any time remove it, it would have remained personal property, and would not have passed to a purchaser under any form of conveyance, providing such purchaser had notice of the fact. But where the land and the buildings thereon belong to the same person, then the buildings are a part of the real estate, and pass with it upon any conveyance thereof. In such a case the grantor can retain title to the buildings only by some reservation in the deed, or by some agreement in writing which will answer the requirements of the Statute of Frauds. Any other rule would be exceedingly dangerous, and would enable a grantor, in derogation of his grant, upon oral evidence to reserve buildings and trees and other portions of his real estate, and thus, perhaps, defeat the main purpose of the grant. For these views the case of *Noble* v. *Bosworth*, 19 Pick. 314, is a very precise authority.

*We are therefore of opinion that the judgment should be reversed,* and a new trial granted, costs to abide event.

All concur.

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## FLORIDA SUPREME COURT.

Noble A. HULL, *Plff. in Err.*,
*v.*
STATE of Florida, *ex rel.* John F. ROLLINS.

(.....Fla.....)

**The right of a purchaser other than a state or some governmental agency acting as such, at a sale of land for taxes** under a statute which provides that the purchaser or his assignee shall have a conveyance of the land, unless the land shall be redeemed within one year next succeeding the sale, is a contract right; and a statute, passed subsequent to such sale, which proposes to extend the period allowed by the former Act for redeeming the land from the sale, is a violation of the contract, and of no effect as to such purchaser or his assignee.

(May 21, 1892.)

ERROR to the Circuit Court for Duval County to review a judgment in favor of relator, in a proceeding by mandamus to compel the issuance of a tax-deed. *Affirmed.*

The facts are stated in the opinion.

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

NOTE.—The full and convincing discussion in the above opinion of the authorities on the question involved makes the case an eminently satisfactory one and leaves no need of annotation.

16 L. R. A.

*Mr.* **William B. Lamar,** *Atty-Gen.*, for plaintiff in error.

*Mr.* **William B. Owen** for defendant in error.

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

The 54th section of the General Revenue Act, approved June 13, 1887, chapter 3681, Laws of Florida, authorized any person claiming land sold for taxes, or any creditor of any such person, to redeem the land, on the terms and in the manner therein stated, "within one year next succeeding the sale:" and the 57th section of the same statute enacted that on the presentation of the certificate of sale to the clerk of the circuit court or his deputy, "after the expiration of time provided by law in this Act for the redemption of land sold as aforesaid, unless the same have been redeemed, he shall execute to the purchaser or his heirs or assigns a deed of the land therein described, unless it shall be shown that the taxes for that year have been paid before the sale."

In the case before us J. C. Greeley bought at a tax-sale made by D. P. Smith, as tax collector of Duval county, on the fifth day of August, 1890, the land mentioned in the proceedings, the same having been sold for the collection of unpaid state and county taxes assessed for the year 1889. Smith, as such collector, issued to Greeley the usual

See also 24 L. R. A. 284; 46 L. R. A. 860.

certificate of sale, bearing date August 5, 1890, and afterwards Greeley assigned the certificate to Rollins, who, on the tenth day of November, 1891, presented the certificate to the plaintiff in error, clerk of the circuit court of Duval county, and demanded that he should execute and deliver to him a tax-deed for the land in accordance with law, he at the time tendering to the clerk his lawful fee for such deed. The clerk refused to issue the deed, and thereupon Rollins applied to the judge of the fourth circuit for a writ of mandamus to compel him to issue it.

The provisions of the 7th and 8th sections of a statute approved June 10, 1891, and entitled "An Act to Provide for Certifying Lands to the Comptroller, upon Which Taxes have not been Paid for the Redemption thereof, and for the Forfeiture and Sale of Land not Redeemed," chapter 4011 of the statutes, are the sole defense made by the clerk to the writ of mandamus issued by the judge.

The effect of preceding sections of this statute is: That after the first day of January, 1892, there should be no sales of lands for either state or county taxes; and that the tax collectors of the several counties should open their books for the collection of taxes on the first Monday in November, 1891, and close them on the first Monday in April, 1892, and do likewise for each succeeding year; and when they shall have closed their books "as now or herein provided," it shall not be lawful for them to receive further moneys remaining due for taxes on land. All lands upon which taxes have not been paid are then to be certified to the comptroller, and clerks of the circuit court, and the comptroller is required to make publication within one year of all lands so certified to him, except such as may have been redeemed before such publication or are not subject to taxation. Redemption in the offices of the comptroller and clerks of the circuit court is then provided for, and the state's title to all lands not redeemed at the expiration of two years from such certification becomes absolute, and the lands are to be placed on sale by the state, subject, however, to the right of redemption at any time after the expiration of the two years from the certification, if the land has not been sold by the state.

The 7th and 8th sections are as follows: "Sec. 7. No deeds, as now provided by law, shall issue upon any tax certificates now outstanding, for two years from the passage of this Act; and any person or persons whose lands may have heretofore been sold for taxes, and to which tax-deeds shall not have been issued at the time of the passage of this Act shall, at any time within two years from the passage of this Act, have the right to redeem said lands by taking the steps now provided by law for the redemption of lands from tax sales.

"Sec. 8. Tax deeds to all lands upon which tax certificates may be now outstanding, and which shall not have been redeemed, as provided in section 7, shall, at the expiration of two years from the passage of this Act, issue as provided by law at the time of the passage of this Act."

The 9th section provides for the grading and pricing of all lands to which the state may acquire title under the Act; and the 10th section, for the sale of the same and the deed of conveyance of those sold. The 11th section repeals all laws and parts of laws in so far as they may be in conflict with the Act; and the 12th section is that the Act "shall be construed in connection with the General Revenue Law;" such a statute, chapter 4010, having been passed at the same session of the Legislature and approved on the same day.

The question presented for our decision is the validity of the Act of 1891, chapter 4011, in so far as it proposes to extend the time for redemption of the purchase made by Greeley at the tax sale of August 5, 1890. It is contended by the relator that the statute is, both as to himself and to Greeley, unconstitutional and void for the reason that it violates the contract of the sale.

The rights of Greeley and his assignee are contractual and not, as in *Essex Public Road Board* v. *Skinkle*, 140 U. S. 334, 35 L. ed. 446, a matter of mere public regulation or policy, nor a mere matter of law. Greeley's rights arose in a contract of bargain and sale. The land was offered for sale by the state, through its official agent, the tax collector of Duval county, under a statute, the validity of which is not impeached, and a compliance with whose essential provisions as to assessment and sale is not questioned, even if it be that the appellant could raise both or either of such questions in this proceeding. The land was offered for sale under the terms and conditions prescribed by the Act of 1887, (chapter 3681,) and one of these was that he should have a deed of conveyance of the land unless the same should be redeemed within one year next succeeding the sale, by making the payments prescribed. Greeley, on this offer being made at public outcry, bid for the land, and his bid was accepted, and he having paid the amount by law, the formal certificate evidencing the sale to him, and stating that he would be entitled to a deed, if the land should not be redeemed within a year, was issued to him. The entry into the agreement was the act of the parties. The state offered the land for sale, Greeley voluntarily made a lawful bid, and the bid was accepted and then complied with. It was a contract between the state and Greeley, and its terms were embodied in the law then in force. *State* v. *Foley*, 30 Minn. 350. The terms of the contract, in so far as the rights of the purchaser, and the duties or obligations of the state are concerned, are to be found in the law authorizing the sale, or under which it was made. "But," says *Judge* Taney, speaking for the Supreme Court of the United States, in *Bronson* v. *Kinzie*, 42 U. S. 1 How. 311, 315, 11 L. ed. 143, 144, "the mortgage given to secure the debt was made in Illinois for real property situated in that state, and the rights which the mortgagee acquired in the premises depended upon the laws of that state. In other words,

the existing laws of Illinois created and defined the legal and equitable obligations of the mortgage contract;" and in *Cargill* v. *Power*, 1 Mich. 369, the decision was that the law in existence at the time a mortgage was executed and delivered was a part of the contract.

The obligation of a contract consists, observes the Supreme Court of the United States, in its binding force upon the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts and forming a part of them as a measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. *McCracken* v. *Hayward*, 43 U. S. 2 How. 608, 11 L. ed. 397.

In the case of the sale of land for taxes, which can be authorized only by the state, and to which the right of redemption is a customary, if not inseparable, feature, defining, if not limiting, the rights of the purchaser and continuing those of the defaulting owner, it is to the law existing at the time of the sale that one reasonably must, and to it only that one naturally would, look to ascertain the period of redemption and the rights of the purchaser as to title and possession. The right of redemption from a tax sale is governed by the law in force at the date of the sale. *Merrill* v. *Dearing*, 32 Minn. 479. That the obligation of a contract to which the state is a party is protected from violation by the state, is settled law. Cooley, Const. Lim. *274, 275, and *note 2*; *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162; *Davis* v. *Gray*, 83 U. S. 16 Wall. 203, 21 L. ed. 447.

That the extension of the time for redemption prescribed by the Act of 1887—one year next after the sale—to two years from the passage of the Act of 1891, or, in other words, from a day in August, 1891, to one in June, 1893, is a material impairment of essential rights guaranteed to Greeley by the contract of sale, and a positive diminution of the duty imposed by the contract upon the state, seems to our minds undeniable in the light of natural justice and common reason. By the contract right to a deed it was intended and implied that upon obtaining the deed he should have the immediate right to the ownership and exclusive possession and use of the land, with all the beneficial incidents of such ownership. This right to have a deed after the fifth day of August, 1891, and the rights incident thereto, were obligations of the contract, and to postpone against the will of the purchaser, or of his assignee, the enjoyment of such rights for even a day, or the shortest period, to say nothing of a period of nearly two years, and this too for the purpose of offering to the owner, or a creditor, during the time the privilege of redeeming, if he shall see fit to exercise it, is a vital and patent impairment of such obligation. This view is fully sustained by satisfactory authority. *Judge* Cooley, in his Constitutional Limitations, *291, expresses himself as follows: "So a law is void which extends the time for the redemption of lands sold on execution or for delinquent taxes after the sales have been made; for in such a case the contract with the purchaser, and for which he has paid his money, is that he shall have title at the time then provided by law; and to extend the time for redemption is to alter the substance of the contract as much as would be the extension of the time for the payment of a promissory note." And the same author, in his work on Taxation, says, that "if the time to redeem has already expired before the passage of the new law, it is manifest such law can have no effect upon the sale; that, the title having become absolute, the Legislature can no more create rights in the land in favor of the former owner than it can in favor of any other person; but if the time for redemption has not expired, and redemption is still open to the owner, the want of power is not so entirely beyond dispute." Observing that in one case, *Gault's Appeal*, 33 Pa. 94, it has been held that the time for redemption might be extended from one to two years, its reasoning being based on the liberal construction which should be put upon redemption laws, he still holds that the decisions to the contrary are based on reasons which are conclusive. "They," he says, "plant themselves upon the principle that the obligation of the contract is inviolable. Now the purchase at a tax sale is clearly a contract. It is made under the law as it then exists, and upon the terms prescribed by the law. No subsequent statute can import new terms into the contract, or add to those before expressed. If it could be changed in one particular, it could be in all; if subject to legislative control at all, it is wholly at the legislative mercy." Cooley, Taxn. 2d ed. pp. 544, 545.

In *Robinson* v. *Howe*, 13 Wis. 341, the decision was that where land has been sold for taxes under a law which provided that the owner might redeem it within a specified time after the sale, it is not in the power of the Legislature by a subsequent Act, although passed before the expiration of that time, to extend the privilege of redemption for a longer period; that to extend it would impair the obligation of the contract; and that an Act proposing to extend the time of redemption does not affect the rights of an assignee of a tax certificate issued before the passage of the Act, although the assignment was made and the tax-deed was executed after the passage of the Extending Act and in the form which that Act prescribed.

In *State* v. *McDonald*, 26 Minn. 145, land was bought in by the state at a tax sale, and the comptroller, pursuant to the terms of the law under which the sale was made, sold and assigned the certificate of sale. After this assignment was made, the Legislature passed an Act requiring every person holding a tax certificate to present the same to the county auditor at least ninety days be-

fore the expiration of the time to redeem, and the auditor to notify the person in whose name the land was assessed of the time when the period of redemption would expire. Hitchings, the assignee of the certificate, did not comply with this Act, and the relator, the administrator of the owner of the land, claimed, as a consequence of this omission, the right to redeem. It was held that legislation could not by any Act subsequent to the assignment, impair to any extent the right acquired by the assignee to the fee simple of the land subject to the redemption provisions of the law under which the sale was made, and that the subsequent Act could not, without violating the Constitution, be applied to a case where the right under the sale had vested in any person other than the state prior to its passage. The doctrine announced in the case of *Merrill* v. *Dearing*, 32 Minn. 479, is that the period of redemption can neither be shortened nor extended by legislation subsequent to the sale.

In *Forqueran* v. *Donnally*, 7 W. Va. 114, the decision was that a purchaser of a part of a tract of land at a sheriff's delinquent tax sale made in 1860, acquired by the purchase payment of the purchase money and delivery to the purchaser of the sheriff's receipt therefor, the right, if the land was not redeemed, in the manner prescribed by a designated section of the Virginia Code, within two years from the sale, to obtain a deed in the mode and manner prescribed by other sections, with the further privilege to the owner of redeeming after the expiration of one year from such two years if no deed had been made to the purchaser; that the right so acquired grew directly out of the contract of sale made in pursuance of the law under which it was made; that the right was an equitable right or interest entitled, on the failure to redeem, to ripen into a full legal title, and was secured by the provision of the Constitution securing contracts against violations by legislation.

In *Dikeman* v. *Dikeman*, 11 Paige, 484, 5 L. ed. 207, it was held that where lands have been sold for taxes or assessments during the existence of a law which entitled the purchaser to an absolute deed or to a lease for a limited term, in case the premises were not redeemed within a specified time, it is not competent for the Legislature to extend the time for redemption, and thus to deprive the purchaser of the right to the possession and enjoyment of the premises without providing an adequate compensation to the purchaser for his loss of the use of the premises during such extension. "When," says *Chancellor* Walworth in this case, "Storms became the purchaser of the premises in question, therefore, if these assessments were valid and the sale regular, his contract with the corporation, under the sanction of the law of the state, entitled him to an absolute lease of the premises at the end of the two years, and to the possession and use of the same for the full term mentioned in his certificate of sale; in case the owners of the land, or some person for them, should not redeem the same within two years, as required by the laws then in force. The question then, which arises under the Act of the 25th of May, 1841, is whether it was competent for the Legislature to extend the time for redemption, for six months at least, beyond the two years; and thus to deprive the purchaser of the possession and use of the premises for a part of the term which he had purchased therein, without any compensation whatever. It is true the 5th section of the Act requires an additional percentage to be paid, in case the owners shall elect to redeem within six months after the service of notice upon the occupant. But such owners are under no obligations to redeem. And there is nothing in the Act requiring them to pay the purchaser the rent of the land, or any interest upon the purchase money, during the time he is kept out of possession, where they neglect or refuse to redeem the premises within the six months. It is perfectly evident, therefore, that the effect of such a law upon the rights of a prior purchaser, who had only purchased a term of one year in the land, would be to deprive him of the half of the value of his purchase, in case the land should not be redeemed at the end of six months. . . . But in deciding upon the constitutionality of a law which is general, and which in its operation may totally destroy the vested rights of other persons, I am not at liberty to declare the law to be constitutional, merely because the injury to one of the parties in the particular case under consideration is comparatively small. For if the law is constitutional in reference to this case it is also constitutional in reference to the purchase of a term of two or three years only; where the purchaser would probably lose the entire benefit of his purchase, and the whole amount paid for the term, by the expiration of such term before the termination of the chancery suit."

We do not understand *Chancellor* Walworth to decide that it would be competent for the Legislature to extend the time for redemption against a purchase made before the passage of the Extending Law, even if such law provided just compensation, but that he was merely pronouncing judgment upon the case before him, including that of the absence from the statute of the specified provision for interest and rental. We fail to perceive the principle upon which the vested right acquired in the property through the contract of purchase could be taken away from one private person and vested in another for his individual use or private purposes, even upon terms of the fullest compensation.

In addition to these tax-sale decisions there are others of convincing analogy. In *Bronson* v. *Kinzie*, *supra*, a mortgage contained a power to a creditor to sell on breach of the condition, and thereby pay the debt. This power when given was valid under the laws of the state, and it was held that laws subsequently passed, giving the mortgagor twelve months to redeem the property from the purchaser at such sale, and prohibiting the sale of the property for less than two thirds of its appraised value, so altered the remedy of the creditor as to impair the obligation of the

contract, and hence were void as to such mortgage and a sale and a purchase thereunder. See also *McCracken* v. *Hayward*, *supra*. *Greenfield* v. *Dorris*, 1 Sneed, 548, adjudged unconstitutional and void as to sales under prior deeds of trust, a statute which provided that "in all sales of real estate thereafter to be made under execution or deed of trust, which by existing laws is subject to redemption, if the debtor is permitted by the purchaser or his assignee to remain in possession, he shall not be liable for rent from the date of the sale to the time of redemption; and if the purchaser or assignee shall take possession under his purchase, upon the redemption by the debtor, he shall be entitled to a credit for the fair rent of the premises during the time they were in possession of the purchaser." *Carroll* v. *Rossiter*, 10 Minn. 174, is a case where, in 1858, and where only one year was allowed to a mortgagor to redeem from a mortgage sale, the plaintiff's grantor mortgaged to the defendant, and in 1861, when a mortgagor was by law allowed three years to redeem from such a sale, the mortgage was foreclosed by advertisement. The sheriff who made the sale gave the mortgagee, who was the purchaser, a certificate stating that the purchaser would be entitled to a conveyance in three years from the date of sale. The court held that right of redemption was governed by the law in force when the mortgage was executed, and that the certificate, nor its acceptance, did not affect the rights of the parties. See also *Goenen* v. *Schroeder*, 8 Minn. 387.

In *Hillebert* v. *Porter*, 28 Minn. 496, it was held that an Act of 1878, so far as it applied to mortgages executed prior to its passage and required to be paid, for redemption from sales under the powers in such mortgages, a greater rate of interest than that required to be paid on such redemption by the laws in force at the time of the execution of such mortgages, impairs their obligation and is void. It is proper to note here a remark in the opinion of the court in this case as to certain earlier decisions in that state which might be relied on as conflicting with our views: "*Stone* v. *Bassett*, 4 Minn. 298, was upon a sale under a decree in an action to foreclose, and the court held the statute regulating redemptions from sales under decrees in force at the time of the sale controlled the right of redemption. . . . The distinction in respect to rights of redemption between sales under decrees and sales under powers are more fully and clearly made by the opinions in *Heyward* v. *Judd*, 4 Minn. 483. . . . The decision was followed—not because it was approved, but upon the rule of *stare decisis*—twice; in *Berthold* v. *Holman*, 12 Minn. 335, 93 Am. Dec. 233, and *Berthold* v. *Fox*, 13 Minn. 501, 97 Am. Dec. 243. It is impossible that any property rights now depend on that decision, and for that reason we do not hesitate to express our disapproval of it."

In *Gault's Appeal*, *supra*, which *Judge* Cooley refers to in his work on Taxation, as one sustaining the power of the Legislature to extend by subsequent legislation, the period of redemption, the passage of the Extending Act intervened the sale and the execution and acknowledgment of the deed. The sale was made by the sheriff under a *levari facias* issuing out of a court in which the judgment had been entered for a municipal paving claim, and it was held that until the deed was made and delivered by the sheriff the sale—which was regarded to all intents as a judicial sale—was liable to be set aside by the court issuing the process, and to which it was returnable and in which the deed was to be recorded: and that so long as the sale was *in fieri*, it could not be called a perfected and completed sale. The court recognizing the rule that the obligation of no contract shall be impaired, whether it be for much or little, yet holds, even conceding there was a contract within the meaning of the Constitution, that the several Acts under consideration constituted a system of remedies for enforcing the taxation power and that the Legislature, whose power to regulate taxation was absolute and exclusive, and extended to seizing and selling to the highest bidder the citizen's property without notice to him, could, in the exercise of this power, and as a part and parcel of such system, pass the Redeeming Act as one of the necessary means to the constitutional end of enforcing the payment of taxes; that the several statutes were the legislative mode of attaining that object, and one of them was as constitutional as the other.

The reasoning of this decision is not satisfactory to our minds. If it be that the judicial feature of the statutory system should distinguish from those in which there is no such feature, then it is only necessary to say that this feature is not a characteristic of our system.

Our conclusion is that the contract rights acquired by Greeley under his purchase would be violated by the extension of the redemption period proposed by the subsequent statute, and that it is not within the power of the Legislature to thus impair them, either as against Greeley or against his assignee, whether such assignment was made before or after the extending statute. This is not a case in which the state was the purchaser at the tax sale and held the certificate at the time of the enactment of the extending statute, and subsequently transferred it. The rule, or the effect of the Statute of 1891, in such a case, or where any governmental agency, as such, holds the certificate at the passage of the statute, is not before us for adjudication. *Tippecanoe County Comrs.* v. *Lucas*, 93 U. S. 108, 23 L. ed. 822; *Lucas* v. *Tippecanoe County Comrs.* 44 Ind. 524; *Essex Public Road Board* v. *Skinkle*, 140 U. S. 334, 35 L. ed. 446.

*The judgment is affirmed.*

Dave LOVETT, *Plff. in Err.*,
*v.*
STATE OF FLORIDA.

(.....Fla.....)

***1. The supreme court entered judgment, on writ of error, reversing a judgment of the circuit court in a capital case** and issued its remittitur which was filed in the latter court. Subsequently during the same term of the supreme court it was shown that the transcript upon which it had acted was, on account of a mistake in making such transcript, an entire misrepresentation of the real record of the circuit court, as to the point upon which the judgment of reversal was based, and a motion was made in behalf of the state by the attorney-general, who had relied on the transcript as truthful, and had not participated in the trial in the circuit court, to vacate the entry of the judgment of reversal, and restore the case to the docket of the supreme court. *Held*, that the supreme court had not lost jurisdiction of the cause, and its entry of judgment should be vacated, and the cause recalled and restored to its docket.

**2. The counsel of appellant party is charged with the duty of bringing to the appellate court a correct transcript of the record** of the inferior court, and no advantage can be gained from any action of the former court upon a false transcript, however ignorant the appellant party or his counsel may be of the real status of the record of the lower court, or of the incorrectness of the transcript, or however free from blame the clerk may have been as to the mistakes in the transcript.

(June 9, 1892.)

MOTION by the State for the vacation of a judgment heretofore rendered by this court reversing a judgment of conviction rendered by the Circuit Court for Duval County in a capital case, and for a rehearing upon the writ of error in the case on the ground of omissions from the transcript. *Motion granted.*

The case sufficiently appears in the opinion.

*Mr.* **William B. Lamar**, *Atty-Gen.*, for the motion.

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

Upon the filing of the former opinion in this cause judgment was entered reversing the judgment of the circuit court of Duval county and remanding the case for a new trial; and our mandate issued, directed to the judge of that court, requiring that such further proceedings be had in the cause as, according to right and justice, the judgment of this court and the laws of the state, ought to be had, and this mandate was filed in the office of the clerk of the circuit court on the 18th day of April. On the 31st day of April, the attorney-general moved for a vacation of our judgment, and for a rehearing of the cause, for the reason that what purports to be a transcript of the record of the circuit court on file in this court, and on which we have acted in rendering the preceding decision, is not a true and correct transcript of such record, and that the alleged defects of record upon which the judgment of conviction was reversed by us do not exist, but that the contrary is true; and suggesting a diminution of the record and moving for a certiorari for a return of the entries showing the presence of the accused at the time of the trial, and his arraignment and plea of not guilty. In support of the motion the attorney-general presented and filed a duly certified transcript from the record of the circuit court of Duval county, under the hand and seal of the clerk of that court, which, after showing the presentment of the indictment for murder in the first degree against Lovett in open court, on the 20th day of November, 1891, at the fall term, exhibits also the following entries, of the date indicated at the same term:

November 28, 1891.

State of Florida } Arraignment. Plea of not
*v.* } guilty.
Dave Lovett. }

Comes T. A. MacDonell, who prosecutes for the State of Florida, and the defendant, Dave Lovett, in his own proper person, and being solemnly arraigned, pleaded not guilty to the indictment, whereupon he was remanded to the custody of the sheriff to await the further action of the court. . . .

December 10, 1891.

State of Florida }
*v.* }
Dave Lovett. }

Comes now T. A. MacDonell, who prosecutes for the State of Florida, and the defendant being present at the bar, attended by his counsel, [then follow, in the same entry, two orders: one for a special venire for twelve jurors, the regular venire having been exhausted, and after a recital that the special venire was exhausted, another for a venire for ten jurors].

The entry concludes as follows: "The three jurors necessary to complete the panel for the trial of this cause having been accepted, the following named jurors [their names being stated, and there being twelve of them] were accepted and duly sworn according to law for the trial of this cause. And the evidence having been submitted to the jury aforesaid, and having heard the argument of counsel and charge of the court, and returning into court in due form of law, upon their oaths do say: 'We, the jury, find the prisoner guilty as charged in the indictment. J. C. Andreu, foreman.' It is thereupon considered by the court that the defendant be remanded to the custody of the sheriff, to await the further action of the court."

Then follows the entry of sentence on December 14, in the form shown by the statement preceding the former opinion.

Upon the presentation of the motion we re-

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

NOTE.—On the interesting and important question as to loss of the jurisdiction of an appellate court by issuing a remittitur which is filed in the lower court, the above opinion presents an array of authorities, and a discussion of them which are of very great value, and no annotation on the subject will be attempted

called our mandate, and caused notice of the hearing of the motion to be given to the accused and to the attorney who represented him both in the circuit court and in this court. This attorney, disclaiming any representation of the accused, as his attorney in this proceeding, has volunteered to file, as *amicus curiæ*, a statement, with authorities, upon the motion, which authorities are reviewed, with others, in the subsequent pages of this opinion.

It is apparent that the state's motion is made during the term of court at which the judgment which it is sought to have revoked was pronounced and entered, and it is a general rule of the common law, that courts have power to either modify or vacate their judgments and decrees during the term at which they were rendered, or while they are *in fieri*. Freem. Judgm. 4th ed. § 90; *Bronson* v. *Schulten*, 104 U. S. 410, 26 L. ed. 797. If our mandate had not reached the circuit court before the motion was made, and we had recalled it before it was filed with or received by the clerk, the question before us would be of easier solution (*Burkle* v. *Luce*, 1 N. Y. 239; *Hosack* v. *Rogers*, 7 Paige, 108, 4 L. ed. 85; *Grogan* v. *Ruckle*, 1 Cal. 193); still in our judgment the consummation of the issue of the mandate, by its receipt by the court whose judgment has been under review, is not, under the circumstances of this case, a termination of our jurisdiction. It is true we find in some adjudications a statement, in general terms, that this juncture concludes the jurisdiction of the appellate court. In *Martin* v. *Wilson*, 1 N. Y. 240, a motion was made in the court of appeals to open a judgment of affirmance taken by default at a former term, and "the court held that it lost its jurisdiction of the cause when the remittitur was filed in the court below, and on that ground denied the motion;" and in *Grogan* v. *Ruckle*, *supra*, the doctrine announced was that the court may, after its judgment has been pronounced, direct a rehearing at any time before the remittitur has been sent to and filed in the clerk's office of the lower court, but after that has been done the jurisdiction of the appellate court to order a rehearing ceases; but the real fact in the case was that the remittitur was improperly sent down after the entry, at the same term, of the order for a rehearing, and it was held that so doing did not deprive the court of its jurisdiction. Again in *Leese* v. *Clark*, 20 Cal. 388, it is said that the supreme court has no appellate jurisdiction over its own judgments, and cannot review or modify them after the case has once passed, by the issuance of the remittitur, from its control, nor recall the cause and reverse its decision; but the court was speaking of the binding effect of a former decision in the same cause. *Martin* v. *Hunter*, 14 U. S. 1 Wheat. 355, 4 L. ed. 110. The same doctrine was enunciated in *Blanc* v. *Bowman*, 22 Cal. 23, where a motion was made to set aside an order, made at the same term, affirming a judgment, the ground of the motion being that one of the judges who participated in the decision had not heard the oral argument of the cause. In the decision of this motion, the court, after alluding to the reason of the rule of the court providing that remittitur shall not issue for ten days after judgment, as being to allow time for applications for rehearings or to modify or set aside the judgment, observes: No excuse is shown why this application was not made within the ten days allowed by the rules of this court, or before the court had lost control of the cause by filing the remittitur in the court below."

The facts of the preceding cases had not called for, it would seem, even an investigation, as to the power of the court to recall the cause under any circumstances after the mandate has been filed in the lower court.

In *Rowland* v. *Kreyenhagen*, 24 Cal. 52, appeals in two cases were dismissed, at the October Term, 1863, on motion of appellee, because transcripts had not been filed. The rules of the court provided that if the appeal transcript was not filed within the time prescribed, the appeal might be dismissed *ex parte* during the first week of the term, and that such dismissal should be final, and a bar to any other appeal in the same case, unless the appeal should be restored during the same term upon good cause shown and upon notice. An order, made as the court was about to adjourn in October, provided that all motions to reinstate causes dismissed under the rules referred to might be made on the first Tuesday in November following, and directed that remittiturs should not issue till after that time. About the last of November, no motion to reinstate having been made, remittiturs were issued in the two causes mentioned, and filed in the lower courts and judgments were entered thereon and executions issued. On December 20, two justices upon representations made by affidavits, signed an order directing a return of the remittiturs, and that the attorneys for respondents show cause before the supreme court why the orders of dismissal should not be vacated and the causes reinstated on the calendar, on the ground that the orders of dismissal were obtained upon false suggestion and mistake, and improvidently granted, and staying further proceedings in the lower court, and the court vacated the dismissals and reinstated the causes. A petition for rehearing was granted. In delivering the opinion of the court and after holding that the dismissal of the appeal, if not reinstated during the term, was, under the above rules, an affirmance of the judgment appealed from as conclusive and binding upon the parties and the court as a direct judgment of affirmance, and after referring to cases mentioned above, and recognizing the general rule to be that stated by them, it is said that this general rule rests upon the supposition that all the proceedings have been regular and that no fraud or imposition has been practiced upon the court or the opposite party; and that if it appears that such has been the case, the court will assert its jurisdiction and recall the case; that against judgments improvidently granted, upon a false suggestion, or under a mistake as to the facts of the case, the court will afford relief after the adjournment of the term, and, if necessary, recall the remittitur and stay proceedings in the court below. That this is not done upon the principle of resumption of jurisdiction, but upon the ground that the jurisdiction of the court has not been devested by an irregular or improvident order; that in contemplation of law an order ob-

tained upon a false suggestion is not the order of the court, and may be treated as a nullity; if, under color of such an order, the proceedings have in part (fact) found their way back to the court below, yet in law they are considered as still pending in the appellate court, and that court may take such steps as may be necessary to make the fact and the law agree. The evidence was held, however, not to show that the dismissals were improvidently or irregularly granted, and the orders recalling the remittiturs were vacated, and a reinstatement of the appeals denied.

In *Vance* v. *Pena*, 36 Cal. 328, an order denying a rehearing was entered, through the mistake of the clerk, when in fact the court had granted a rehearing, and the court adjourned and the remittitur was sent down. At the next term a motion was made to recall the remittitur and reinstate the cause and vacate the order mistakenly entered, and for the entry of the order really announced. In affirming the doctrine of *Rowland* v. *Kreyenhagen*, it is said: "This must be so or intolerable injustice might result. The principle here announced is broad enough to cover the present case. There has been a false order entered by mistake, . . . and upon this false order the remittitur issued. A mistake of this kind stands upon the same principle as a fraud, for it operates as a fraud upon the rights of the party injured by it." The motion was granted. See also *Swain* v. *Naglee*, 19 Cal. 127.

In *Lightstone* v. *Laurencel*, 2 Cal. 106, a judgment of affirmance was entered by the supreme court on motion of the appellee, the appellant not appearing; and at the subsequent term appellant moved to set aside the judgment and restore the cause to the calendar, for the reason that no notice of the argument had been served on him, and the court sustained the motion.

*Legg* v. *Overbagh*, 4 Wend. 188, 21 Am. Dec. 115, was a case where the decree appealed from was affirmed for default of counsel of appellants to appear and argue the appeal at the time it was duly set down and noticed for argument, such absence of counsel being attributable to sickness. The remittitur was regularly issued and filed in the lower court, and the court for the correction of errors held, on a motion to reinstate, that it had lost jurisdiction of the cause, and had no power to vacate its decree of affirmance; but the doctrine that jurisdiction is not lost, and the case may be recalled, where either the mandate was issued irregularly, or the order or judgment of the appellate court had been irregularly or improvidently obtained, or its judgment has been misconceived and entered erroneously by its clerk, is recognized in the opinions. "When issued irregularly," says Savage, *Ch. J.*, "in contemplation of law the proceedings remain here, and the order or decree made will of course be suspended; the remittitur issued not being considered the act of the court."

The same court previously, in *Waters* v. *Travis*, 8 Johns. 566, where a decree by default for not answering the petition of appeal had been entered reversing the decree appealed from, vacated its decree, after the record had been remitted to the lower court, and for the reason that the required notice to answer the petition had not been served on the appellee; and in *Chamberlain* v. *Fitch*, 2 Cow. 243, it set aside a decree of reversal obtained, on default, in violation of verbal stipulations between counsel, and directed the papers in the cause to be returned by the court of chancery, to which they had been remitted.

In the case of *The Palmyra*, 25 U. S. 12 Wheat. 1, 6 L. ed. 531, there had been a decree in the district court acquitting the vessel and denying any damages for her capture or detention, and both parties had appealed to the circuit court, which court affirmed the acquittal of the vessel, but reversed so much of the decree appealed from as denied damages, and then proceeded to award damages to the complainant for a stated sum. From this decree the United States and the captors appealed to the supreme court, and the cause coming on to be heard, that court, upon an inspection of the record, dismissed the appeal because it did not appear that there has been an ascertainment of the amount of the damages, the court being of opinion that in the absence of a decree ascertaining the amount of damages there was no "final decree," within the meaning of the Act of Congress. At a subsequent term of the court it was made to appear that there had been a final award of damages, and that the error was a mere misprision of the clerk of the circuit court in transmitting an imperfect record, and the court, on motion of the appellants, ordered the cause to be reinstated on the docket. See also *Vicars* v. *Haydon*, 2 Cowp. 841.

In the case of *White* v. *Tommey*, 3 H. L. Cas. 49, there was a final judgment in the House of Lords in the year 1850, reversing a decree rendered by the Irish court of chancery in January, 1835, from which decree a former application to appeal had been refused by the house in 1839; and after such reversal, and at the same sitting of the house of lords there was a petition for rehearing, the ground thereof being that the respondents (petitioners) had been taken by surprise, and had not been heard. The judgment upon the petition was that respondents' failure to be heard in the house of lords was their own fault, and that after a final judgment of the house had been pronounced there could not be a rehearing, nor could its judgment be reversed, except by Act of parliament. Subsequently, however, in the same case in the year 1853 (4 H. L. Cas. 313), it was shown by the respondents, on a further petition, that the decree of January, 1835, had been before the house on an appeal taken in 1846, from an order sustaining a demurrer to a bill of review, calling in question the decree of 1835, and had then been specially complained of in the petition of appeal, and that, on such appeal, there had been in July, 1847, a general dismissal of the appeal, and also a special affirmance of the order on the demurrer, but no special mention of the decree of 1835 had been made in the order of dismissal. In the petition of appeal, upon which the decree of reversal was made in 1850, it was stated that "it appeared by the order of July, 1847, that the decree of January, 1835, had not been complained of, and that their lordships had not made any declaration with respect to it," and

that it "had never been adjudicated upon by their lordships." There had been no appearance by respondents since the refusal of an allowance of appeal in 1839, and since then appellant's proceedings had been *ex parte*. The decision of the house of lords in 1853 on the second petition was that the judgment of reversal of 1850 had been obtained by suppression and misrepresentation, and the order allowing the appeal upon which it was rendered, was vacated; and the *Lord Chancellor*, in advising the house of lords, makes the following observations: That the quoted words of the second petition of appeal were "a complete misrepresentation, . . . a fencing or quibbling in a way which your lordships will never permit to any suitor at your bar, . . . it is not in any sense true to say that it appears by the order that it,—the decree of 1835,—was not complained of. All that can be said is that the order is silent about it, if you can treat it as being silent when it dismisses in terms the appeal which did in fact include that decree as a subject-matter of complaint. It appears to me it was a statement well calculated to mislead your lordships. . . . Although in any question decided by this house on appeal the matter is finally settled by the litigant parties, it is always subject to this condition, that if one party has by any misrepresentation,—I will not put it so high as to say by fraud, for I do not wish to use harsh terms, but, if by misrepresentation, inadvertently (if you will) introduced, a party has led the house into an error;—has led it to suppose that something is going on irregularly,—all the commonest principles of justice compel this house, as they must compel any other tribunal, to interfere to prevent its own decisions from being made the machinery for effecting fraud, or the machinery for effecting that which, if not done *per curiam*, would have been a fraud."

Where a case has been heard upon its merits in an appellate court according to its rules of practice, and the judgment of the court has been correctly entered, and the time, if any, allowed by statute or its rules for a rehearing having passed, and, no application for a rehearing having been made, the remittitur issues and is lodged in the lower court, it may well be said that the appellate court has lost its jurisdiction of the cause, and has not power to recall or reconsider it. Under these circumstances it has fairly and duly exercised its appellate functions and exhausted its powers as to the cause. There must be an end of litigation; public policy, as well as the interests of individual litigants, demands it, and the rule just announced is indispensable to such a consummation. There are many such cases: *King* v. *Ruckman*, 22 N. J. Eq. 551; *Putnam* v. *Clark*, 35 N. J. Eq. 145; *Browder* v. *McArthur*, 20 U. S. 7 Wheat. 58, 5 L. ed. 397; *Ex parte Story*, 37 U. S. 12 Pet. 339, 9 L. ed. 1108; *Martin* v. *Hunter*, *supra*; still they are not in conflict with those in which jurisdiction is held not to have been lost, nor do they fail to recognize this fact or the principles upon which the other decisions are founded.

Illustrative of this is *King* v. *Ruckman*, where, at a preceding term, the cause had been argued and decided and the remittitur sent down, and a motion for a rehearing was applied for at a subsequent term. The decision of the court was that after a cause has been heard upon the merits, and the judgment properly entered and the papers remitted to the court below, the court of errors has no further jurisdiction with respect to the case. "It is not pretended," says the opinion, "that the judgment has been taken through deception or mistake, . . ." and, referring to *White* v. *Tommey*, *supra*, as a case in which the final decree had been revoked by the house of lords on the ground that it had been procured by deception, it is said: "In the practice of this court, therefore, it seems clear that an error in a decree or judgment occurring from fraud or mistake will be rectified. . . . I have no doubt that this court has the power at any time to amend its judgment if it is erroneous by reason of a mis entry of the clerk, or by reason of any other mistake, or that such judgment may be set aside and treated as a nullity if it has been procured by fraud or is the result of misapprehension."

The case before us is one in which a judgment of reversal has been rendered, and improvidently, through mistake, and has been obtained upon a false suggestion; our decision of it is the result of misapprehension, and of an imposition upon the court. A false representation of the record of an inferior court has been brought here in the form of a transcript, duly certified as a true representation of the original, and we have exercised appellate jurisdiction upon it, believing that it was a correct representation of that record; or, in other words, of the case as it appears in the lower court, but now it is shown that, instead of speaking the truth, it is a falsification, and that no such case is or has been there for review by us. It is not pretended that the attorney-general had any suspicion of the falsehood. It is not required of him that he shall ordinarily regard the mere features of a transcript upon which questions of the legality of procedure may be raised, as grounds of suspicion of the correctness of the transcript, and, in response to such suspicion, to make inquiry of the clerk before submitting the cause. He does not participate, except upon the written request of the governor, in trials at *nisi prius*, and usually has no source of information except the transcript. It is also immaterial that the counsel for the prisoner is not charged with the duty of seeing that the records of conviction are correctly entered against his client; still where the record has been entered as showing the prisoner's personal presence at the trial, in the manner appearing from the new transcript before us, the prisoner and his attorney are charged with the duty of bringing to the appellate court a correct or truthful transcript of that record (*Horne* v. *Carter*, 20 Fla. 45; *Ormand* v. *Barnard*, 5 Fla. 528; *Bridger* v. *Thrasher*, 22 Fla. 383); and no advantage can be gained from any action of this tribunal upon an untruthful representation of that record, however ignorant the convict or the counsel may be of the real status of the record, or of the incorrectness of the transcript, and however free from blame the clerk may have been in the mistake characterizing his transcript and certificate. It is of no moment that, as is the case here, there has been between

the clerk and the prisoner, or the clerk and the prisoner's counsel, no fraud or collusion, nor suspicion, nor suggestion of either, in the preparation of the transcript, or in the certificate thereof; and that neither the prisoner, nor his attorney, nor any representative of the prisoner, had anything to do with the preparation of the transcript, other than to ask for it; and that the issuance of the remittitur was entirely regular. The fact still remains that a false record has been brought here on behalf of the convict and a reversal has been obtained in his behalf on it, such reversal being based solely upon its false feature; and this fact is not changed, nor its result modified, by the innocence of the prisoner, his counsel, and the attorney-general, but the extent of the imposition, and of the mistake, is only made the greater. To attempt to take any advantage from the judgment thus obtained would, in view of the innocence of the state, be an attempt at fraud upon the state, and we do not see that it would not be an imposition upon the court, and a fraud upon its jurisdiction, however innocent the mistake upon the part of each and every person connected with the cause, or the obtaining or preparing of the transcript. The appellate jurisdiction of this court is to be exercised over the tribunals subject thereto, only in the causes actually decided by them, and as such causes are shown by their records to be (*Pearce* v. *Jordan*, 9 Fla. 526; *Darden* v. *Lines*, 2 Fla. 569; *Price* v. *Sanchez*, 8 Fla. 136; *Jacksonville* v. *Lawson*, 16 Fla. 321; *Irvin* v. *State*, 19 Fla. 872; *Zinn* v. *Dzialynski*, 14 Fla. 43); and it will never permit itself to be misled, by mistake or otherwise, into acting upon any of those tribunals except through the very cause as it may have been decided there and is shown by its records; and when it discovers, as here, that it has been thus misled it will not hesitate to undo the improvident work, however innocent all parties interested may be. The anomalous and mischievous conditions which would arise from a departure from this rule are palpable. The consideration, or reversal, or affirmance, of a judgment or decree upon a misrepresentation of the record of the cause, or upon anything else than the true record of that cause, is entirely outside of the functions or purposes of an appellate court.

This case is, in our judgment, clearly within the rule which preserves our jurisdiction of it. We have been misled into reversing a judgment on a false record, into acting in a cause when that cause, as it really is and only can be acted on by us, has not been before us. In law, the writ of error issued in the cause is, in so far as our exercise of our powers is concerned, still before us, and will be until that cause, as it really is, shall be decided, or the writ dismissed on legal grounds. Ostensibly it has passed from use, but only through the means of a misrepresentation, and by the decision of a case which is not shown by the real record, and does not exist; in the eyes of the law, however, decisions or judgments obtained in this manner are not binding on us.

In coming to the above conclusion we have not been unmindful that the state is the actor in the motion, nor failed to ask ourselves if there is in the fact that the cause is criminal in its character, anything which precludes the Commonwealth from making such a motion. We are aware that this court has decided that the state is not entitled to a writ of error to reverse the judgment of the circuit court quashing an indictment and discharging the accused (*State* v. *Burns*, 18 Fla. 185); and that the current of authority, in the absence of legislative grant to the contrary, is that the state is not entitled to an appeal or writ of error to a judgment of acquittal in a criminal cause, for even the mere purpose of settling questions of law. The provision of our Constitution, that no person shall be twice put in jeopardy for the same offense, (Declaration of Rights, § 8), does not escape our attention, we also know that it is not the practice for the state to apply for a rehearing here in a criminal cause on account of any error of the court; if any such application has ever been made we are not aware of it; and we certainly assume for the purposes of this decision that such an application is not tenable. Still we find nothing in these considerations that seems to preclude the action now being taken by the state. It is not attempted even to review any judgment on account of an error of the court; for no error has been committed by it: the only thing attempted is to set aside that which, though in the form of a judgment, is, because of the circumstances under which it was obtained, in law, not the judgment of the court upon the true case of the plaintiff in error. It is an entry obtained under circumstances of misrepresentation, for which the plaintiff in error and those acting for him must, in so far as our powers and duties are concerned, be held responsible, and on which the law does not contemplate that we should ever act, and on which we would not have acted had we known of the misrepresentation; and for which blame or laches are not imputable to the state. The state's judgment in criminal causes cannot be the subject of review in this manner; they can be brought in review only upon the records of them, and not upon a falsification of such records; and the state is not prohibited by any principle of law known to us from arresting the reversal which has been made of her judgment upon such false representation. She is entitled to require the party seeking relief from such judgments to bring to the appellate court the record of the cause in which it was obtained, for without this, that cause is not before the appellate tribunal for consideration. Any other doctrine than this must result in the frequent consummation of fraud upon the courts, and its constant encouragement.

Our conclusion is, that the judgment of reversal should be vacated and the cause reinstated on our docket. Whether there may not be cases in which a party would be estopped by his conduct, or by that of his counsel, from claiming benefit from a mistake of this character, is not before us for decision. The circumstances of this case exclude any expression on such point.

*The entry of the judgment of reversal heretofore rendered will be vacated*, and the cause recalled and restored to our docket for further proceedings, including an application for a certiorari in accordance with the rule of practice governing in such cases.

## TEXAS SUPREME COURT.

GULF, COLORADO & SANTA FÉ R. CO., *Appt.*,
*v.*
Richard HENRY.

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

**A ticket which is good for a continuous passage only** does not entitle a passenger, who voluntarily takes passage upon a train which he must be held to have known would not convey him to his destination and who leaves that train at an intermediate point, to be carried the remainder of the journey on the train which he ought to have taken in the first instance.

(May 20, 1892

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

The facts are stated in the opinion.

*Mr.* **J. W. Terry,** for appellant:

Even in the absence of any stipulation on the ticket it is good only for a continuous passage, and the passenger is not entitled to disembark from a train upon which he has taken passage at an intermediate point and afterwards resume it again upon another train, but he must inform himself as to what trains run through to his destination and take one of such trains, and hence it was certainly competent for the defendant to contract by stipulation on the ticket that it would only be good for continuous passage, and the plaintiff having traveled on the freight train as far as Brownwood, and disembarked there, and afterwards attempting to resume his journey on a regular passenger train, his ticket was properly refused by the conductor.

Thompson, Carr. 69, 70; Hutchinson, Carr. § 575; *Dietrich* v. *Pennsylvania R. Co.* 71 Pa. 434, 10 Am. Rep. 711; *Stone* v. *Chicago & N. W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458; *McClure* v. *Philadelphia, W. & B. R. Co.* 34 Md. 532, 6 Am. Rep. 345; *Johnson* v. *Concord R. Corp.* 46 N. H. 213, 88 Am. Dec. 199; *Petrie* v. *Pennsylvania R. Co.* 42 N. J. L. 450; *Wyman* v. *Northern Pac. R. Co.* 34 Minn. 210, 22 Am. & Eng. R. R. Cas. 402; *Hatten* v. *Railroad Co.* 39 Ohio St. 375, 13 Am. & Eng. R. R. Cas. 53, and cases cited in *note*, p. 55. See *notes* to *O'Brien* v. *New York Cent. & H. R. R. Co.* 1 Am. & Eng. R. R. Cas. 262; *Auerbach* v. *New York Cent. & H. R. R. Co.* 6 Am. & Eng. R. R. Cas. 337; *Walker* v. *Wabash, St. L. & P. R. Co.* 16 Am. & Eng. R. R. Cas. 386; *Texas & P. R. Co.* v. *McDonald,* 2 Will. C. C. § 163; *Pennington* v. *Philadelphia, W. & B. R. Co.* 62 Md. 95, 18 Am. & Eng. R. R. Cas. 310, and cases cited in *note*, p. 312; *Little Rock & Ft. S. R. Co.* v. *Dean,* 43 Ark. 529, 51 Am. Rep. 584; *Howard* v. *Chicago, St. L. & N. O. R. Co.* 61 Miss. 194; *Pennsylvania Co.* v. *Hine,* 41 Ohio St. 276.

It is competent for a carrier, especially in case of an excursion ticket sold at reduced rates, to limit the time in which the ticket shall be used; and in this case it appears, both from the plaintiff's petition and the evidence, that the time limited for the use of his ticket had expired before he presented it for passage to the conductor of the train on leaving Brownwood, and hence the conductor rightfully refused to receive it for passage.

His ticket being invalid for passage upon its face, both on account of the expiration of the time in which it should have been used and the fact that the plaintiff had broken the condition requiring a continuous passage, he was properly expelled by the conductor, and, under such circumstances, it was not proper or competent for the conductor to hear excuses from the plaintiff for his failure to use the ticket in the proper time and in the proper manner.

*Mosher* v. *St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249, 34 Am. & Eng. R. R. Cas. 339, 17 Fed. Rep. 880, 21 Am. & Eng. R. R. Cas. 283; *Bradshaw* v. *South Boston R. Co.* 135 Mass. 407, 43 Am. Rep. 481, 16 Am. & Eng. R. R. Cas. 386; *Hall* v. *Memphis & C. R. Co.* 9 Fed. Rep. 585, 9 Am. & Eng. R. R. Cas. 348; *Lake Shore & M. S. R. Co.* v. *Pierce,* 47 Mich. 277, 3 Am. & Eng. R. R. Cas. 340; *Yorton* v. *Milwaukee, L. S. & W. R. Co.* 54 Wis. 234, 41 Am. Rep. 23, 6 Am. & Eng. R. R. Cas. 322; *Townsend* v. *New York Cent. & H. R. R. Co.* 56 N. Y. 295; 15 Am. Rep. 419; *Frederick* v. *Marquette, H. & O. R. Co.* 37 Mich. 342, 26 Am. Rep. 531; *Shelton* v. *Lake Shore & M. S. R. Co.* 29 Ohio St. 214; *Downs* v. *New York & N. H. R. Co.* 36 Conn. 287, 4 Am. Rep. 77; *Chicago, B. & Q. R. Co.* v. *Griffin,* 69 Ill. 499.

Nor was the action of any previous conductor in receiving the ticket for passage binding on the conductor who refused plaintiff's ticket.

*Dietrich* v. *Pennsylvania R. Co.* 71 Pa. 434, 10 Am. Rep. 711; *Beebe* v. *Ayres,* 28 Barb. 276; *Johnson* v. *Concord R. Corp.* 46 N. H. 213; *Stone* v. *Chicago & N. W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458; *Keeley* v. *Boston & M. R. Co.* 67 Me. 163, 24 Am. Rep. 19; *Wakefield* v. *South Boston R. Co.* 117 Mass. 544; *Sherman* v. *Chicago & N. W. R. Co.* 40 Iowa, 45; *Thorp* v. *Concord R. Co.* 61 Vt. 378; *Hill* v. *Syracuse, B. & N. Y. R. Co.* 63 N. Y. 101.

*Messrs.* **Powell & Smith,** for appellee:

A passenger is "a person whom a railway, in the performance of its duty as a common carrier, has contracted to carry from one place to another place for a valuable consideration, and whom the railway, in the course of the

NOTE.—For *notes* on expulsion of passenger generally, see South Florida R. Co. v. Rhoads (Fla.) 3 L. R. A. 733; McGowen v. Morgan's L. & T. R. & S. S. Co. (La.) 5 L. R. A. 817; Carsten v. Northern Pac. R. Co. (Minn.) 9 L. R. A. 688.

For conditions in ticket as to the right to ride upon it, see portion of above *note* in McGowen Case, on page 819 of 5 L. R. A., also *note* to Fonseca v. Cunard S. S. Co. (Mass.) 12 L. R. A. 340.

performance of that contract, has received at its station, or under its care."

Patterson, Railway Accident Law, § 210, and cases cited.

The relation of carrier and passenger having been constituted, continues until the journey, expressly or impliedly contracted for, has been concluded, and the passenger has left the railway's premises; thus, one who has been accepted as a passenger is entitled to protection as such while he is in the railway's station, journeying on its line, in transit from one means of conveyance to another provided by the railway, and while he is temporarily absent from the cars at a way station for a proper purpose.

Patterson, Railway Accident Law, § 220; *Clussman* v. *Long Island R. Co.* 73 N. Y. 606; *Jeffersonville, M. & I. R. Co.* v. *Riley*, 39 Ind. 568.

Appellee, on the morning of the 24th day of May, 1888, having been accepted as a passenger upon the proper cars by the agents of appellant, *en route* for the place of destination, specified on said ticket, and having prosecuted his journey as diligently, rapidly, and continuously as he was enabled to do by the means of conveyance furnished him by appellant, under its contract, it was compelled to carry him to the end of his said journey, although the time limited in the ticket may have expired long before said journey had been completed, and if appellant, in the operation of its trains, failed to make proper connections, or failed to run on time, or operated and run its cars, upon which passengers were permitted to be carried, from one intermediate point to another intermediate point, and appellee, a passenger thereon, was retarded in the progress of his journey by reason of such misconnections, delays or unusual short-line runs, it will not be heard to say that appellee's journey was not continuous, and arbitrarily eject him from its cars upon the pretext that the time limited in said ticket, meanwhile, had expired.

*International & G. N. R. Co.* v. *Smith*, 62 Tex. 252; *St. Louis, A. & T. R. Co.* v. *Mackie*, 1 L. R. A. 667, 71 Tex. 491; Patterson, Railway Accident Law, §§ 210-220.

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

Appellee purchased from appellant a round-trip ticket from Ballinger to Austin and return, on May 13, 1888, limited until the expiration of May 24 following, on which he went to Austin by way of Brenham and the Houston & Texas Central Railway. On the morning of May 24, 1888, after having his ticket properly stamped, appellee went by the railway on which he came to Brenham, at which place it was necessary for him to take a train on appellant's road to reach Ballinger. He, however, did not leave Austin in time to make connection with appellant's train that would reach Ballinger on May 24, which left Brenham at 10:35 A. M. on that day, and in consequence of this he remained at Brenham until 11:50 on the night of that day, when he took a train on regular time for Temple, which place he reached at 3:20 on the morning of May 25, and there remained until 10:45 on the same morning, when he boarded a mixed train, which was not going to Ballinger; and when he reached Brownwood, under instructions from the conductor of that train, he left it to wait for the regular train for Ballinger, which he boarded, but on failure to pay fare when demanded he was expelled from the car, and, being without money, had to walk to Ballinger. To have reached Ballinger before the expiration of the time to which his ticket was limited, appellee should have left Austin in time to have taken appellant's train No. 1, leaving Brenham at 10:35 A. M. on May 24, and by that train alone could he make continuous passage from Brenham to Ballinger. The movement of trains on appellant's road is thus stated by appellant's general passenger agent, and there seems to be no controversy as to the correctness of his statement: "May 24 and 25 defendant had trains 1, 3, and 47 between Brenham and Temple, and train 11 between Temple and Ballinger, all allowed to carry passengers. It had also train No. 49, a freight, that was permitted to carry passengers between Temple and Coleman, but between no other points. The schedule time was—No. 1, leave Brenham, 10:35 A. M.; arrive Temple, 2:30 P. M. No 3, leave Brenham 11:50 P. M.; arrive Temple, 3:20 A. M. No. 47, leave Brenham, 1:05 P. M.; arrive Temple, 10 P. M. No. 11, leave Temple, 5:15 P. M.; arrive Ballinger, 12:55 A. M. On May 24 train No. 1 left Brenham 2 minutes late, and arrived at Temple 8 minutes late; train No. 3 left Brenham 5 minutes late, and arrived at Temple 10 minutes late; train 47 left Brenham 12 minutes late, and arrived in Temple 12 minutes late; train No. 11 left Temple 2 hours and 45 minutes late, and arrived at Ballinger 2 hours and 45 minutes late. On May 25, train No. 1 left Brenham on time, and arrived at Temple 12 minutes late; train No. 3 left Brenham on time and arrived at Temple 6 hours and 42 minutes late; train 47 left Brenham, and arrived at Temple, on time; train No. 11 left Temple 40 minutes late, and arrived at Ballinger 30 minutes late. In order to have made a continuous passage from Brenham to Temple, and from Temple to Ballinger, plaintiff should have taken train No. 1 from Brenham to Temple, and train No. 11 from Temple to Ballinger." It seems to be uncontroverted that the ticket on which appellee was traveling was one that entitled him only to a continuous passage from Brenham to Ballinger, and that it was limited to May 24 is conceded. After boarding the mixed train at Temple, appellee presented his ticket to the conductor of that train, who advised him that it was only good for a continuous passage, and prepared to put him off at Belton without punching his ticket, there to await the passenger train bound for Ballinger, but appellee refused to do this, and said he would remain on the train until it was overtaken by the passenger train bound for Ballinger, whereupon the conductor punched his ticket, and returned it to him, and he remained on that mixed train until it reached Brownwood, where he left it, and soon afterwards entered the train from which he was expelled.

The charge of the court, in effect, informed the jury that appellee was entitled to passage to Ballinger on the ticket held by him, notwithstanding the period limited for its use had expired before he was expelled from the train, unless he had lost that right by breaking the passage. The court, however, instructed the jury as follows: "If plaintiff, when he entered defendant's freight or mixed car at Temple, or soon thereafter, was informed by the conductor that said car did not run to Ballinger, and that said conductor offered to return plaintiff's ticket, and allow plaintiff to ride to Belton without canceling any part of said ticket, and that plaintiff voluntarily remained on said car, and offered his ticket to said conductor for cancellation for so much of said distance from Temple to Ballinger as should be made on said car, and, further, that said conductor punched said ticket, to indicate that said ticket had been used for a part of said distance, and that plaintiff, when said train arrived at Brownwood, voluntarily left said car, then said ticket would not be binding on defendant for any other train, and the conductor of such other train would have a right to eject plaintiff from such train unless plaintiff paid his fare; and if you find the above facts from the evidence you will find for the defendant."

Appellant asked an instruction to the effect that plaintiff was not entitled to passage on the train after the time had expired within which he, by terms of his ticket, was required to use it. The court refused this instruction. Appellant also asked an instruction in reference to the duty of appellee, under the contract, to make a continuous passage from Temple to Ballinger, which, in substance, contained the same matter as that contained in the charge of the court upon that subject, but it was more elaborate and informed the jury that it was the duty of plaintiff to inform himself as to the trains on which he could make continuous passage. That charge also informed the jury that the fact that the conductor on the mixed train between Temple and Brownwood permitted plaintiff to travel on his train from the one place to the other would not entitle him to passage on the train from which he was expelled, if otherwise not entitled. This charge was refused.

If the charge of the court before quoted be the law, a new trial should have been granted, for there was no conflict in the evidence, and every material fact made necessary by that charge to relieve defendant from liability was proved. It must be conceded that plaintiff was not entitled to recover if the facts enumerated in the charge given existed, but the inquiry arises whether that charge did not make the defense to depend too much upon information given by the conductor to plaintiff, and upon his voluntary action based on such information. There can be no pretense that plaintiff was induced to go upon the mixed train, which did not run to his place of destination, by reason of any invitation or representation made by any servant of the company, and we understand it to be the duty of a person, situated as was plaintiff, to inform himself whether or not he could make that continuous passage from Temple to Ballinger, contemplated by his ticket, on any particular train, and the jury should have been so instructed. *Dietrich* v. *Pennsylvania R. Co.* 71 Pa. 433, 10 Am. Rep. 711. We understand the law, further, to be that the act of the conductor on the mixed train running between Temple and Coleman, in permitting plaintiff to have passage from Temple to Brownwood on that train did not confer any right whatever upon him to have passage on the through passenger train from Temple to Ballinger, and the jury should have been so instructed. *Ibid.*

It being conceded that plaintiff had a right, at most, only to continuous passage over appellant's road, we understand the law to be that he had no right to enter a through train, and thereon have passage for a part of the journey, and then leave it, and again have passage on a following train, by virtue of the original contract and payment. Nor had he any more the right, under the contract for continuous passage, to take a train that could not give him such passage, and this to leave at some intermediate point, and again to enter and have passage on another train that could take him to his destination, even though the latter train may be the one he should have taken in the first instance. *Ibid.*; *Stone* v. *Chicago & N. W. R. Co.* 47 Iowa, 85, 29 Am. Rep. 458; *McClure* v. *Philadelphia, W. & B. R. Co.* 34 Md. 535, 6 Am. Rep. 345; *Johnson* v. *Philadelphia, W. & B. R. Co.* 63 Md. 107; *Johnson* v. *Concord R. Corp.* 46 N. H. 213, 88 Am. Dec. 199; *Petrie* v. *Pennsylvania R. Co.* 42 N. J. L. 450; *Wyman* v. *Northern Pac. R. Co.* 34 Minn. 210; *Cleveland, C. & C. R. Co.* v. *Bartram*, 11 Ohio St. 457; *Oil Creek & A. R. R. Co.* v. *Clark*, 72 Pa. 231; *Drew* v. *Central Pac. R. Co.* 51 Cal. 425; *Cheney* v. *Boston & M. R. Co.* 11 Met. 121; *Hatten* v. *Railroad Co.* 39 Ohio St. 375, 13 Am. & Eng. R. R. Cas. 53.

The contract of the parties must fix their rights, and many reasons are suggested in the cases cited why, in the absence of express contract for continuous passage, such should be presumed to have been within the intent of the parties, and why substantial rights would be denied if such contracts be not enforced. No question arises in this case as to what, within the meaning of such a contract, is continuous passage, when the passenger holds coupon tickets evidencing his right to transit over several roads within the line of an entire journey. The right of plaintiff was to travel, by one continuous journey, from Brenham to Ballinger, on such trains on appellant's road as carried passengers and made connection between these places, and this continuity would not be broken by any delay or change of cars made necessary by the conduct of appellant's business; but when plaintiff voluntarily took passage on a train which he must be held to have known would not convey him to Ballinger, and at a point on the line broke the journey, he must be held to have lost his right to enter another train and to be carried to Ballinger on the original contract, as fully as would he, had he, on the 23d of the month,

come to Brownwood on the regular passenger train bound for Ballinger, and stopped over at Brownwood until the next day.

Cases may arise in which, by accident, misfortune, fault of the carrier, or the misconduct of employés of a carrier of passengers, continuous transit may be interrupted without fault on the part of the passenger, and in such cases the passenger may be entitled to resume his journey, and to be transported as though no interruption had occurred; but no such facts exist in this case. It is insisted that the time had expired, when plaintiff was expelled from the train, during which he was entitled to travel on the ticket, and that the jury should have been so instructed and if the continuity of the journey had not been broken it would be necessary to decide whether, if the journey was begun on appellant's road before the close of May 24, 1888, plaintiff was entitled to complete it on the subsequent day. The ticket is not found in the transcript,—of its verbiage we are not advised; and, in view of the fact that the question already considered is decisive of this appeal, we do not now deem it necessary to determine whether the construction of such a contract as the petition describes ought to be as appellant contends, which would require the journey to be ended before the expiration of the day named in the contract as its limit, or whether, if the passage was commenced before the expiration of that day, it might be completed by continuous passage afterwards. There are decisions placing the latter construction on such contracts. *Lundy* v. *Central Pac. R. Co.* 66 Cal. 191, 56 Am. Rep. 100; *Auerbach* v. *New York Cent. & H. R. R. Co.* 89 N. Y. 281, 42 Am. Rep. 290.

For the errors noticed *the judgment will be reversed*, and the cause remanded.

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## ILLINOIS SUPREME COURT

Lizzie BINGEL, *Appt.*,
*v.*
Frederick H. VOLZ *et al.*

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

**1. A court of equity has no jurisdiction to reform a will.**

**2. A devise of land in the "northwest" quarter of a certain section** of land cannot be shown by parol evidence to mean land in the southwest quarter, as such a change would amount to a reformation of the will.

(March 28, 1892.)

APPEAL by defendant from a decree of the Circuit Court for Madison County dismissing her cross-bill and granting the relief prayed

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NOTE.—*Parol evidence of mistake in description of land devised.*

The English authorities from a very early date have given sanction to the principle, that parol evidence is admissible to correct a mistake in the description of either land devised or personal property bequeathed. Selwood v. Mildmay, 3 Ves. Jr. 306; Doe v. Huthwaite, 3 Barn. & Ald. 632; Mosley v. Massey, 8 East, 149; Thomas v. Thomas, 6 T. R. 671; Doe v. Oxenden, 3 Taunt. 147; Doe v. Hiscocks, 5 Mees. & W. 363; Miller v. Travers, 8 Bing. 244; Goodtitle v. Southern, 1 Maule & S. 299; Hodgson v. Hodgson, 2 Vern. 593; Lingren v. Lingren, 9 Beav. 358; Beaumont v. Fell, 2 P. Wms. 140; Day v. Trig, 1 P. Wms. 286.

In the Federal courts it is an established canon of interpretation, applicable alike to deeds, written contracts, and testamentary devises, that extrinsic or parol evidence is competent for the purpose of applying the writing to its appropriate subject-matter; and all courts, in the construction of a will, are controlled, as to the admission of evidence, by liberal considerations. Bradley v. Washington A. & G. Steam Packet Co. 38 U. S. 13 Pet. 99, 10 L. ed. 77; Doe v. Hiscocks, 5 Mees. & W. 363; Blake v. Hawkins, 98 U. S. 325, 25 L. ed. 141; Maryland v. Baltimore & O. R. Co. 89 U. S. 22 Wall. 112, 22 L. ed. 714; Blake v. Doherty, 18 U. S. 5 Wheat. 362, 5 L. ed. 109; Smith v. Bell, 31 U. S. 6 Pet. 75, 8 L. ed. 325; Clarke v. Johnston, 85 U. S. 18 Wall. 502, 21 L. ed. 906; Atkinson v. Cummins, 50 U. S. 9 How. 485, 13 L. ed. 227; Wilkins v. Allen, 59 U. S. 18 How. 393, 15 L. ed. 398; King v. Ackerman, 67 U. S. 2 Black, 417, 17 L. ed. 298; Reed v. Merchants Mut. Ins. Co. of Baltimore, 95 U. S. 30, 24 L. ed. 349.

Equity has jurisdiction to correct mistakes in wills, only where the error appears upon the face of the will itself, so that both the mistake and the correction can be ascertained and supplied by the context, from a plain interpretation of the terms of the instrument as it stands. A resort to extrinsic evidence is never permitted either to show a mistake or to ascertain the correction. Mistakes which can be thus corrected may be in the names of legatees or devisees, in the description of property, or in other terms. 2 Pomeroy, Eq. Jur. § 871, citing *Re* Aird's Estate, L. R. 12 Ch. Div. 291; Whitfield v. Langdale, L. R. 1 Ch. Div. 61; Barber v. Wood, L. R. 4 Ch. Div. 885; Newman v. Piercey, L. R. 4 Ch. Div. 41; Wilson v. Morley, L. R. 5 Ch. Div. 776; Travers v. Blundell, L. R. 6 Ch. Div. 436; Homer v. Homer, L. R. 8 Ch. Div. 758; Garland v. Beverley, L. R. 9 Ch. Div. 213; *Re* Nunn's Trusts, L. R. 19 Eq. 331; Farrer v. St. Catharine's College, L. R. 16 Eq. 19; Hardwick v. Hardwick, L. R. 16 Eq. 168; McKechnie v. Vaughan, L. R. 15 Eq. 289; *Re* Ingle's Trusts, L. R. 11 Eq. 573; Hall v. Lietch, L. R. 9 Eq. 376; Box v. Barrett, L. R. 3 Eq. 244; Hart v. Tulk, 2 DeG. M. & G. 300; Campbell v. Bouskell, 27 Beav. 325; Taylor v. Richardson, 2 Drew. 16; Snyder v. Warbasse, 11 N. J. Eq. 493; Wood v. White, 32 Me. 340, 52 Am. Dec. 654; Jackson v. Payne, 2 Met. (Ky.) 567; Goode v. Goode, 22 Mo. 518, 66 Am. Dec. 630; Trexler v. Miller, 41 N. C. 248; Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773; Yates v. Cole, 54 N. C. 110; McAlister v. Butterfield, 31 Ind. 25; Erwin v. Hamner, 27 Ala. 296; Machem v. Machem, 28 Ala. 374; Nutt v. Nutt, 1 Freem. Ch. 129.

A court may look beyond the face of the will



See also 26 L. R. A. 370; 28 L. R. A. 149.

for by the bill in a suit to obtain partition of certain land. *Affirmed.*

The facts are stated in the opinion.

*Messrs.* **Happy & Travous,** for appellant:

It is presumed that a testator, when he makes and publishes his will, intends to dispose of his whole estate, unless the presumption is rebutted by its provisions, or evidence to the contrary.

*Higgins* v. *Owen*, 100 Ill. 554; *Smith* v. *Smith*, 17 Gratt. 268; *Irwin* v. *Zane*, 15 W. Va. 646.

When it is shown that the description of the subject of the devise, as it appears on the face of the will, is false in part, courts may look beyond the words of the will,—may place themselves in the position occupied by the testator when he executed the will,—and with the aid of extrinsic evidence, view the testator's

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where there is an ambiguity as to the person or property to which it is applicable, but not to enlarge or diminish the estate devised. King v. Ackerman, 67 U. S. 2 Black, 417, 17 L. ed. 298.

"As a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of the gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or, secondly, it may arise when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator. The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed *by any evidence that will have that effect.* 1 Jarman, Wills, 370; Hawkins, 2, 10." Patch v. White, 117 U. S. 240, 29 L. ed. 860.

From the earliest period in the history of testamentary law, there has been manifested a disposition to apply a more favorable construction to wills than to ordinary legal instruments. Regret has sometimes been expressed at the disposition thus manifested, but the courts have nevertheless continued to countenance that line of judicial policy. It must therefore be accepted and acted upon as an established rule of construction at the present time. Cleveland v. Spilman, 25 Ind. 95; Brownfield v. Brownfield, 12 Pa. 136; Wilkins v. Allen, 59 U. S. 18 How. 385, 15 L. ed. 396.

O'Hara, in his work on the Interpretation of Wills, on page 374, concludes his review of void testamentary gifts as follows: "The question whether an uncertainty of the description of the subject or object of a gift by will can be cured or not by parol, resolves itself into the ulterior inquiry, Is the ambiguity so patent as that the testator shows that he was aware of it, and that he was leaving a part of his will undeclared in writing? As this is very rarely the case, it follows that at the present day hardly any case of uncertain or erroneous description in a will can occur which may not be remedied by parol."

Where the description of the subject-matter of the devise is mistaken, parol evidence has been admitted to aid the construction, by showing to what the testator must have referred. As where, on a devise of a house and lot in Fourth street, Philadelphia, it appeared the testator had no property in Fourth street, but did own a house and lot in Third street, in that city, it was held such property passed under the devise. And where the devise was of "thirty-six acres, more or less of lot 37 in the second division in Barnstead," and there was no such lot in the second division in that town, but the testator owned a portion of lot 97 in that division, it was held to pass under the devise. 1 Redfield, Wills, p. 584, citing Allen v. Lyons, 2 Wash. C. C. 475; Riggs v. Myers, 20 Mo. 239; Cleveland v. Spilman, 25 Ind. 95; Winkley v. Kaime, 32 N. H. 268; Redfield, Am. Cases on Wills, 547. See also Jackson v. Goes, 13 Johns. 518, 7 Am. Dec. 399; Pritchard v. Hicks, 1 Paige, 270, 2 L. ed. 643; Pinson v. Ivey, 1 Yerg. 296; Wusthoff v. Dracourt, 3 Watts, 243; Gass v. Ross, 3 Sneed, 211; Doe v. Roe, 1 Wend. 541; Storer v. Freeman, 6 Mass. 440, 4 Am. Dec. 155; Watson v. Boylston, 5 Mass. 417; Tudor v. Terrel, 2 Dana, 49; Hand v. Hoffman, 8 N. J. L. 86; Breckenridge v. Duncan, 2 A. K. Marsh. 51; Haydon v. Ewing, 1 B. Mon. 113; Capel v. Robarts, 3 Hagg. Eccl. 156.

Elsewhere the same author says: "The admission of parol evidence in regard to wills is essentially the same as that which prevails in regard to contracts generally. It can be received to show the intention of the testator, and especially to enable the court, where the question arises, to give his language such an interpretation as it is reasonable to presume, from the circumstances in which he was placed, he intended it should receive, or to put the court in the place of the testator." 1 Redfield, Wills, 496; Scott v. Neeves, 77 Wis. 305.

"The law is not so unreasonable as to deny to the reader of any instrument the same light which the writer enjoyed." Wigram, Wills, p. 161; Gilmer v. Stone, 120 U. S. 586, 30 L. ed. 734.

The reasoning which sustains the admission of parol evidence to correct a misdescription as to the particular individual intended in a bequest would seem to apply with equal force when such evidence is introduced for the purpose of determining the particular piece of property devised. Thus a mere misdescription of the legatee does not render the legacy void, unless the ambiguity is such as to render it impossible, either from the will or otherwise, to ascertain who was intended as the object of the testator's bounty. Smith v. Smith, 4 Paige, 271, 3 L. ed. 433.

In Button v. American Tract Soc., 23 Vt. 336, neither of the claimants answered the description, and neither came any nearer to it than the other, but the will was construed with the aid of extrinsic circumstances. St. Luke's Home for L. C. F. v. Aged Indigent Females Asso. 52 N. Y. 191.

And it has been held that when the will contains two inconsistent descriptions extrinsic evidence may be resorted to to ascertain which is the true description; and where there is a latent ambiguity, as, if the object of the testator's bounty or subject of disposition is described in terms applicable indifferently to more than one person or thing evidence is admissible to prove which of the persons or things was intended, including declarations of the testator. Gary's Probate Law, § 645, citing Case v. Young, 3 Minn. 209; Morgan v. Burrows, 45 Wis. 211; Sydnor v. Palmer, 29 Wis. 226; 1 Redfield, Wills, chap. 9, § 4; 2 Williams, Exrs. pt. 3, bk. 3, chap. 2, § 1; 2 Jarman, Wills, 762.

The purpose for which extrinsic evidence may be legitimately admitted is not to add to or vary, or ordinarily to explain, the literal meaning of the terms of the will, or to give effect to what may be supposed to have been the unexpressed intention of the testator, but to connect the instrument with the extrinsic facts therein referred to, and to place the court, as nearly as may be, in the situation occupied by the testator, so that his intention may be determined from the language of the instrument, as it is explained by the extrinsic facts and circumstances. Dougherty v. Rogers, 3 L. R. A. 847, 119 Ind. 254, citing Greenpoint Sugar Co. v. Whitin, 69 N. Y. 328, 336. F. S. R.

affairs as he viewed them, in order to determine the intention of the testator from the language of the will, after excluding what is shown to be false.

*Decker* v. *Decker*, 10 West. Rep. 344, 121 Ill. 341; *Moreland* v. *Brady*, 8 Or. 303, 34 Am. Rep. 581; *Morgan* v. *Burrows*, 45 Wis. 211, 30 Am. Rep. 717.

A latent ambiguity may arise when the will contains a misdescription of the subject, as where the subject as literally described does not belong to the testator; and as this ambiguity only appears from extrinsic evidence, it may likewise be removed by extrinsic evidence.

*Patch* v. *White*, 117 U. S. 210, 29 L. ed. 860; *Decker* v. *Decker*, 10 West. Rep. 344, 121 Ill. 341.

That the court, in construing the will, may occupy the testator's position when he made it, evidence of the state of testator's family; the state of his property; the relations of the testator with those claiming the property, whether friendly or otherwise; the state of his mind and feelings toward them; as to whether reasons existed for preferring some to others; and in short of all collateral facts and circumstances which will enable the court to see and feel as the testator then saw and felt in regard to his affairs and those now claiming his bounty, —is admissible.

*Cotton* v. *Smithwick*, 66 Me. 360; *Decker* v. *Decker*, 10 West. Rep. 344, 121 Ill. 341; *Smith* v. *Smith*, 4 Paige, 271, 3 L. ed. 432; *Allen* v. *Lyons*, 2 Wash. C. C. 475; *Winkley* v. *Kaime*, 32 N. H. 268; *Black* v. *Richards*, 95 Ind. 184; *Vernor* v. *Henry*, 3 Watts, 385; *Moreland* v. *Brady*, 8 Or. 303, 34 Am. Rep. 581.

Where there is a latent ambiguity in the devise, the descriptive words of the subject of the devise being in part false, if, after striking so much of the description as is false enough remain in the will, interpreted in the light of surrounding circumstances when the will was made, to identify the premises, the devise will be good.

*Merrick* v. *Merrick*, 37 Ohio St. 126, 41 Am. Rep. 493; *Moreland* v. *Brady*, 8 Or. 303, 34 Am. Rep. 581; *Patch* v. *White*, 117 U. S. 210, 29 L. ed. 860; *Decker* v. *Decker*, 10 West. Rep. 344, 121 Ill. 341, and authorities there cited.

*Messrs.* **E. F. Springer** and **Wise & Davis** for appellees.

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

On the 19th day of August, 1887, John Volz died, leaving him surviving his widow and six children, five sons and one daughter, and also leaving a last will and testament, as follows:

"I, John Volz, of Alhambra, county of Madison, and state of Illinois, farmer, being of sound mind, memory, and understanding, do make and publish this, my last will and testament (hereby revoking and making void all former wills by me at any time heretofore made): (1) I wish my funeral expenses and debts, if any, paid at an early day. (2) I give, bequeath, and devise to my wife, Barbara Volz, all my personal estate, of every nature and kind, wherever situated, during her natural lifetime. (3) I give, bequeath, and devise to my oldest son, John Volz, four hundred dollars ($400.00), to him paid by my son Joseph Volz, as hereinafter mentioned. (4) I give and bequeath and devise to my son Peter Volz, one thousand dollars ($1,000), to him paid by my son Joseph Volz, as hereinafter mentioned. (5) I give, bequeath, and devise to my son Fritz Volz five ($5.00) dollars, to him paid by Barbara Volz, his mother, out of the personal property, as hereinafter mentioned. (6) I give, bequeath, and devise to my son Joseph Volz my homestead of ninety (90) acres, described as follows, to wit: The south one half of the northwest quarter, containing eighty acres more or less, and also ten (10) acres off of the north side of the north one half of the southwest quarter, adjoining the south one half of the northwest quarter, all in section No. sixteen (16), township No. five (5), range No. six (6) west of the third principal meridian, Madison county and state of Illinois. My said son Joseph Volz to pay my said son John Volz four hundred dollars, and also my said son Joseph Volz to pay my said son Peter Volz one thousand dollars, within two years after my death and that of my wife, Barbara Volz. (7) I give, bequeath, and devise to my son Adam Volz five dollars ($5.00), to him paid by Barbara Volz, his mother, out of the personal property. (8) I give, bequeath, and devise to my daughter, Elizabeth Bingel, seventy (70) acres off of the south side of the north one half of the northwest quarter of section No. sixteen (16), township No. five (5), range No. six (6) W. of third principal meridian, county of Madison and state of Illinois. (9) My wife, Barbara Volz, to retain or hold her dower in the real estate during her natural lifetime, receiving the rent from said real estate, and to pay the taxes. After her death the before-described real estate to remain as hereinbefore mentioned. In witness whereof I have signed and published and declared this instrument my will, at Alhambra, county of Madison, Illinois, this 13th day of August, A. D. 1887. John Volz. [Seal.]"

The testator, at the time of his death, was the owner of 160 acres of land in Madison county, being the S. ½ of the N. W. ¼, and the N. ½ of the S. W. ¼, of section 16, township 5 N., of range 6 W. At that time he did not own, and so far as appears never had owned, the 70 acres off from the S. side of the N. ½ of the N. W. ¼ of said section 16, which by said will was devised to his daughter, Elizabeth or Lizzie Bingel. Said daughter now insists that, by mistake of the draughtsman who drew up the will, the word "northwest" was inserted instead of the word "southwest" in the devise to her; and that in view of the remaining language of the will, and of the circumstances surrounding its execution, it should be construed as devising to her the S. 70 acres of the N. ½ of the S. W. ¼ of said section.

Three of the brothers of said Lizzie Bingel executed to her a quitclaim deed of the S. 70 acres of the N. ½ of the S. W. ¼ of said section, reciting in said deed that it was "made for the purpose of removing the latent ambiguity in said will caused by using the word 'northwest' instead of 'southwest' in describing said land in said will." The widow of the testator having died, the two other brothers, Frederick and Adam Volz, filed their bill against their

three brothers and their sister, Lizzie Bingel, for a partition of said S. 70 acres of the N. ½ of the S. W. ¼ of said section, alleging that said tract was intestate estate, and that upon the death of their father it descended to his six children as tenants in common.

The three brothers who had quitclaimed to their sister filed a disclaimer. Lizzie Bingel answered, and filed her cross-bill, alleging that said John Volz, being the owner in fee of the 70 acres off from the S. side of the N. ½ of the S. W. ¼ of said section, by his last will and testament devised the same to her, by the designation and description of "seventy acres off of the south side of the north one half of the northwest quarter of section number sixteen," etc.; that said John Volz, at the time of making said will, was the owner in fee of the 160 acres of land first above described, and no other real estate, and that by said will he devised all of his real estate, except said 70 acres, to Joseph Volz; that at the time of making said will he did not own, or suppose he owned, or expect to become the owner of, any interest in the tract to which the devise to said Lizzie Bingel, taken literally, would apply, and that he intended, by said will, to dispose of all his estate, real and personal, and supposed he had done so; that during his lifetime he was a farmer, and cultivated said 160 acres of land owned by him; that said Frederick and Adam Volz, long prior to the making of said will, went to do and work for themselves, and refused to stay with or assist their father in the cultivation and management of said land, or otherwise, and were disposed to be disobedient, shiftless, and of unsteady habits, and to act in all things against their father's wishes; that John and Peter Volz, two of the other sons, also left their father a few years prior to his death, and went to do and work for themselves, and were, at the time of making said will residing in and engaged in business in the state of Kansas; that Joseph Volz, the remaining son, and the complainant in the cross-bill, although being past their majority, remained with their father and mother, and assisted, worked, and cared for them up to the time of their respective deaths, and that, for a number of years prior to the death of said John Volz, said Joseph Volz and the complainant were the only children who remained with or did anything for their said parents; that said last will and testament was written by Charles Reudy, as draughtsman, at the request of John Volz, and that, as a part of the instructions from said John Volz, said draughtsman was given the deeds by which said John Volz held the land owned by him, from which to obtain the description of the portions of said land to be devised to Joseph Volz and to said complainant, respectively, in writing said will; that in said deeds said lands were correctly described, but that in copying said description therefrom into said will said draughtsman erroneously and unintentionally wrote the word "northwest" instead of "southwest" in describing the quarter of said section in which the land devised to said complainant lay, which error was overlooked, and the said will was so executed, devising said 70 acres so owned by said John Volz to the complainant by said faulty description; that, while on the face of the will the subject-matter of the devise is clear, yet, by reason of the premises, there arises a latent ambiguity, and a cloud is thereby cast upon the complainant's title to said land; but that, by construing said will in the light of surrounding circumstances, it will appear that said devise referred to and vested in the complainant the lands owned by said John Volz, and not devised to said Joseph Volz, and had reference to no other land or interest therein. Said cross-bill further represented that, in order to remove any ambiguity or uncertainty, or any cloud upon the complainant's title, arising from the failure of the testator to fully and accurately describe said land devised to the complainant, three of the complainant's brothers had executed to the complainant a quitclaim deed of said land, with the proper description. Said cross-bill prays that evidence be heard touching the matters therein alleged, and in aid of the construction of said will, and that the court examine the language of the devise to the complainant in connection with the facts alleged, and construe and interpret its meaning in the light of surrounding circumstances at the time the will was made, and determine and define what lands, if any, the complainant took by said devise, and what land was referred to and intended by the language there used; and decree that said will, by the language employed, devised to the complainant the said 70 acres off from the S. side of the N. ½ of the S. W. ¼ of said section, and that said land is the property of the complainant, and that complainants in the original bill have no interest therein or title thereto.

Frederick and Adam Volz answered denying the equities of the cross-bill; and, the cause coming on to be heard on pleadings and proofs, evidence was introduced by the complainant in the cross-bill substantially supporting the allegations therein contained; and, on consideration of the pleadings and evidence, the court entered a decree dismissing the cross-bill for want of equity, and awarding partition of said 70 acres of land in accordance with the prayer of the original bill. From that decree said Lizzie Bingel now appeals to this court.

The counsel for the appellant, while admitting that equity will not entertain a bill to reform a will, seems to us to be seeking to accomplish essentially the same thing under the guise of an attempt to construe the will. It is admitted that the terms of the devise to the appellant, on their face, are clear and unambiguous, and that they accurately describe a tract of land in existence, and capable of being readily identified, and which, if the testator had owned it, would have passed to the appellant by the terms of the will. But it is insisted that, when extrinsic evidence is applied to the devise, a latent ambiguity is raised, and that such evidence may therefore be resorted to for the purpose of explaining the ambiguity and showing what land the testator intended to devise to the appellant. The purpose of construction, as applied to wills, is unquestionably to arrive, if possible, at the intention of the testator; but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed by the language of the will. While, in attempting to construe a will, reference may

be made to surrounding circumstances, for the purpose of determining the objects of the testator's bounty, or the subject of disposition, and, with that view, to place the court, so far as possible, where it may interpret the language used from the standpoint of the testator at the time he employed it, still the rule is inflexible that surrounding circumstances cannot be resorted to for the purpose of importing into the will any intention which is not there expressed.

On this subject, Mr. Jarman lays down the rule as follows: "As the law requires wills, of both real and personal estate (with an inconsiderable exception), to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced either to contradict, add to, or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is a partial or total failure of the testator's intended disposition; for it would have been of little avail to require the will *ab origine* should be in writing, or to fence a testator around with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources." 1 Jarm. Wills, 409.

This court has long been committed to this doctrine. This question arose and was carefully considered in *Kurtz* v. *Hibner*, 55 Ill. 514. There a devise to Elizabeth Kurtz described an 80-acre tract in section 32, and a devise to James Kurtz described a 40-acre tract in section 31. Proof was offered that the testator, at the time of his death, owned but one 80-acre tract, that being described precisely as was the devise to Elizabeth Kurtz, except that it was in section 33 instead of section 32; and also that the devisee had been in the actual possession of said tract for a number of years, and, upon the repeated promise of the testator in his lifetime that he would give her said tract, she had made valuable and lasting improvements thereon at her own expense. Evidence was also offered that James Kurtz, at the time of the death of the testator, was in actual possession of the 40-acre tract as the testator's tenant, and that the draughtsman of the will by mistake inserted the word "one" after the word "thirty," instead of the word "two," thus devising to James land in section 31 instead of section 32. This evidence was excluded, and this court, in sustaining said ruling, said: "The law requires that all wills of lands shall be in writing, and extrinsic evidence is never admissible to alter, detract from, or add to the terms of the will. To permit evidence, the effect of which would be to take from a will plain and unambiguous language, and insert other language in lieu thereof, would violate the foregoing well-established rule. For the purpose of determining the object of a testator's bounty, or the subject of disposition, parol evidence may be received, to enable the court to identify the person or thing intended. In this regard, the evidence offered afforded no aid to the court. The devise is certain both as to the object and subject. There are no two objects, no two subjects." The doctrine of this case has been repeatedly approved and reaffirmed in subsequent cases. Thus, in *Starkweather* v. *American Bible Soc.*, 72 Ill. 50, it was said: "The courts are so strict that they will not permit the terms of a will to be altered, even when the devisor has, by mistake, misdescribed the land in a devise, by substituting that which could be clearly proved to have been intended." In *Bishop* v. *Morgan*, 82 Ill. 351, 25 Am. Rep. 327, the testator was the owner of 40 acres of land, being the S. E. ¼ of the N. E. ¼ of a certain section, and by his will he devised to his son the S. E. ¼ of said section, "containing 40 acres more or less;" and it was held, on the authority of *Kurtz* v. *Hibner*, *supra*, that the mistake in the description could not be corrected by reference to extrinsic evidence, and that such correction could not be made by reference to the words "containing 40 acres, more or less," used in the will. See also *Heslop* v. *Gatton*, 71 Ill. 528; *Emmert* v. *Hays*, 89 Ill. 11; *Bowen* v. *Allen*, 113 Ill. 53, 55 Am. Rep. 398; *Bradley* v. *Rees*, 113 Ill. 327, 55 Am. Rep. 422; *Decker* v. *Decker*, 121 Ill. 341, 10 West. Rep. 344.

We are aware that other courts whose opinions are entitled to the highest consideration have gone considerably further than we have been disposed to do in holding that mistakes of the character of the one presented here constitute cases of latent ambiguity which may be explained, and, in effect, corrected by extrinsic evidence. It cannot be denied that decisions which so hold are based upon reasons which are at least plausible, and, if the question were a new one in this state, we might feel disposed to give them serious attention. But the contrary rule has long been in force here, and has become a rule of property, and a change now by judicial construction, which must necessarily be given a retroactive operation, would have the effect of unsettling titles of very considerable value, which rest upon the rule which we have heretofore laid down. We must therefore adhere to our former decisions, although, in particular cases, the result may be to defeat the real intentions of testators, which, by mistake of those charged with drafting their wills, they have failed to adequately express.

But it is contended that the real intention of the testator in the present case, as shown by the extrinsic evidence, and his intention as expressed in the language of the devise, may be brought into harmony by rejecting a portion of the description of the land devised as repugnant, as was done in *Decker* v. *Decker*, *supra*. The rule of construction here referred to is the one indicated by the familiar maxim, *falsa demonstratio non nocet*, and is applicable alike to the construction of deeds and wills. As applied to deeds, it is explained by Mr. Tiedeman in his treatise on Real Property, as follows: "It is a general rule of construction that the deed should be so construed that the whole deed may stand and be enforced. If this is impossible, and the description contains several elements or descriptions, all of which are necessary to the identification of the property intended to be conveyed, the deed will be void if no property of the grantor can be found which will correspond with every part of the description. But if the intention, as gathered

from the deed, does not make it necessary to satisfy all the elements of the description, or if parts of the description are inconsistent with the other parts, and enough of them are consistent to identify the property intended by the parties to pass, whatever is repugnant is rejected, and the deed is enforced under this construction." Tiedeman, Real Prop. § 829.

Doubtless if there were repugnant elements in the description employed in the devise in question, and if the description, after rejecting a repugnant element, were complete in itself, so as to accurately and sufficiently describe the land intended to be described, that rule of construction might be adopted. But we are unable to see, and the ingenuity of counsel has been unable to point out, any way in which that rule of construction can be applied, so as to work out the result sought to be attained. The description in the devise, as we have already seen, is in these words: "Seventy acres off of the south side of the north one half of the northwest quarter of section No. sixteen, township No. five, range No. six W. of the third principal meridian, county of Madison and State of Illinois." If it be admitted that there are repugnant elements in this description, it is impossible to see what repugnant element can be rejected so as to leave a description which will apply to the land which the appellant claims. If we reject the words "northwest quarter," or "northwest," or "north," what remains does not apply to the land in question. The difficulty of the description, as it appears in the devise, is that it substitutes "northwest" for "southwest," and the correction of the description, so as to make it apply to the right tract, requires, not only that one of these words should be stricken out, but that the other should be inserted. It involves more than construction; it requires reformation; and in this state, at least, courts of equity have persistently refused to entertain bills to reform wills.

We are of the opinion that *the decree was proper, and it will therefore be affirmed.*

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Theodore SONTAG *et al., Plffs in Err.,*
*v.*
Walter W. BIGELOW *et al.*

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

**1. A plaintiff in ejectment cannot rely upon a parol partition** to establish his title.

**2. A master's deed in partition proceedings is sufficient color of title** upon which to found a claim to adverse possession notwithstanding the proceedings which led to the sale did not conform to the law.

**3. A parol partition does not constitute color of title** for the purpose of adverse possession against the co-tenant.

**4. The mere receipt of rents and payment of taxes** by a tenant in common is not a sufficient claim of adverse possession as against his co-tenant.

(June 18, 1892.)

ERROR to the Circuit Court for Monroe County to review a judgment in favor of plaintiffs in an action brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion.

*Messrs.* **H. Clay Horner** and **George L. Riess,** for plaintiffs in error:

As the partition was only by parol, each one on the parol partition's consummation became seised of the legal title to one half of his allotment, and had only the equitable title to the other half. As an equitable title will not support ejectment (*Barrett* v. *Hinckley,* 12 West. Rep. 792, 124 Ill. 36), on their own showing, defendants in error would be entitled to judgment for only the undivided one half of the land sued for.

*Gage* v. *Bissell,* 8 West. Rep. 54, 119 Ill. 305; *Shepard* v. *Rinks,* 78 Ill. 191; *Tomlin* v. *Hilyard,* 43 Ill. 302, 92 Am. Dec. 118, and cases there cited as to effect of parol partition; Freem. Co-tenancy & Partition, § 397; *Den* v. *Longstreet,* 18 N. J. L. 405; Browne, Stat. Fr. § 71.

In order to support this declaration and judgment, they should have shown "in themselves a fee-simple title at law, as contradistinguished from an equitable fee."

*Barrett* v. *Hinckley, supra.*

The legal title remains unaffected by parol division.

*Tomlin* v. *Hilyard, Gage* v. *Bissell, Shepard* v. *Rinks,* and *Den* v. *Longstreet, supra.*

As to the payment of taxes relied on by the defendants in error, it is stated by the widow that her husband paid them until his death and she paid them afterward. The payment of taxes must concur with the color. The

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NOTE.—*Parol partition to give legal title or color of title.*

The novel questions presented above as to the effect of a parol partition to give legal title or color of title are more interesting than difficult. A contrary decision on either point would have been surprising. The system of written conveyances and records of land titles would be exceedingly faulty and very poor protection to purchasers if parol agreements could transfer legal title even between co-tenants.

It is different however as to the effect of adverse possession, since possession itself constitutes notice to third persons. In states where color of title is not essential to adverse possession, it would seem clear that a parol partition would be sufficient to initiate the adverse possession of co-tenants as against each other to the shares partitioned to them respectively. To hold a parol partition sufficient for this purpose would be the logical effect of the principle by which such a partition when followed by actual possession is held valid as a defense or by way of estoppel.

For *note* on a conveyance by a co-tenant by metes and bounds, see Benedict v. Torrent (Mich.) 11 L. R. A. 278.

For the effect of an agreement upon a parol partition giving a right of one to enter on the other's portion and take a share of the fruit, see Taylor v. Millard, 6 L. R. A. 667, 118 N. Y. 244.

For *notes* on color of title, see Gage v. Hamilton (Ill.) 2 L. R. A. 512; Cramer v. Clow (Iowa) 9 L. R. A. 772.

For *notes* on adverse possession as between co-tenants, see Erck v. Church (Tenn.) 4 L. R. A. 645; Baker v. Oakwood (N. Y.) 10 L. R. A. 387. B. A. R.

color, to the extent it existed, was in the heirs after the father's death. It should have been paid by the heirs or their guardian. The mother is not the custodian of the heirs' estate; she has nothing to do with it.

*Perry* v. *Carmichael*, 95 Ill. 530; *Holmes* v. *Field*, 12 Ill. 428; *Rawson* v. *Fox*, 65 Ill. 200; *Chickering* v. *Failes*, 26 Ill. 507.

*Messrs.* **Hartsell & Sprigg**, for defendants in error:

A parol partition of lands between tenants in common, carried into effect by possession taken by each party of his share, is valid and binding on the parties thereto and on those claiming under them.

*Tomlin* v. *Hilyard*, 43 Ill. 300, 92 Am. Dec. 118; *Gage* v. *Bissell*, 8 West. Rep. 54, 119 Ill. 298; *Shepard* v. *Rinks*, 78 Ill. 188; *Best* v. *Jinks*, 13 West. Rep. 287, 123 Ill. 447.

As boundary lines can be settled by parol agreement, partition of lands can be so made by tenants in common, as title to land is involved in each instance.

*Cutler* v. *Callison*, 72 Ill. 113; *Kerr* v. *Hitt*, 75 Ill. 51; *Bauer* v. *Gottmanhausen*, 65 Ill. 499; *McNamara* v. *Seaton*, 82 Ill. 493; *Bloomington* v. *Bloomington Cemetery Asso.* 126 Ill. 221; *Fisher* v. *Bennehoff*, 11 West. Rep. 82, 121 Ill. 426, *Grim* v. *Murphy*, 110 Ill. 271.

Color of title, acquired in good faith, and payment of taxes for seven successive years, accompanied with actual possession of the parties, as in this case, is a complete bar.

*Bunchman* v. *Whetstone*, 23 Ill. 185; *Hale* v. *Glidfelder*, 52 Ill. 91, *Riverside Co.* v. *Townshend*, 10 West. Rep. 578, 120 Ill. 9, Ang. Lim. § 331

A right to land acquired by limitation is affirmative and can be enforced.

*Faullin* v. *Hale*, 40 Ill. 274.

The statute of seven years' limitation does not require that the possession under claim and color of title should be continued in one person; nor that the same person shall pay all the taxes for that period; taxes may be paid by the administrator, tenant, trustee of a *cestui que trust*, or by those having or succeeding to the possession.

*Cofield* v. *Furry*, 19 Ill. 183; *Chickering* v. *Faile*, 38 Ill. 345.

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

This was an action of ejectment brought by Walter W. Bigelow and Martha Krueger, heirs-at-law of Walter Bigelow, Sr., deceased, against Theodore Sontag, to recover the W. ½ of the W. fractional ¼ of section 4, township 3 S., range 11 W., in Monroe county, containing fifty-eight acres. On a trial of the cause in the circuit court the plaintiffs recovered a judgment for the land described in the declaration, and the defendant sued out this writ of error. For the purpose of establishing title, plaintiffs read in evidence a deed dated December 1, 1853, from James Moore and wife to N. B. Harlow, conveying the S. W. fractional ¼ of section 4, township 3, range 11, Monroe county; also a deed dated January 7, 1857, from N. B. Harlow and wife to Alfred and Walter Bigelow, conveying the same land. The plaintiffs then called as a witness Mrs. Means, who testified substantially as follows: "Walter Bigelow was my husband, and was the son of Alfred Bigelow, and was the father of plaintiffs. He died before this suit was begun, leaving Ellen and Martha and Walter Bigelow, his children and heirs. Ellen, the oldest, and Martha, were by a former wife. Walter is my child. Ellen is dead. Walter Bigelow, Sr., went into possession of this tract of land in 1857. He paid the taxes till he died, and I paid them after he died till 1868. I then moved to Missouri, and afterwards returned to Randolph county, Ill. Walter Bigelow, plaintiff, was born in 1862, April 15. Alfred Bigelow and Walter, Sr., divided this land shortly after buying from Harlow. I married Walter in 1861, after the land was divided. Walter took the west part, and Alfred took the east part. Walter built house, well, stable, and smokehouse on this land soon after land was bought, and cleared twenty-five acres. There was a dividing fence. Walter and his family occupied this land until 1868, and paid the taxes."

For the purpose, we presume, of proving that plaintiffs and defendant claim title through a common source, plaintiffs read in evidence the following deeds: A deed from Alfred and Walter Bigelow and wives to James Cann, of February 5, 1858, conveying S. E. corner of S. W. fractional ¼ of section 4, township 3, range 11, containing twenty-nine acres. Also, deed from James Cann to R. L. Bigelow, of October 4, 1858, for twenty-nine acres, in last deed. Also, deed from S. W. Means and wife to Joseph McGregor, of November 16, 1870, for S. W. fractional ¼ of section 4, township 3, range 11. Also, deed from J. Robinson and wife to R. L. Bigelow of February 6, 1863, for "our interest in" same land as last-mentioned deed. Also, deed from R. L. Bigelow and wife to N. B. Harlow, of August 15, 1863, for the twenty-nine acres bought by him from James Cann, (above;) "also, the interest of the above-described land, heired by myself and wife; and also the interest deeded me by John Robinson and wife, being the interest of Alfred Bigelow's estate, being 7½ acres, the last two interests; the whole tract containing 116 acres." Also, deed from Ezra Bigelow and wife to A. T. Cann, of April 26, 1865, for "all my interest in" said S. W. fractional ¼, etc. Also, deed from A. T. Cann and wife to B. F. Masterson, of April 6, 1866, for "all my interest in" said S. W. fractional ¼, "it being my interest, and that I purchased of Ezra Bigelow and wife, being 7½ acres, more or less." Also, deed from N. B. Harlow and wife to B. F. Masterson, of November 4, 1865, for the lands deeded grantors by R. L. Bigelow, (see deed above.) Also deed from B. F. Masterson to Theodore Sontag, (defendant,) of March 1, 1867, for the following described premises: "twenty-nine acres in the southeast corner of the southwest fractional qr. of section No. 4, township No. three south, range No. eleven west, being the same conveyed to James U. Cann by Alfred Bigelow and others on the 15th day of February, 1858; also 7½ acres on the

above-described fractional section heired by R. L. Bigelow and John Robinson and wife in the estate of Alfred Bigelow, deceased; and also seven and ½ acres more or less in the above-described fractional qr. of the above-described section heired by Ezra Bigelow and A. T. Cann in the estate of Alfred Bigelow, dec'd; the whole tract containing 116 acres."

It will be observed that the plaintiffs did not establish a chain of title from the United States, but the title under which they claim started with a deed from James Moore to Harlow, and this was followed by a deed from Harlow to Alfred and Walter Bigelow.

While these two conveyances did not establish title in Alfred and Walter Bigelow, they were, however, good color of title, which, if followed with seven successive years' possession, and payment of taxes, would ripen into title to the premises; and, as we understand the position of plaintiffs, this is what they rely upon to sustain the judgment. In order to establish title under the Act of 1839, three things are requisite: Color of title, seven years' possession of the premises, and seven successive years' payment of taxes by the person in whose name the color of title stands. It may be regarded as sufficiently established by the evidence that Walter Bigelow went into possession of the land in controversy in 1857. He continued in possession and paid all taxes until his death, the date of which is not shown. It occurred, however, before the seven years had expired. After his death, his widow and children remained in the possession of the premises, and paid all taxes until 1868, which would make seven years' possession and payment of taxes, and two or three years to spare. But the question arises whether Walter Bigelow and his heirs, while so in possession, and while paying the taxes, had color of title to the entire tract in controversy. Under the deed from Harlow to Alfred and Walter Bigelow, it is plain that Walter Bigelow acquired color of title only to the undivided half of the premises, and upon his death that only descended to his heirs, the plaintiffs, and it nowhere appears that he ever received any other deed of the premises, or any part thereof, from any person. But it is said that, after Alfred and Walter Bigelow received a deed from Harlow, they made a parol partition, under which Walter took the west half and Alfred the east half of the premises conveyed to them, and, under this parol partition, Walter became vested with the color of title to the west half.

It is no doubt true, as held in *Tomlin* v. *Hilyard*, 43 Ill. 301, 92 Am. Dec. 118, and the authorities there cited, that a parol partition between tenants in common, when followed by a possession in conformity therewith, will so far bind the possession as to give to each co-tenant the rights and incidents of an exclusive possession of his property. But can a parol partition be treated as a deed, and is it sufficient to pass the legal title or color of title, so as to authorize the party claiming under it to maintain ejectment? In the case last cited, it is said, while the legal title might not, perhaps, be considered as passing by such parol partition, unless after a possession sufficiently long to justify the presumption of a deed, yet the parol partition, followed by a several possession, would leave each co-tenant seised of the legal title of one half of his allotment, and the equitable title to the other half, and by a bill in chancery he could compel from his co-tenant a conveyance of the legal title according to the terms of the partition.

In *Shepard* v. *Rinks*, 78 Ill. 188, a parol partition was held to be binding on the parties, and a possession of premises under a partition of that character was held to be sufficient to defeat an action of ejectment.

In *Best* v. *Jenks*, 123 Ill. 447, 13 West. Rep. 281, in a proceeding for partition and assignment of dower, where a parol partition of a certain tract of land had been made between a brother and sister, which had been acquiesced in for a period of thirty five years, it was held that the sister was the owner of the portion allotted to her at her death, and that her husband was entitled to dower therein.

Washburn on Real Property, p. 385, lays down the rule that a parol partition cannot be effectual unless accompanied by deed, on the ground that the Statute of Frauds applies; but the author also says, where a parol partition is followed by a possession in conformity with such partition, it will so far bind the possession as to give each co-tenant the rights and incidents of an exclusive possession of his property. But without citing further authorities we think it is plain, where a parol partition has been made, and the premises occupied according to the partition by the respective parties, the partition will be valid, and such partition may be set up as a defense, should an action be brought to recover the possession, in violation of the parol partition and a bill in equity may be maintained to compel a deed. But in an action of ejectment the plaintiff must recover, if at all, on a legal title, not upon an equity; and we are aware of no case which goes so far as to hold that a plaintiff could treat a parol partition as a deed, and thus recover upon it in an action of ejectment. We entertain no doubt that plaintiffs might maintain a bill in equity for a deed, or, had they been in possession under the partition, they could have relied upon it as a defense; but having lost the possession, we do not think they can in ejectment rely upon a parol partition to establish their title to the premises involved. From what has been said, it follows that plaintiffs recovered the entire premises described in the declaration, when they were only entitled to recover an undivided half.

But it is insisted by the defendant that he established color of title, and possession and payment of taxes for seven successive years before the action was brought, and the title thus established was sufficient to defeat plaintiffs' action. The defendant first offered in evidence the deeds conveying the premises to him, which had been read in evidence by the plaintiffs. The defendant then offered

in evidence: A patent from the United States to Porter, Glasgow, and Nervine of May 3, 1824, for W. fractional ½ of section 4, township 3, range 11, signed, "By the President J. M. G. G., Commissioner of the General Land Office." (Objected to because not properly signed. Objection sustained. Exception.) Also, deed from Glasgow and wife (one of patentees) to William Henckler, of April 3, 1873, for patent land above. Also, bill in chancery by Henckler against Porter and Nervine, the other patentees, and others, including defendants and Joseph McGregor, for partition of land in controversy. Decree of March 6, 1874, for partition sale. Also, deed of master in pursuance of said partition decree to defendant, Theodore Sontag, Sr., of April 27, 1874, for W. fractional ½ of section 4, township 3, range 11. The master's deed is relied upon as color of title. Whether the proceedings which led to the sale and execution of the master's deed conformed to the law or not was a question which would properly arise if the deed had been offered as title; but the proceedings, however defective, would not affect the deed as color of title. *Mason* v. *Ayers*, 73 Ill. 121; *Hardin* v. *Gouveneur*, 69 Ill. 140; *Dickenson* v. *Breeden*, 30 Ill. 326. In the last case cited, after referring to several decisions to establish what kind of an instrument constituted color of title, it was said: "The substance of these decisions is that any deed purporting on its face to convey title, no matter on what it may be founded, is color of title." Here the deed contained a grantor and grantee, and purported on its face to convey the land; and under the uniform decisions of this court, it constituted color of title. As to payment of taxes the defendant proved that he had paid for a period of at least ten years from 1875 to 1884, both years included. He also proved possession of the land during the same period.

But while the evidence established color of title, seven years' possession, and payment of taxes, we do not think the possession of the defendant was adverse; and upon that ground he cannot invoke the aid of the Statute of Limitations of 1839. As has been seen, Alfred Bigelow and Walter Bigelow were tenants in common, and on the 1st day of March, 1867, the defendant, Sontag, acquired the title orginally held by Alfred Bigelow through deed from B. F. Masterson. Under this title, he went into the possession of the premises. On the trial in 1889, he testified that he had been in possession twenty or twenty-one years. From this testimony, it is manifest that the defendant went into the possession of the premises in 1868, the same year the plaintiffs moved away, and went in under the Bigelow title as he had no other title at that time. He therefore acquired possession of the premises as a tenant in common with the plaintiffs; and, occupying that position, he could not acquire color of title in 1874, and rely upon such title to defeat the plaintiffs. In 1 Washburn on Real Property, p. 656, the author, in speaking in reference to the possession of tenants in common, says: "But their possession being common, and each having a right to occupy, not only will such possession, though held by one alone, be presumed not to be adverse to his co-tenant, but it is ordinarily held to be for the latter's benefit, so far as preserving his title thereto; the possession of one tenant in common being deemed to be the possession of all." In *Brown* v. *Hogle*, 30 Ill. 119, it was held that it was fraud for a tenant in common to permit the land he holds in common with others to be sold for taxes, and he himself became the purchaser for his own benefit. In *Busch* v. *Huston*, 75 Ill. 344, this court held, where one tenant in common is in possession of land, it requires clear and satisfactory proof of a subsequent disseisin of a co-tenant to characterize his possession as being adverse, so as by lapse of time to bar a right of entry. It is not sufficient that he continues to occupy the premises, and appropriates to himself the exclusive rents and profits, makes slight improvements on the land, and pays the taxes. The same doctrine was announced in *Ball* v. *Palmer*, 81 Ill. 370. Here the defendant did nothing to apprise the plaintiffs that he was claiming to be the absolute owner of the entire premises, except to receive the rents and pay the taxes, which in the case last cited was held to be insufficient. Had the defendant before he went into the possession of the property, acquired title or color of title from a stranger, and entered, claiming the land under such title, then he might properly invoke the Statute of Limitations as a bar; but he does not occupy that position. He acquired the title of the heirs of Alfred Bigelow, who were tenants in common with plaintiffs, and entered into possession under such title, and so far as appears, never gave the plaintiffs notice that he was claiming under any other or different title.

From what has been said, it follows that the decision of the court as to the defense of the Statute of Limitations was correct; but for the error indicated *the judgment will be reversed*, and the cause remanded.

## MISSOURI SUPREME COURT.

John LARSON, *Appt.*,
*v.*
METROPOLITAN STREET R. CO., *Respt.*

(.....Mo.....)

1. **One who employs a contractor to excavate for a building is not relieved of liability for the fall of a building on adjacent premises** caused by digging a trench too long and deep alongside the wall by the fact that the work was done by a contractor where the contract stipulated that the employer's engineer should be in charge of the work, with power to order the discharge of men who refused to obey his orders and where by an authorized assistant he did in fact order the trench to be dug as it was dug.

2. **One who promises the adjoining owner that in digging near the wall of the latter's building he will excavate and lay up his wall one section at a time,** is liable for the fall of the building where after laying one section of his wall he causes the fall of the building by digging a long and dangerous trench without notice of his change of plan.

(*Sherwood*, Ch. J., *and Gantt*, J., *dissent.*)

(May 9, 1892.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jackson County in favor of defendant in an action brought to recover damages for the fall of plaintiff's building because of the alleged negligent removal by defendant of its lateral support. *Reversed.*

The facts are stated in the opinion.

*Messrs.* **Gage, Ladd & Small,** for appellant:

A proprietor who makes excavations in his own land, near the premises of his neighbor, in a careless and negligent manner, is liable in damages for injuries to the building of the adjoining owner, which were the consequence of his carelessness and negligence in the work of excavation.

*Charless* v. *Rankin*, 22 Mo. 566, 66 Am. Dec. 642; *Stevenson* v. *Wallace*, 27 Gratt. 89; *Moody* v. *McClelland*, 39 Ala. 52, 84 Am. Dec. 779; *Myer* v. *Hobbs*, 57 Ala. 177, 29 Am. Rep. 719; *Shafer* v. *Wilson*, 44 Md. 269; *Austin* v. *Hudson River R. Co.* 25 N. Y. 334; *Quincy* v. *Jones*, 76 Ill. 231, 29 Am. Rep. 243; *McMillin* v. *Staples*, 36 Iowa, 532; *Dodd* v. *Holme*, 1 Ad. & El. 493; *Foley* v. *Wyeth*, 2 Allen, 131, 79 Am. Dec. 771; Washb. Easem. 4th ed. top p. 582 *et seq.*, *430 *et seq.*; Thomp. Neg. 276; Cooley, Torts, 2d ed. top p. 707, *595; Wood, Nuisances, 2d ed. §§ 189, 190.

Although work has been let to a contractor, this fact will not exonerate a party for whom the work is performed from liability for the negligent acts of the contractor, or his servants, if the right to control or direct the mode or manner of the work in any respect is retained, or if such control be in fact exercised, or such direction assumed.

*Speed* v. *Atlantic & P. R. Co.* 71 Mo. 303; *New Orleans, M. & C. R. Co.* v. *Hanning*, 89 U. S. 15 Wall. 657, 21 L. ed. 223; *Heffernan* v. *Benkard*, 1 Robt. 432; *Schwartz* v. *Gilmore*, 45 Ill. 457, 92 Am. Dec. 227; *Faren* v. *Sellers*, 39 La. Ann. 1011; *Brophy* v. *Bartlett*, 10 Cent. Rep. 709, 108 N. Y. 632; *Jones* v. *Chantry*, 4 Thomp. & C. 61; Whart. Neg. § 181.

It is not only unnecessary, but improper, to plead the evidence of the fact to be established.

It is sufficient in this state to state the act complained of, and allege that it was negligently done.

Under such allegation, all facts and circumstances tending to prove negligence are admissible.

*McPheeters* v. *Hannibal & St. J. R. Co.* 45 Mo. 24; *Kendig* v. *Chicago, R. I. & P. R. Co.* 79 Mo. 208; *Mack* v. *St. Louis, K. C. & N. R. Co.* 77 Mo. 234; *Crane* v. *Missouri Pac. R. Co.* 3 West. Rep. 922, 87 Mo. 594; *Goodwin* v. *Chicago, R. I. & P. R. Co.* 75 Mo. 75; *Braxton* v. *Hannibal & St. J. R. Co.* 77 Mo. 455; *Schneider* v. *Missouri Pac. R. Co.* 75 Mo. 296; *Robertson* v. *Wabash, St. L. & P. R. Co.* 84 Mo. 121; *Judd* v. *Wabash, St. L. & P. R. Co.* 23 Mo. App. 61; *Minter* v. *Hannibal & St. J. R. Co.* 82 Mo. 128.

Defendant failed to take the usual and ordinary precaution, and one imposed upon it by law, to give notice of its intention. The failure to take that precaution was one of the circumstances which made the digging and carrying away of the soil a negligent act.

*Schultz* v. *Byers*, 13 L. R. A. 569, 53 N. J. L. 442; *Ulrick* v. *Dakota Loan & T. Co.* (S. Dak.) Oct. 20, 1891.

*Messrs.* **Pratt, Ferry & Hagerman** for respondent.

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

Plaintiff's case is for damages occasioned by the fall of a building, occupied by him as lessee of the Ackerson estate, in Kansas City, Mo. The gist of his petition is that "the defendant wrongfully, carelessly, and negligently dug out and carried away the soil immediately adjoining and under the west wall of said building, by means of which . . . the said west wall was made to fall, . . . thereby destroying and damaging the property of plaintiff therein contained . . . to the extent of $3,000." The answer is a general denial. The circuit court forced plaintiff to a nonsuit, by giving an instruction in the nature of a demurrer to the evidence. It is therefore proper to outline the facts upon which plaintiff relies as constituting his cause of action. In so doing, he is entitled to the benefit of the most favorable view of his case that the evidence warrants, and of every reasonable inference therefrom. So viewed, the substance of his case is this: The plaintiff's build-

NOTE.—For *note* on the exceptions to the rule that an employer is not liable for acts of an independent contractor, see Hawver v. Whalen (Ohio) 14 L. R. A. 823.

For *note* on duty of owner in making excavations, see Schultz v. Byers (N. J. L.) 13 L. R. A. 569.



See also 19 L. R. A. 240.

ing was a two-story brick, in which he carried on business. It stood two inches from the eastern boundary of defendant's property, and extended from the street line some seventy-two feet southward. The excavation to which the damage is ascribed was made upon defendant's lot, close along that boundary line. This line ran at a right angle to Ninth street, on which plaintiff's house fronted. Both the lots reached southward from the street 125 feet, to an alley. The defendant proposed erecting an engine house on its lot, and in prosecuting that purpose contracted in writing with a firm for the necessary excavating and masonry for the foundations. Some of the terms of that contract will be mentioned later. The contractors sublet the excavating to another, who began its performance, having a foreman there in charge of a number of workmen and teams. The defendant's chief engineer occasionally visited the work, but the actual superintendence, under the first contract mentioned, was mainly exercised by Mr. Butts, the engineer's assistant, who remained on the ground. The foreman of the digging party testified that the subcontractor placed him under the orders of Mr. Butts, and that the work was accordingly done as the latter directed. About the time the excavating began, plaintiff had an interview with Mr. Butts, in which he asked "if he thought it was not dangerous to be taking dirt away," (namely, from "alongside of the wall;") to which Mr. Butts replied that "there was not going to be any injury to the building. Of course, he was going to take it out in sections, and wall it up as they went along." Plaintiff says that that "kind of satisfied" him. The house fell about a week later. Plaintiff observed the work meanwhile. A trench some five feet wide and from seven to eleven feet deep was first dug, near defendant's east boundary line, from the street to a point about opposite the south end of plaintiff's building, some seventy-two or seventy-three feet. The foundation of the latter was at a depth of eleven feet from the natural surface. They then began at the street line, and carried the trench to a further depth of about two feet (a total depth of about thirteen feet) for a distance of twenty-five or thirty feet from the street. The concrete and footing stone of defendant's foundation wall were then laid in the space or section. Three days later, according to the testimony of the foreman of the excavators, Mr. Butts directed him to "take out the remainder of the ditch," and he proceeded to do so, excavating to the additional depth of twenty-four to twenty-six inches (to correspond with the level of the first section) along the entire building line opposite plaintiff's house, a stretch of forty odd feet from the end of the first section. Mr. Butts was present while this work was being done. The job was begun at half past 2 o'clock, and was finished about half past 5 o'clock of the same afternoon. That night, about 10 o'clock, a large part of plaintiff's building slipped into the excavation, on account, as it is claimed, of that removal of its lateral support; but that portion of the house which faced the masonry work of the first section of defendant's foundation (for a distance of twenty-six feet from the street front) remained in place. The soil of the locality is that of the Missouri river bottom,—a mixture of sand and loam, formed by alluvial deposits. There was abundant evidence of experienced builders and civil engineers that the customary way of removing such soil for foundations adjacent to and below that of other buildings is to take out the earth in sections of ten to sixteen feet, each, in length, and to substitute the new foundation in each section before opening the next one; that any other mode of doing such work is likely to result as in the present case; but that building in sections involves an expense from 18 to 30 per cent greater than the cost of proceeding without subdividing the work in that manner. On these facts the trial court declared that plaintiff had no cause of action, and he has appealed against that ruling.

1. Before reaching the main issue, it will be well to dispose of a subordinate one, touching the responsible connection between defendant and the digging force, to whose acts the consequences complained of are ascribed. The defendant claims that those acts were done, in effect, by a contractor independent of its control, and that it is not liable on account thereof. It is now an accepted rule that supervision of such work may be retained without interfering with the independent action of liability of contractors who have engaged to perform it or subdivision of it; but in the case at bar the contract under which the work was done goes much further. It declares that "the excavation shall be carried to such general depth as may be indicated by the engineer. Excavations for the trenches and piers will be made as required from time to time in the progress of the work, and to such an extent as may be indicated by the engineer." Along with this language are statements that the engineer was "in charge of the work," and that men who refused or neglected to obey his orders were to be discharged by the contractors. Now, the very act complained of here is the digging of the trench too long and too deep in the circumstances. That act is charged as negligence. It was ordered by defendant's representative on the spot acting for the chief engineer who had express power to direct "by his authorized agents" as well as personally. The work was done precisely as ordered. Thus it was the exercise of the discretion or judgment vested in the supervising authority which caused the catastrophe; and for that exercise of judgment defendant must respond. *Lancaster* v. *Connecticut Mut. L. Ins. Co.* (1887) 92 Mo. 460, 10 West. Rep. 409; *Bower* v. *Peate*, (1876) L. R. 1 Q. B. Div. 321.

2. The chief question in the case is to determine what duty towards plaintiff rested upon defendant in view of the facts. Very much has been written upon the right of lateral support and its limitations under the English law. It will not be necessary to restate the general principles governing that right. They were discussed very lucidly

here years ago in *Charless* v. *Rankin*, (1856) 22 Mo. 573, 66 Am. Dec. 642, which remains a leading case on that subject. For present purposes it will suffice to say it is settled law that the unquestionable right of a landowner to remove the earth from his own premises, adjacent to another's buiding, is subject to the qualification that he shall use ordinary care to cause no unnecessary damage to his neighbor's property in so doing. We need not inquire how such a principle became ingrafted upon a system which traces its origin to the English common law; but that it is there is evidenced by abundant decisions, of which a few leaders, besides that above cited, may be mentioned: *Foley* v. *Wyeth*, (1861) 2 Allen, 131, 79 Am. Dec. 771; *Austin* v. *Hudson River R. Co.* (1862) 25 N. Y. 334; *Quincy* v. *Jones*, (1875) 76 Ill. 240, 29 Am. Rep. 243. The underlying principle of legal ethics on which this rule rests is well stated in *Charless* v. *Rankin*, above, to be that, "if a man, in the exercise of his own rights of property, do damage to his neighbor, he is liable if it might have been avoided by the use of reasonable care." The reports furnish many illustrations of its application, but we need not stop to emphasize the statement of it by references to them, since its force, in cases of this character, is now fully recognized. What is the standard of ordinary care which one excavating on his own estate must use to avoid damage to his neighbor's building, is a question of some difficulty. In many localities the subject is regulated by statutes defining the reciprocal rights of the parties. It may be stated generally, in the absence of a statutory rule, that the care required of a party so excavating is that of a man of ordinary prudence in the circumstances of the particular situation; but that statement affords meager aid in determining the exact duty imposed by the rule in its practical application to any given case. The fact is that the particular circumstances so largely shape and indicate the duty that any attempt to reduce the rule to greater certainty would probably tend to impede, rather than to promote, the administration of justice. Quite recently it has been definitely held, following supposed indications in earlier cases, that prior notice to the neighbor whose property may be endangered by an excavation is an essential part of the ordinary care referred to,—*Schultz* v. *Byers*, (1891) 53 N. J. L. 442, 13 L. R. A. 569; but that ruling was accompanied by a vigorous dissent, and can scarcely be considered as settling the point. It is not necessary to decide it in the case at bar, for it is here conceded that plaintiff had ample notice, in fact, of the intended excavation. He also had notice that it was to be made in a particular manner, namely, by removing the dirt "in sections," and walling "it up as they went along." The defendant's superintendent in charge so stated to him at the outset, when plaintiff suggested the danger of the undertaking; and the former, as a witness in the cause, did not deny the plaintiff's account of that interview. It was in evidence that that course was the one indicated by ordinary prudence, and by the uniform custom of builders in that locality, in view of the nature of the surrounding soil. But for that information as to the mode of excavation and construction to be pursued, the plaintiff might have taken effective steps to shore up and protect his building,—steps which were unnecessary if the work was done in sections. We think that plaintiff had the right to rely upon the statement of the superintendent, made during the progress of the work and of his agency, (and hence *res gestæ*,) as to the care which defendant intended to exercise towards the property of plaintiff, with reference to which that statement was made. He had the right to assume that the course foretold would be followed, at least until he had notice to the contrary, and a reasonable opportunity thereafter to act upon such later notice. We have added this last observation to meet the suggestion of defendant that plaintiff was duly advised that the excavation was not being done in sections. But on this point it appears that one section was first built substantially as promised, and that the long and dangerous excavation later, to which the fall of the building is charged, occurred between half past 2 and 5 o'clock of the afternoon preceding the injury.

On these facts the court cannot justly declare, as a conclusion of law, that plaintiff, in the exercise of reasonable care, was chargeable with notice that the plan of construction previously indicated by the superintendent was not to be followed, and should have taken measures of his own for the protection of his domicil. Nor do we think plaintiff's case concluded by the consideration that the removal of the earth in sections would have involved some additional outlay, and would have lessened, in some slight degree, the strength of its foundation wall. As to the latter fact, it is not claimed that the utility or value of the wall for the purpose of its construction would be in any wise impaired by the building in sections. As to the former fact of extra expense, we regard it immaterial, in view of the other evidence already alluded to, not to mention broader considerations bearing on that point. *Beauchamp* v. *Saginaw Min. Co.*, (1883,) 50 Mich. 163. If defendant notified plaintiff that a certain mode of proceeding was to be pursued, and thus led him to act upon that hypothesis, and refrain from taking steps which would otherwise have been necessary and prudent to insure the safety of his property, the risk of injury to the plaintiff in the premises imposed on defendant the duty towards him of conforming to the plan of work of which it had advised him, or to reasonably notify him of a change in that plan in season to admit of his adopting protective measures of his own. The evidence tends to prove that no such evidence was given, and, in default thereof, the measure of reasonable and proper care on defendant's part, in the circumstances, was that indicated in the statement of the superintendent. As to whether the same measure of care would rest upon defendant in the absence of the peculiar facts here presented we are not called upon to say. In the view we take of the

case, the fact that the promised course of construction involved a greater expense than some other one can have no material bearing on the rights of the parties. On the whole case we think it fairly a question of fact whether defendant exercised ordinary care in directing the excavation to be made as it did, in view of the circumstances mentioned, and whether the fall of the building was caused or contributed to by any want of such care. The trial court, we consider, erred in instructing to the contrary.

*The judgment should be reversed*, and the cause remanded. It is so ordered.

**Black, Brace, MacFarlane,** and **Thomas, JJ.**, concur. **Sherwood,** *Ch. J.*, and **Gantt,** *J.*, dissent.

**Sherwood,** *Ch. J.*, dissenting:

Action for damages growing out of the defendant company digging ditches or trenches for the foundations of an engine house, then in process of erection, upon its own lot 13, and along the western line of the building and lot which plaintiff occupied as lessee of the Ackerson estate, in consequence of which digging the west wall of the house—a two-story brick building—in which plaintiff lived, and which he used as a saloon, restaurant, and boarding house, fell, and in its fall carried with it other portions of the building, thereby damaging and destroying the personal property of plaintiff therein, and rendering the building untenantable. The petition charges that "the defendant wrongfully, carelessly, and negligently dug and carried away the soil immediately adjoining and under the west wall of said building, by means of which," etc. The building in question was built within one inch of the division line of the two lots, and had so stood for several years. The ditches for the east line of the engine house were dug quite close to the boundary line between the plaintiff's property and that of the defendant. The soil in the locality—the Missouri river bottom—is a mixture of sand and loam. In doing the work, a trench of sufficient depth and width for the proposed foundation was wholly dug upon respondent's lot near the east line thereof. The trench was first dug out by Collins and his men for a distance of twenty-five feet. The original contractors filled up this space with stone masonry work. Three days thereafter the subcontractor started to dig the remainder of the trench on the east side of the lot, and the night of the day this work was finished the Ackerson building fell and plaintiff's property therein was injured thereby. The evidence shows that the soil of lot 14, in its natural condition, without the additional weight of the Ackerson building, would not have fallen. And the testimony also shows that, so far as the mere fact of excavating was concerned, it was done in the proper way; but, had the work been done in sections, the injury would not have occurred. By doing the work in sections is meant that the excavators would dig 16 feet or less in length of the trench, and then, before proceeding further, wait till the stone masons had walled up that portion of the excavation, and so continue till the work was completed. To have done the work in sections would have increased the cost from 20 to 30 per cent, and would have weakened the foundation. This increased expense would fall upon the contractor. The testimony also shows that the trenches for the foundation were dug to the depth of some thirteen feet, and five feet in width; and the first section of the trench, some twenty-five feet, running backward from Ninth street and along the boundary line, was at once filled in with concrete and footing stones, to a point just below the lower level of the adjoining foundation; but the Ackerson building, when it fell, did not fall beyond the south end of these footing stones of the new foundation wall.

At the close of the testimony the court instructed the jury that upon the pleadings and evidence the plaintiff could not recover, and this action of the court resulted in the plaintiff taking a nonsuit, with leave, etc. The correctness of the instruction thus given to the jury is the only question necessary for consideration, and this involves the salient question in this cause,—whether the plaintiff was guilty of actionable negligence in the circumstances stated. On the point in hand an eminent text-writer observes: "Of a nature somewhat akin to the easement of light connected with the ownership of a house is that of support, or the right of having one's land and the structures erected thereon supported by the land of a neighboring proprietor. The proposition may be stated thus: A, owning a piece of land without any buildings upon it, has a natural right of lateral support for his land from the adjoining land. This right exists independent of grant or prescription, and is also an absolute right; so that, if his neighbor excavates the adjoining land, and in consequence A's land falls, he may have an action, although A's excavation was not carelessly or unskillfully performed. This natural right does not extend to any buildings A may place upon his land; and therefore, if A builds his house upon the verge of his own land, he does not thereby acquire the right to have it derive its support from the land adjoining it until it shall have stood and had the advantage of such support for twenty years. In the meantime such adjacent owner may excavate his own land for such purposes as he sees fit, provided he does not dig carelessly or recklessly; and if, in so doing, the adjacent earth gives way, and the house falls by reason of the additional weight thereby placed upon the natural soil, the owner of the house is without remedy. It was his own folly to place it there. But if it shall have stood for twenty years with the knowledge of the adjacent proprietor, it acquires the easement of a support in the adjacent soil. . . . But this right of a land-owner to support his land against that of the adjacent owner does not, as before stated, extend to the support of any additional weight or structure that he may place thereon. If, therefore, a man erect a house upon his own land, so near the boundary line there-

of as to be injured by the adjacent owner excavating his land in a proper manner, and so as not to have caused the soil of the adjacent parcel to fall if it had not been loaded with an additional weight, it would be *damnum absque injuria*,—a loss for which the person so excavating the land would not be responsible in damages." 2 Washb. Real Prop. 5th ed. pp. 380-382, and cases cited. In 2 Shearman & Redfield on Negligence, 4th ed. § 701, it is stated: "In exercising his rights over his land, the owner is bound to use ordinary care and skill for the purpose of avoiding injury to his neighbor. Thus, while, as a general rule, he is not bound to continue the support which his land gives to a structure upon, or other artificial arrangement of, adjoining land, and is, therefore, not liable for the natural consequences of his withdrawing this support, yet in doing so he must act with such care and caution that (as nearly as by reasonable exertion it is possible to secure such a result) his neighbor shall suffer no more injury than would have accrued if the structure had been put where it is without ever having had the support of his land One who digs away land which affords support to an adjoining house ought to give the owner reasonable notice of his intention to do so, and he must allow the latter all reasonable facilities for obtaining artificial support, including a temporary privilege of shoring up the house by supports based upon the former owner's land;" and in the next preceding section the rule is laid down that "it is not, therefore necessarily negligence on the part of a landowner to make a use of his land which inevitably produces loss to his neighbor; for, as he may willfully adopt such a course, and yet not be a wrongdoer, much less is he liable for unintentionally doing that which he has a right to do intentionally." In another approved writer on negligence it is stated: "But, whatever may be the right of one landowner to excavate his own soil so as to deprive his neighbor's land of its support, the authorities are agreed that he must exercise what care and skill he can to prevent injury to his neighbor, and if he inflict an unnecessary injury upon his neighbor through negligence, he must pay the damages. Thus the authorities are agreed that one who proposes to excavate, or make other alterations or improvements upon his own land, which may endanger the land or house of his neighbor, is bound to give the latter reasonable notice of what he proposes to do, to enable him to take the necessary measures for the preservation of his own property. But, after giving such notice, he is bound only to reasonable and ordinary care in the prosecution of the work. Where the excavation was of itself lawful, and the gravamen of the plaintiff's complaint was that it was unskillfully done, it was held incumbent on the plaintiff to show negligence by other proof than by the mere fact that the walls of his house cracked and gave way. In the view of the court so deciding, this was not a case for the application of the rule *res ipsa loquitur*. . . . If the owner of a house, in a compact town finds it necessary to pull it down and remove the foundation of his building, and he gives notice of his intention to the owner of the adjoining house, he is not answerable for the injury which the owner of that house may sustain by the operation, provided he removes his own with reasonable and ordinary care." 1 Thomp. Neg. 276, 278.

The court of appeals of Kentucky says: "The proprietor making the excavation cannot be charged with damages for negligence because he failed to shore up his neighbor's house in a case where the latter has no right of support in the nature of an easement by grant or prescription. In such case his neighbor must shore up his own house." *Shrieve* v. *Stokes*, 8 B. Mon. 453, 48 Am. Dec. 401. And there is no obligation on the part of the owner of a building about to be removed to shore up the other buildings. Goddard, Easem. (Bennet's ed.) pp. 43, 44. In *Shafer* v. *Wilson*, 44 Md. 268, the same doctrine is distinctly recognized,— that, proper notice being given to the owner of a building on an adjacent lot, it is the duty of the latter, on receiving such notice, to shore up his own building. In *Lasala* v. *Holbrook*, 4 Paige, 169, 3 L. ed. 390, the same principle finds recognition. To the same effect, see *Peyton* v. *London*, 9 Barn. & C. 725, and other English cases, and 2 Shearm. & Redf. Neg., *supra*, § 701. And the duty of the owner of a building on an adjacent lot which may probably be imperiled by the digging for a foundation on his neighbor's lot, to protect his building, is stated to begin after he has been notified of the intended improvement, and given an opportunity to protect his own interests. But if he has personal knowledge of the progress of the intended improvement, this is tantamount to notice. This is the doctrine, also, of this court in *Charless* v. *Rankin*, 22 Mo. 566, 66 Am. Dec. 642.

These cases have been cited and quotations made from them as preliminary to the present investigation. Let us proceed to apply the result of these authorities to the facts in the case at bar. That the plaintiff was aware of the excavation going on, living as he did in the house which fell, and watching the excavation, cannot be questioned; and such actual knowledge has been held to countervail and overthrow the effect of notice when given even under an Act of parliament, and before the time specified in the notice had expired. *Peyton* v. *London*, *supra*. In that case, having such actual knowledge that the adjoining building was being pulled down, it was ruled that it was the duty of the plaintiffs to shore up their building by supports within that building, and, they having failed to do this, a nonsuit was directed; and this was so ruled notwithstanding that the adjoining house, whose removal caused the litigation, had been supported by struts, and that these struts were removed when the house was torn down, it not appearing that any peculiar right or servitude had been acquired by the plaintiffs over the adjoining house or property. The authorities cited also teach the doctrine that ordinary care is the measure of a man's liability,

when excavating upon his own lot, which adjoins that of his neighbor, on which a building stands. Such improving owner, assuming that notice of the intended excavation has been given, or that knowledge of it exists, is only responsible for actual or positive negligence in the manner of digging for the foundations of his proposed building. So long as he does not dig carelessly or recklessly, he is free from liability, let the consequences be what they will. 2 Washb. Real Prop. *supra*. And as the plaintiff here was fully cognizant of what was going on, he was bound properly to shore up, support, or protect his own building against any probable danger. It was his clear duty, under the authorities and upon the evidence, for him to do this. As it was, the plaintiff's duty to protect his own property from destruction, it is clear that a concurrent duty to protect the same property could not exist as against the defendant. The bare statement of such a premise announces its own conclusion. But as the measure of the defendant's care was only ordinary care, it did not belong to him, nor was it required of him to use the same care that a prudent man would exercise in similar circumstances. Such a standard of care was held too high a one on the part of an excavating proprietor in *Charless* v. *Rankin*, *supra*. And that case is also authority for the assertion that the owner of the servient tenement owes no duty to the adjoining proprietor to guard the interests of his neighbor, as he would do as the prudent owner of both properties; that he was not bound, for illustration, to go to an increased expense in the progress of excavation, by building his foundation wall in sections, nor to weaken that wall by such a course, and that a failure thus to build and thus to endanger the wall was not negligence. Applying these principles to this case, it becomes wholly immaterial whether or not a representative of the defendant company gave assurances to the plaintiff that he would build the remainder of the wall in sections. Such promise or assurance, if it were not the duty of that company, was but a *nude pact*, made without either duty to create, or consideration to support it, and therefore not obligatory on the defendant company, even granting that the party making such promise was in reality the representative of the company. Besides, even after the promise was made, the plaintiff was present, and knew that the promise as to building in sections was not performed, but making no effort to protect his property. In any event, this action is not brought because of any negligent failure of the defendant company to build the wall in sections, or to notify the plaintiff. The very gravamen of the action is the mere negligent manner in which the trenches for the foundations were dug. On such a statement, negligence in any other regard obviously would be excluded. *Peyton* v. *London*, *supra*; *Waldhier* v. *Hannibal & St. J. R. Co.* 71 Mo. 514; *Reed* v. *Bott*, 100 Mo. 62. The judgment should be affirmed.

The foregoing opinion was filed by me in division No. 1 of this court, and I still adhere to the conclusions of fact and of law therein announced. The authorities I have cited fully sustain the positions I have taken, and especially is this true of *Peyton* v. *London*, *supra*, on the question of pleading, in which the opinion was delivered by *Lord* Tenterden, *Ch. J.* I am content to err, if err I do, in such good company. **Gantt**, *J.*, concurs in this dissent.

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## MINNESOTA SUPREME COURT.

James E. GLASS *et al.*, *Plffs.*,
*v.*
Nels A. FREEBURG *et al.*, *Respts.*,
and
Charles K. FULTON *et al.*, *Appts.*

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

***Where a building is constructed under one entire contract** between the owner and the original contractor, the liens of all subcontractors, who furnished material or performed labor for the building at any time during the process of construction attach, by relation, as of the date of the commencement of the work, and are entitled to a preference over a mortgage on the premises, executed by the owner subsequent to that date.

(July 7, 1892.)

APPEAL by defendants, Charles K. Fulton *et al.*, from a judgment of the District

*Head note by MITCHELL, J.

NOTE.—*Relation back of subcontractor's lien to the date of that of original contractor.*

Whether or not the subcontractor's lien will relate back so as to become effective from the date when that of the principal contractor attaches depends almost exclusively on the wording of the particular statute under which it is claimed.

Where the statute makes the mechanics' lien effective from the time work on the building is commenced the tendency of the courts is to hold that all liens including those of subcontractors become effective at that time regardless of when the work was done or the material furnished.

Thus, in Montana, mechanics' liens have priority over all other incumbrances put upon the property after the commencement of the building. Davis v. Bilsland, 85 U. S. 18 Wall. 659, 21 L. ed. 969.

The language of the statute there is that such liens "shall be prior to, and have precedence over, any mortgage made subsequent to the commencement of work on any contract for the erection of the building," and this is held to carry the lien of the subcontractor back to the date of the commencement of the building, although it is conceded that the rule might be otherwise if the statutes read "subsequent 'to the commencement of the work," as in some other states. Merrigan v. English, 5 L. R. A. 837, 9 Mont. 113.

The lien of a subcontractor relates back to the date of the commencement of the erection of a

16 L. R. A.

See also 19 L. R. A. 478; 33 L. R. A. 685.

Court for Hennepin County postponing their claim to a mechanics' lien on certain real estate, to the lien of a prior mortgage which had been filed after work on the building had been commenced. *Modified.*

The facts sufficiently appear in the opinion.

*Messrs.* **Wilkinson & Traxler** for appellants.

*Mr.* **George D. Emery** for respondent Pioneer Savings & Loan Co.

*Mr.* **Edson S. Gaylord** for defendant Freeburg.

*Messrs.* **Gray & Pulliam** for defendants Henry Yost *et al.*

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

Counsel for the respondent building association claims that the correct construction of the findings of the trial court is that Nels A. Freeburg, was merely the agent of Olaf A. Freeburg, and as such contracted in the name and behalf of his principal for material and labor for the construction of the buildings referred to. We do not concur with this view. We think the findings are clearly to the effect that Olaf, as owner of the premises, contracted with Nels for the erection by the latter of the buildings, and that the latter, as principal and in his own behalf, purchased and contracted for the material and labor for the construction of the same and that when the court described him as the "agent" (as well as the contractor) of Olaf, "with authority and power to contract for labor and material for the construction of the buildings," it had reference merely to the legal principle upon which it is held that a contractor has authority to charge the land of the owner with debts for labor and material incurred by him in performing his contract. See *O'Neil* v. *St. Olaf's School*, 26 Minn. 329; *Laird* v. *Moonan*, 32 Minn. 358; *Meyer* v. *Berlandi*, 39 Minn. 438; *Bardwell* v. *Mann*, 46 Minn. 285.

According to the findings we have, then, this state of facts: The owner of land made one entire contract with another for the erection thereon by the latter of certain buildings; that in the performance of his contract the contractor purchased from plaintiffs, and the plaintiffs furnished to him, certain material for the construction of such buildings on May 17, 1890, so that it must be taken as a fact that the actual work of the construction of the buildings was commenced as early as that date; that subsequently, and while the work was in progress, the owner of the premises executed a mortgage thereon to the respondent building association; that after this mortgage had been executed and recorded, and while the work was still in progress, the appellant, the Fulton & Libby Company, furnished to the original contractor certain material for the construction of the buildings in question. So far as appears, and presumably, the erection of the buildings was one continuous job performed under the original contract between the owner and the original contractor. The original contractor never filed any claim for a lien, but the appellant, not having received its pay, seasonably filed its claim for a lien for the material thus furnished to the contractor.

The sole question on this appeal is whether the lien of the appellant is entitled to a preference over the mortgage of the building association. This question has never before been presented for our consideration.

In *Finlayson* v. *Crooks*, 47 Minn. 74, each of the liens arose under a separate and independent contract by the claimant directly with the owner of the property. Moreover, the question of priority between the mortgagee and the lien claimants was not raised.

In *Hill* v. *Aldrich* (Minn.) 50 N. W. Rep. 1020, the rights of subcontractors were not involved, and it also appeared that the mortgage was executed and recorded before anything had been done towards the construction of the building.

In *Haupt Lumber Co.* v. *Westman* (Minn.) 52 N. W. Rep. 33, the original contractor had not commenced performance of his contract when the mortgage was executed, but it was intimated that possibly a different result might have been reached had the work of the construction of the buildings been commenced before the execution of the mortgage.

We have had occasion recently to refer to the fact that the Mechanics' Lien Law fails

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building the work upon which has been continuous and has priority over a mortgage placed upon the property after the work was begun. Hyraulic Press. Brick Co. v. Bormans, 2 West. Rep. 434, 19 Mo. App. 664.

Although it has been previously held that under the Missouri law relating to St. Louis County, the lien attaches in favor of the subcontractor at the time of performing the work or furnishing the material for which it is claimed. Kuhleman v. Schuler, 35 Mo. 144.

In Denkel's Estate, 1 Pearson, 213, it is stated that claims of all mechanics and materialmen commence at the date of the first stroke of the axe or spade used in making the house, without regard to the time of their being filed or to the doing of the work or furnishing material.

Mellor v. Valentine, 3 Colo. 259, also seems to recognize the rule that the lien relates back to the time the work was commenced or the first of the material furnished.

As intimated above the language of the statute would change this rule and consequently a different rule is found in other jurisdictions, and the rule has been changed at times in the same state when a change has been made in the language of the statute. Thus an early California case held that the subcontractor's lien attaches at the time of service of notice on the owner. Cahoon v. Levy, 6 Cal. 295, 65 Am. Dec. 515.

But a later case held that the lien relates back to the time the work commenced. Tuttle v. Montford, 7 Cal. 360.

And the authority of Cahoon v. Levy, *supra*, is apparently recognized again in the later case of Brennan v. Mars, 10 Cal. 435.

Under the Act of 1862 if there is no written contract for the construction of the building the liens do not relate back to the commencement of the building, but each lien takes effect on the day when the particular labor was commenced for which it is claimed. Barber v. Reynolds, 44 Cal. 520. See also Germania Bldg. & Loan Asso. v. Wagner, 61 Cal. 355. H. P. F.

to make any express provision with reference to cases where a mortgage or other incumbrance is placed on the premises after the work of construction has been actually commenced. But we have arrived at the conclusion that, even in the absence of any express provision on the subject, upon certain general equitable principles, and also as a necessary implication from certain provisions of the statute that are expressed, the appellant's lien is entitled to a preference over that of the mortgage. The lien of the original contractor for the entire building, if he had claimed one, would have been held to have attached at the date of the actual commencement of the work or of the furnishing the first material, and no subsequent sale or incumbrance of the land by the owner would have affected this right, and any party purchasing or taking an incumbrance on the property while the buildings were thus in process of erection would have done so subject to it. The contract for the erection of the buildings being an entirety, the contractor, notwithstanding the mortgage to the building association, had a right to go on and finish them, and to insist on the priority of his lien for his entire pay over the lien of the mortgage. A subcontractor comes in by reason of his direct contract relation to the contractor, and the right of lien of the former for his claim is *pro tanto*, in a certain sense, substitutionary to that of the latter, and by relation is deemed to have attched at the date when the lien of the original contractor attached. The whole work, being done in the performance of one entire contract with the owner, is to be deemed a unit, whether done directly by the contractor himself or by subcontractors, and all liens therefor, without regard to the time in the progress of the work when the labor was done or the material furnished, are co-ordinate, and all attach by relation as of the date of the commencement of the work. The authority of the contractor to charge the land for the purposes of the contract is co-extensive with the necessities of the building, and continues until it is finished, and the commencement of the building is notice to all the world of the existence of the power. Everyone dealing with the property has the means, by ocular examination, of ascertaining whether work has been commenced or materials furnished on the ground. The fact that buildings are in process of erection on premises charges everyone with notice of the rights of the parties doing the work. If a building is being erected under a contract with the owner, any one dealing with the property is bound to take notice of the fact that labor and material for the completion of the building will be required, and that those who perform or furnish it will, under the law, be entitled to a lien therefor; and if they see fit to take a mortgage under such circumstances they assume the risk of its being subordinated to all liens which may attach to the premises for labor or material for the completion of the building in accordance with the contract under which it is being erected. This rule is almost necessarily implied from the provisions of section 10 of the statute regulating the enforcement of such liens as between the contractor and the subcontractors and as between the subcontractors themselves. The incongruities and confusion that would arise in attempting to carry out these provisions upon any other theory will be apparent on a moment's reflection, as, for example, where a lien is given to the contractor as well as to subcontractors, or where, after judgment, the contractor pays off the subcontractors and is subrogated to their rights. Our conclusion is that appellant's lien is entitled to a preference over respondents' mortgage. The cause is remanded, with directions to *modify the judgment* accordingly.

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## FLORIDA SUPREME COURT.

JACKSONVILLE, TAMPA & KEY WEST R. CO., *Appt.*,
*v.*
Joseph GALVIN.

(.....Fla.....)

***1. A declaration against a railroad corporation, alleging that the defendant company unsafely and negligently loaded a certain car** upon its railroad with railroad iron so that the bars projected a considerable distance over the end of said car, and that it was negligently accepted by defendant company for transportation when in an unsafe condition, and unfit for the purpose of coupling, which was known to defendant, but of which plaintiff, a brakeman employed on defendant's train to couple cars, was ignorant, and by due care could not have known, and by means whereof said plaintiff was injured while attempting to couple said car, is not amenable to a demurrer, on the ground that the injury was caused by the acts of fellow-servants of plaintiff.

**2. A brakeman employed by a railroad company to couple cars on its railroad assumes the hazards of the ordinary perils** which are incidental to such employment, and in a suit by such brakeman against the company to recover damage for injuries received in attempting to couple cars on account of alleged negligence in loading a car to be

*Head notes by MABRY, *J.*

NOTE.—In addition to the cases discussed in the opinion which directly touch the subject of a brakeman's assumption of the risks of projecting timbers or other articles over the ends of a loaded car, we call attention to the following *notes* on the general subject of assumption of risks by employés.

Pidcock v. Union Pac. R. Co. (Utah) 1 L. R. A. 131; Foley v. Pettee Mach. Works (Mass.) 4 L. R. A. 51; Howard v. Delaware & H. Canal Co. (Vt.), 6 L. R. A. 75.

See also the case next following this one in which on a similar state of facts an opposite conclusion was reached.



See also 22 L. R. A. 292.

coupled, and in negligently accepting a car to be coupled, when the same was in an unsafe condition, a charge of the court to the jury that excludes the right to consider such a coupling as coming within the ordinary hazards and risks of his employment is erroneous.

3. **The instructions of the court must be confined to the issues made by the pleading,** and it is error for the trial court to instruct the jury that they may base their verdict in favor of plaintiff upon a cause of action however meritorious or satisfactorily proved, that is substantially different from that which he has alleged.

(May 28, 1892.)

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

Statement by **Mabry, J.:**

The appellee, Galvin, sued the appellant, a railroad corporation, in the Duval circuit court, for personal injuries received by the alleged negligence of said corporation. The allegations of the declaration, as to the cause of action, are as follows: "That the plaintiff (appellee here) was employed by the defendant (appellant) as brakeman, to couple cars for the defendant upon its said railway, and upon the 26th day of November, 1885, at Palatka, in Putnam county, said state, on defendant's said railway being so employed, a certain one of said cars was coupled, or attempted to be coupled, by plaintiff, which, by the negligence and default of defendant, had been loaded unsafely and negligently, and was so received and accepted by defendant for coupling and transportation, and was in an unsafe condition and unfit for the purpose of coupling, which the defendant well knew, but of which the plaintiff was ignorant, and by due care could not have known, and by reason of the premises, whilst the plaintiff was so employed as such brakeman as aforesaid upon said railway at said place, defendant's railroad locomotive engine and train of cars attached thereto, driven and conducted by its servants, was driven to said car to be coupled thereto when the said car so negligently and unsafely loaded as aforesaid, being so negligently and unsafely loaded with railroad iron that the bars projected a considerable distance over the end of said car, thereby leaving so little space between said car sought to be coupled, and the engine and train of cars to which said car was sought to be coupled, that plaintiff was mashed and squeezed between said cars, so sought to be coupled, and said engine and train of cars attached thereto, to which said car was sought to be coupled, and his collar-bone was broken, and one of his hands broken and he was permanently injured and rendered unfit for work, to the damage of plaintiff of $10,000, and therefore he brings suit and claims damages in the sum $10,000." The summons was served upon the superintendent of the defendant company in Duval county, Florida.

The railroad corporation interposed a demurrer to the declaration on the ground that the alleged injury was caused by the acts of fellow-servants of plaintiff, and for which defendant corporation is not liable. The demurrer was overruled, and said defendant plead the general issue, that the alleged injury was caused by the acts of fellow-servants, and that plaintiff by his own carelessness and negligence contributed to said injuries. A trial of the cause resulted in a verdict and judgment for plaintiff below for $2,472, from which an appeal is prosecuted to this court.

The other facts of the case sufficiently appear in the opinion of the court.

*Mr.* **J. R. Parrot** for appellant.

*Mr.* **Frank W. Pope** for appellee.

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

The first error assigned is the overruling of defendant's demurrer to the declaration. There is no error in the decision of the court overruling this demurrer. The declaration in substance alleges that the defendant corporation unsafely and negligently loaded a certain car upon its railroad with railroad iron so that the bars projected a considerable distance over the end of said car, and that defendant negligently received and accepted said car for coupling and transportation; that said car was in an unsafe condition and unfit for the purpose of coupling, which was well known to said defendant, but of which the plaintiff was ignorant, and by due care could not have known; that plaintiff was employed by defendant to couple cars on its road, and while so employed, at Palatka, in Putnam county, Florida, on the 26th day of November, 1885, coupled, or attempted to couple, said car so negligently and unsafely loaded, and received and accepted by defendant for coupling and transportation; that defendant's locomotive engine, with a train of cars attached thereto, was driven by its servants to said loaded car to be coupled, and that the projection of said railroad iron over the end of said car left so little space between the said car sought to be coupled, and the train of cars attached to the said engine that plaintiff was mashed between said cars and received the alleged injuries. The allegation is that the defendant corporation negligently loaded the car in the manner specified, and negligently accepted it for coupling and transportation when in an unsafe condition, and that in consequence thereof plaintiff was damaged.

The defendant cannot under a demurrer to this declaration avail itself of an exemption from liability on the ground that it is not chargeable with the acts of plaintiff's fellow-servants. The declaration does not disclose what class of servants of defendant performed the acts alleged to have caused the injury. The averment is that the defendant loaded and accepted the car, and not only so, but it is alleged that the defendant negligently loaded and accepted the car for coupling and transportation. The demurrer admits these allegations to be true, and if true, they show a cause of action against the defendant. The demurrer was properly overruled.

Various assignments of error are predicated upon exceptions taken to instructions given for plaintiff, and refused to defendant in the

trial court. Before considering these assignments of error we will refer to the testimony on the point of defendant's liability. The plaintiff, at the time of the accident, was employed by the defendant company as brakeman on one of its freight trains. His account of the occurrence is as follows: "On November 26 we were backing down on the side track to get at a car of iron. They gave me the keys and told me to get out that car, and just as he gave me the keys he said 'I will go myself.' I was on one side and he on the other side; we both came down to the switch, and when we came to the switch I jumped off to let the engine in, and we went back by the main line and against the car to couple on. He hallooed to the engineer to come back, and the engineer came back very carefully, but being dark I could not see at all till I got up to the car. When I got up to the car, it came back and crushed me down and I did not know anything more."

The testimony shows that the defendant company, at the time of the injury, was engaged in extending its railroad beyond the point of the accident, and the freight train on which plaintiff was employed as brakeman was daily hauling cars loaded with lumber and iron to a point near where the road was being constructed. On the day of the accident a flat car was loaded with railroad iron by a gang of men working with a construction train of defendant, and placed on a side-track at Palatka for the freight train to pick up and haul to the work on the road. The construction train was under the control of a conductor, whose duty it was to have the cars loaded.

The iron on the flat car projected over one end eighteen or twenty inches, and the car was about the length of or a little longer than the iron. It appears from the testimony of the freight conductor, who was examined as a witness for defendant, that it was his duty to inspect the cars to be taken into the train, and that he received this car after he saw the iron projecting over the end. He states, however, that he was daily hauling lumber and iron for the construction of the road, and it was very common at this time to find cars loaded with lumber and iron projecting over the ends. A witness, who was at the time a brakeman on the construction train, and introduced by plaintiff, testified that he could not say it was a general thing for the company to load trains in that way, but that the flat cars had brakes on them at one end, set back eighteen or twenty inches, and in loading iron the conductor would tell the men to push it back so as not to hit the brakes, and this would cause a projection over the other end. This witness also states that the iron could have been loaded so as to avoid the brakes and still not project over the end. The plaintiff says that his train was engaged in daily hauling cars loaded with lumber and iron, but he never saw any before projecting over the ends of the cars. At the time of the accident plaintiff had been in the service of the company two or three weeks, but he states that he was an experienced brakeman, and had been engaged in this business on other roads two or three years.

The freight train on which plaintiff was employed arrived in Palatka about dark, and the accident occurred between half-past six and seven o'clock at night, in attempting to couple on the car loaded with iron. The engine to which was attached a flat car loaded with lumber, was backed in on the side track to connect with the iron car, and the proof is that the engine went back very carefully. The conductor directed the plaintiff to couple the car, and he went between them for this purpose, and was mashed by the projecting iron. At the time he had a lantern which was giving good light, but he says he did not see that the iron projected until it was too late, and he was caught. The conductor says he saw the iron projecting, and hallooed to plaintiff to look out for himself, but did not call attention to the fact that the iron projected. His reason for calling to plaintiff to look out for himself, he says, was because he was naturally apt to be careless, and it was a bad coupling to make. The engineer, who was examined for defendant, says that he saw the iron projecting over the end of the car, and told plaintiff not to stand up to make the coupling. He knows plaintiff heard him, because he made reply that it was his business, or something like that. Plaintiff says he heard none of this, and did not see his danger until it was too late. He says he acted as carefully as he could, and went between the cars on the side that he thought would be open, as the curve was coming that way. He stood up straight to make the coupling, and he says he could not have coupled the car in any other way, and that was the only way to couple cars. The deadwoods between the cars were long enough for a man to stand between them and turn any way, and the bumpers were one and one fourth to one and one half feet long. One witness for plaintiff testified that plaintiff could not have seen the projection of the iron from where he was standing and attempting to couple the car, and that he could not have coupled in any other way unless he had been possessed of a stick or had been looking to see if the iron was projecting. He says further that coupling can be made by going underneath, and this way is safer, but a brakeman must have his time, and to brake this way he cannot perform his work properly. The conductor testified that he had had ten or twelve years' experience in railroad business, and his invariable rule as brakeman, when coupling at night, was to get down below, in order to avoid mashing, and that a brakeman always runs some risk of getting mashed unless he gets down when coupling without a stick at night. He says it was his custom to instruct brakemen how to couple, but does not remember giving any instructions to plaintiff. The engineer says his first work in railroad business was coupling cars, and the proper way to couple after dark was "under," and then the cars can go together and not hurt the coupler, because he is under, and out of the way. The other brakeman on the train with plaintiff testified that he was not present when the accident happened, but went to the scene soon thereafter. He says the proper way to couple after night is by getting underneath and reaching up, so that the head will be clear of the platform, and that witness coupled this car after the accident in this way without getting hurt. Other testi-

mony in the record relates to the character and extent of the injuries received by plaintiff.

Among other charges for the plaintiff, the circuit judge instructed the jury as follows: "If you believe from the evidence that a car of railroad iron was loaded under the direction and supervision of a conductor of a construction train charged with that duty by the defendant railroad company, and that the same was loaded so that the bars of iron projected over the end of the car, and that with ordinary care in loading, such projection would have been obviated, and that in such condition it was, under the direction of such conductor, placed on a track of defendant's railway for the purpose of being transported by a freight train of defendant's railroad company, and that the plaintiff was a brakeman on said freight train, and that in obedience to the orders of the conductor of said train he proceeded in the nighttime with due care to couple said cars and was injured by said iron projecting over said car, without fault on his part, while attempting to couple said car, then your verdict should be for the plaintiff."

"When a brakeman enters the employ of a railroad company he only risks the dangers which ordinarily attend such employment, and not risks which are directly and only caused by an omission of duty on the part of his employer; and if you believe from the evidence that the plaintiff was injured without fault on his part, by railroad iron projecting over the car, while attempting to couple the car, in the line of his duty and in obedience to the order of his superior, in the night-time, and without knowledge of the danger, if such danger was known to his superior, then it is not a risk ordinarily incident to his employment and which he assumes to take, but it is an omission of duty on the part of the defendant, and for which the defendant is liable to plaintiff in whatever damages may have been sustained by him from such injury." These instructions were duly excepted to by the defendant.

By referring to the declaration it will be seen that plaintiff bases his cause of action upon the alleged negligence and default of defendant in loading a car with railroad iron so that the rails projected over the end, and in receiving said car for coupling and transportation in an unsafe and unfit condition. If the declaration can be construed to allege any defect or imperfection in the car other than the way in which the iron was placed on it, it is clear from the evidence that no such defect was shown either in the car or any other machinery or implements with which plaintiff was employed to work. The improper arrangement of the iron on the car cannot be classed under the head of defective machinery, whatever may be defendant's liability by reason thereof on other grounds. The liability of defendant must rest upon the loading of the car so that the bars of iron projected over the end eighteen or twenty inches, or in accepting the car so loaded for coupling and transportation. The accident, it must be remembered, occurred not while the car was being loaded or placed on the side track, but in attempting to couple it on to a train to be carried forward on the road. According to the first charge above referred to, the loading of the car under the supervision of a conductor in charge of defendant's construction train with iron, so that the bars projected over the end, which could have been avoided by ordinary care and placing the same on the side-track of defendant's road for transportation by the freight train, impose a liability upon defendant for an injury received by a brakeman on the freight train in attempting to couple said car at night by direction of his conductor. The charge necessarily excludes the right of the jury to consider such a coupling as coming within the ordinary hazards and risks of the employment which a brakeman assumes in his engagement with the company, because they are instructed to find for plaintiff if they believe from the evidence that a car was so loaded and placed on the side-track for transportation, and that plaintiff was injured in coupling the same while acting within the line of his duty without fault. It was the duty of plaintiff to couple cars on the road of defendant, and when the accident occurred he was acting within the line of his employment. By voluntarily engaging in the hazardous business of coupling cars he assumed the ordinary risk and dangers incident to such business. The authorities are clear on this point. Does the loading of the car in the manner shown by the testimony, and its acceptance for transportation, take the case out of this rule?

In *Toledo, W. & W. R. Co.* v. *Black*, 88 Ill. 112, a brakeman sued for injuries received from alleged defective and careless loading of railroad iron, so that it projected over the end of the car. The rails projected over the end eighteen inches, if not further, and plaintiff testified that if the rails had not projected he would have seen the difficulty of coupling, and would not have attempted it. It appears that he had been in the employment of the defendant company as a switchman at its yard six or seven months prior to the accident, and that cars had frequently come in there before loaded as the one in question was with old iron projecting over the end of the cars. The plaintiff stated that he discovered the improper loading just as the car to be coupled was coming towards him, about six feet off, and that he was standing with his lantern, at the end of the caboose, to which it was to be coupled, and the car was coming slowly. It also appeared that the car was about twenty-eight feet long and the rails projected over both ends; that old rails are of different lengths and was a common article of freight shipped over the road frequently, and generally projected over the ends of the cars; that this resulted sometimes from irregular loading or jolting by transportation, and sometimes the rails were longer than the cars. The plaintiff stooped down to make the coupling and his hand was caught between the iron bars and crushed, and his leg was also injured. It was held that the plaintiff could not recover. The court said: "The accident with which he met was but an ordinary peril of the service which he had undertaken. The business of the employment was attended with danger, and upon entering into it plaintiff assumed the hazard of the ordinary perils which are incidental to it. We do not see why the

casualty in question is not one which is to be held as having been in the contemplation of plaintiff as liable to happen, and which he took the risk of when he engaged to enter into the employment."

In *Louisville & N. R. Co.* v. *Gower*, 85 Tenn. 465, a brakeman on a railroad recovered a verdict for injuries received in coupling cars. In this case a car loaded with lumber had been taken into a train, and at a station two flat cars were taken out of the train and placed on a side-track, which necessitated the coupling of the lumber car with a box car. It was the duty of the plaintiff to make the coupling, which was done without special order. He stood at one end of the box car, signaled the engineer to back to the car, which was carefully done. When within a few feet of the box car the plaintiff observed that the plank projected over the end of the lumber car, and that it was necessary for him to stoop to avoid it in entering between the cars to make the coupling. He entered in this way and made the coupling, but on account of some difficulty in getting the coupling-pin into the draw-head he raised his head and was caught between the box car and the projecting lumber and badly injured. The trial court instructed the jury, in substance, that the reception of a car so loaded that the lumber projected eighteen inches over the end of it was negligence on the part of the company, and that it was an extraordinary hazard to which the company must not subject its employés. This was declared to be error. The opinion states that it may be extra hazardous in the sense that it is not a coupling ordinarily or frequently required; but it is one incident to the duties of the place, and not more hazardous, as a matter of law, than he stipulates to perform on the occasions, however rare and infrequent, where such couplings become necessary in the variety of shipments made to meet the demands and necessities of trade and transportation. Lumber of all kinds, iron, steel and finished structures must often necessarily be transported on cars of shorter length than the material transported. . . . To hold that such a service is not to be anticipated by a railroad employé as occasional, incidental, though extremely hazardous duty to be performed, would be to do so in manifest disregard of the demands of the age upon transportation lines and their common and well understood service in conformity to such requirements."

The facts in the case of *Northern Cent. R. Co.* v. *Husson*, 101 Pa. 1, 47 Am. Rep. 690, were, that Husson was in the employment of the railway company as a hand on one of its gravel trains engaged in hauling ballast, earth, railroad iron, bridge irons, bridge timbers and other material required in constructing a road-bed. It was Husson's duty to assist in coupling the cars, and he assisted one morning in making up a train consisting of four cars loaded with large pieces of bridge iron in such a manner that the ends extended beyond the ends of the cars. When the bumpers or dead-woods of the cars were together the distance between the projecting ends of the iron was about five inches. While Husson was coupling the cars, his head was caught and crushed between the ends of the iron so that he died. His widow and child brought suit to recover damages for his death occasioned by the alleged negligence of defendant. The company had a regulation, which was known to Husson, that persons in coupling cars together should stoop below and make the coupling by reaching up. It was held that the risk run by decedent in coupling the cars was ordinarily incident to his employment, and also that he failed to take ordinary care in making the coupling. For a further discussion of the principle of law controlling cases like the one at bar, see *Atchison, T. & S. F. R. Co.* v. *Plunkett*, 25 Kan. 188; *Brown* v. *Atchison, T. & S. F. R. Co.* 31 Kan. 1; *Day* v. *Toledo, C. S. & D. R. Co.* 42 Mich. 523; Patterson, Railway Accident Law, § 316.

There are two cases in Iowa which hold a different doctrine: one is the case of *Haugh* v. *Chicago, R. I. & P. R. Co.*, 73 Iowa, 66, cited by counsel for appellee, and the other is reported in 36 Iowa, 31 [*Hamilton* v. *Des Moines Valley R. Co.*] It appears that they have a statute in this state imposing liability upon railroad corporations for all damages sustained by any persons, including employés, in consequence of any neglect of its agents, or mismanagement of any of its employés. How far these decisions have been influenced by the statute does not appear, as the decision in *Haugh's Case* makes no reference to any statute.

In the case at bar the plaintiff was twenty-eight years old, and an experienced brakeman. The train on which he was employed was engaged daily in hauling cars loaded with railroad iron and lumber for railroad construction. The conductor testified that it was very common for the iron and lumber to project over the ends of the cars. The plaintiff admits the train was daily hauling lumber and iron, but says he never saw any before the accident projecting over the ends of the cars. Under the charge of the court to the jury, they were precluded from finding that the injury resulted from the ordinary risks and hazards incident to plaintiff's employment, and in this respect it was erroneous, and prejudicial to the defendant.

The second instruction was also calculated to mislead the jury in considering the real question involved in the case. In so far as this charge can be construed as a direction to the jury that the coupling of a car loaded with iron projecting over the end is not such a danger and risk as ordinarily appertain to plaintiff's employment, it would not differ from the first charge considered. In our opinion, however, the second charge changes the basis of a verdict from that presented in the first, and puts it upon the action of a superior officer with knowledge of an extra hazardous coupling, directing the plaintiff, who was a brakeman without knowledge of the extra danger, to make the coupling in the night-time without informing him of this danger. This instruction directed the jury that if plaintiff was injured, without fault on his part, by railroad iron projecting over the end of the car which he was attempting to couple in the night, in obedience to the orders of a superior who knew the danger, and which was not known to plaintiff, then the risk in coupling the car was one not ordinarily incident to plaintiff's employment. The negligence of defendant, upon which plaintiff relied in his declaration, was in load-

ing a car with railroad iron projecting over the end, and in receiving such car for transportation. The jury was directed to find for plaintiff if they believed that a superior, with knowledge of danger in making a coupling, directed the plaintiff to perform this duty at night when he was ignorant of the danger. There are no allegations in the declaration to justify a finding on this particular phase of the charge. We do not hold that the company would be exempt from liability in a case where a conductor, with knowledge of a dangerous coupling, directed a brakeman to make it in the dark without informing him of the danger, when he did not know of it. What would be the rule in such a case we need not say, because the declaration before us does not allege it. We held in the case of *Parrish* v. *Pensacola & A. R. Co.*, 28 Fla.—, that there could be no recovery upon a cause of action, however meritorious it may be, or however satisfactorily proved, that is in substance variant from that which is pleaded by the plaintiff. And in *Jacksonville, T. & K. W. R. Co.* v. *Neff*, 28 Fla.—, we held that the instructions of the court to the jury must be confined to the issues made by the pleadings. In the case now under consideration we think the jury was clearly misled, to the prejudice of defendant, by the charges of the court as to the real question involved, and a new trial should be granted. It is well to note that the present case arose before the passage of chapter 3744, Laws of Florida, and no question is presented under this statute.

There are other exceptions in the record to charges given and refused by the court, but we do not consider them, for the reason that what is stated above covers the question presented by the declaration.

*The judgment of the court below is reversed,* and a new trial awarded.

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## MICHIGAN SUPREME COURT.

Calvin B. DEWEY, *Appt.*,
*v.*
DETROIT, GRAND HAVEN & MILWAUKEE R. CO.

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

1. **An inspector of cars is not a fellow-servant of a brakeman** so as to relieve the railroad company from liability for injury to the latter while coupling cars caused by the negligent loading of a car so that lumber projected over the end.
2. **The fact that loaded cars were received by a railroad company from another road** does not relieve the company from liability for injuries to a brakeman caused by the improper manner in which they were loaded.

(*Montgomery and Grant, JJ., dissent.*)

(July 23, 1892.)

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

The facts are stated in the opinion.

*Messrs.* **Dickinson, Thurber & Stevenson,** for appellant:

If any doubt could remain, since *Van Duzen* v. *Letellier*, 78 Mich. 492, as to the doctrine now existing, it is swept away by the holding in *Morton* v. *Detroit, B. C. & A. R. Co.*, 81 Mich. 423. In that case a brakeman on a logging train was thrown from a car and killed by reason of the breaking of the brake chain, which was of insufficient strength to be used with safety. Here it is distinctly stated that it is settled law in this state that a master is bound not only to use all reasonable care in providing safe tools and appliances for the use of workmen in his employ, but that this is a duty which cannot be delegated to another, so as to relieve the master from personal responsibility.

See also *Northern Pac. R. Co.* v. *Herbert*, 116 U. S. 650, 29 L. ed. 759; *Ford* v. *Fitchburg R. Co.* 110 Mass. 240; *Town* v. *Michigan Cent. R. Co.* 84 Mich. 214; *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Fuller* v. *Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Lewis* v. *Seifert*, 9 Cent. Rep. 751, 116 Pa. 648; *East Tennessee, V. & G. R. Co.* v. *De Armond*, 86 Tenn. 74; *King* v. *Ohio & M. R. Co.* 14 Fed. Rep. 277; *Northern Pac. R. Co.* v. *Herbert*, 116 U. S. 652, 29 L. ed. 760; *Fay* v. *Minneapolis & St. L. R. Co.* 30 Minn. 231; *Gutridge* v. *Missouri Pac. R. Co.* 13 West. Rep. 644, 94 Mo. 468; *Gottlieb* v. *New York, L. E. & W. R. Co.* 1 Cent. Rep. 728, 100 N. Y. 466; *International & G. N. R. Co.* v. *Kernan*, 9 L. R. A. 703, 78 Tex. 294.

*Mr.* **Otto Kirchner,** with *Mr.* **E. W. Meddaugh,** for appellee:

The testimony clearly shows that plaintiff fully understood not only the risk attending his employment generally, but that he fully understood the risk involved in doing the particular work in which he was injured, consequently he cannot recover.

*Michigan Cent. R. Co.* v. *Smithson*, 45 Mich. 212; *Hathaway* v. *Michigan Cent. R. Co.* 51 Mich. 253, 47 Am. Rep. 569; *Brewer* v. *Flint & P. M. R. Co.* 56 Mich. 620.

The reception of the car improperly laden with lumber, was the negligence of plaintiff's fellow-servant, to wit: the car inspector at Holly.

*Smith* v. *Potter*, 46 Mich. 258.

The doctrine of *Smith* v. *Potter*, *supra*, has recently (December 23, 1891) been approved by

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NOTE.—See the case next preceding this one in which after apparently agreeing that the inspection of cars is not the work of the fellow-servant of a brakeman the court nevertheless holds that the brakeman assumes the risk of negligence in making such inspection.



See also 17 L. R. A. 811; 22 L. R. A. 292.

this court in *Irvine* v. *Flint & P. M. R. Co.* 89 Mich. 416.

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

Plaintiff, a brakeman in defendant's employ, was injured while attempting to recouple, after dropping two cars at the Lake Shore junction, near Detroit, at 2 o'clock in the morning of October 21, 1890. The last car on the moving section of the train was what is known as a "sand flat car," upon which the bumpers are much shorter than in the ordinary car. The car to be attached was one laden with lumber. The lumber projected several inches beyond the end of the floor of the car, leaving a space of but seven inches, when the cars were coupled, between the ends of the lumber and the end of the sand flat car. When plaintiff went between the cars they were two rods apart. With the aid of his lantern he noticed the character of the drawbar and bumpers upon the sand flat car, and held up his light, and saw that the other car was an ordinary flat, but did not notice that the lumber projected beyond the end of the car. When the cars came together, plaintiff's body was caught between the lumber and the end of the sand flat car, his arm was thrown between the bumpers and crushed. At the conclusion of plaintiff's case the court directed a verdict for defendant, upon the ground that the proximate cause of the injury was the improper loading of the lumber car, and that, as defendant had made provision for the inspection of cars, the negligence was that of the inspector, who was a fellow servant of the plaintiff.

The rule that the master must furnish the servant with a reasonably safe place in which to perform his work has been settled by repeated decisions of this court. *Van Dusen* v. *Letellier*, 78 Mich. 492; *Morton* v. *Detroit, B. C. & A. R. Co.* 81 Mich. 423; *Roux* v. *Blodgett & D. Lumber Co.* 85 Mich. 519; *Irvine* v. *Flint & P. M. R. Co.* 89 Mich. 416.

It is also well settled that this duty cannot be delegated to another, so as to relieve the master from personal responsibility. *Van Dusen* v. *Letellier* and *Morton* v. *Detroit, B. C. & A. R. Co. supra.*

These cases clearly overrule the doctrine of *Smith* v. *Potter*, 46 Mich. 258. It was there held that the duty of inspection was not one of management or supervision, and that inspectors and brakemen were in the strictest sense fellow servants. In the *Van Dusen* and *Morton Cases*, it was held that the duty of inspection was one that could not be delegated so as to relieve the master of liability. *Justice* Morse, in the *Van Dusen Case*, says: "If the master can delegate this duty to an employé, and apply the doctrine of fellow servant to such employé, because he is working in and about the same business, and in the same general line of such business,—as, in this case, the manufacture and piling of lumber,—then the employer is permitted to shirk his duty upon another, and then allowed to escape all responsibility and liability upon the plea that the person injured is the fellow servant of his delegate or agent. The law, as I understand it, will not permit this. It is a duty the master owes, which he cannot delegate to a fellow servant of his employés. If he picks out one of the men working about the mill, and imposes upon him the duty of seeing that the machinery is kept in safe repair, or delegates to one of the men working in the millyard the duty of seeing that these docks are kept safe and sound, these men, as far as these duties are concerned, stand in the place of their employer, and their negligence is his negligence." Champlin, *J.*, concurring, says: "I do not think the duty of inspection, when such inspection is required by the circumstances of the case, can be delegated by the master in such manner as to avoid responsibility, and I concur in reversing the judgment." Campbell, *J.*, who wrote in the *Smith Case*, says: "I agree in reversing the judgment, but I do not think it proper to throw doubt on our previous decisions which have dealt with the questions in this cause." The *Morton Case*, by a very full and able opinion by Cahill, *J.*, reaffirms the doctrine of *Van Dusen* v. *Letellier.*

In *Irvine* v. *Flint & P. M. R. Co.* we held that it is as much the duty of the company to see that the cars are so loaded that brakemen will have reasonably safe access to the brakes, and an opportunity for the discharge of their duties, as it is to see that proper appliances are provided. In the discussion of that question, however, I am satisfied that the statement made in that opinion, that if the cars were inspected, or if the company provided the means for their inspection, by a fellow servant, and the inspector neglected his duty, then there would be no recovery, is not supported by the later decisions of our own court, nor by the weight of authority elsewhere. Shearm. & Redf. Neg. 4th ed. §§ 194–204; *Hannibal & St. J. R. Co.* v. *Fox*, 31 Kan. 586; *Ford* v. *Fitchburg R. Co.* 110 Mass. 241; *Hough* v. *Texas & Pac. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Northern Pac. R. Co.* v. *Herbert*, 116 U. S. 652, 29 L. ed. 760; *King* v. *Ohio & M. R. Co.* 14 Fed. Rep. 277; *Lewis* v. *Seifert*, 116 Pa. 648, 9 Cent. Rep. 751; *East Tennessee, V. & G. R. Co.* v. *De Armond*, 86 Tenn. 74; *Fay* v. *Minneapolis & St. L. R. Co.* 30 Minn. 231; *Gutridge* v. *Missouri Pac. R. Co.* 94 Mo. 468, 13 West. Rep. 644; *Fuller* v. *Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Gottlieb* v. *New York, L. E. & W. R. Co.* 100 N. Y. 466; *International & G. N. R. Co.* v. *Kernan*, 78 Tex. 294, 9 L. R. A. 703; *Hulehan* v. *Green Bay, W. & St. P. R. Co.* 68 Wis. 520; 7 Am. & Eng. Encyclop. Law, p. 825, and *note.* The doctrine of these cases is that, when it is the duty of the master to furnish sound apparatus, machinery, etc., and defective machinery causes an injury to the servant, the rule which exempts the master from liability for injury to servants through the negligence of a fellow servant does not apply.

In *Hulehan* v. *Green Bay, W. & St. P. R. Co., supra*, it was held that where a railway company permitted its track to be incumbered with sticks and blocks of wood at places where plaintiff was called upon to perform his duties in coupling cars, by reason of which he was injured, the negligence of permitting the roadway to be obstructed was that of the company. At best, the duties of brakemen are

dangerous, and it is the plain duty of their employers to provide against increased peril. There is no reason why one rule should apply to the case of a defective brake chain, and that another should govern a case where a car has been so improperly loaded as to prevent the use of the brake without great hazard.

In the recent case of *Mexican Cent. R. Co.* v. *Shean* (Tex.) 18 S. W. Rep. 151, the cars were improperly loaded, but the decision was put upon the ground that the plaintiff knew that the car was loaded in such a manner as to render the attempt to couple it extremely hazardous. In the present case plaintiff had no such knowledge. It is insisted, however, that this lumber car was one received from another company; but the obligation to receive cars from other roads does not require the reception of defective cars, or cars so loaded as to render their transportation hazardous to employés. The duty is not one to be discharged without reward. The service rendered is not gratuitous. As was said by Campbell, *J.*, in *Smith* v. *Potter:* "This [duty imposed by statute] does not require the transfer of cars unfit for passage. . . . There is no difference in the nature of the danger, or in the quality of the inspector's employment, between the case of shifting cars belonging to other roads and cars belonging to the same road. Defects in both lead to the same results, and the methods of examining both are identical." In *Fay* v. *Minneapolis & St. L. R. Co.*, *Gutridge* v. *Missouri Pac. R. Co.*, *Gottlieb* v. *New York, L. E. & W. R. Co.* and *International & G. N. R. Co.* v. *Kernan, supra*, the cars were freight cars, but the cases hold, and I think correctly, that the fact was immaterial. It follows that *the judgment must be reversed*, and a new trial had, with costs of this court to plaintiff.

**Morse**, *Ch. J.*, and **Long**, *J.*, concurred.

**Montgomery**, *J.*, dissenting:

I cannot yield my assent to the views expressed by *Mr. Justice* McGrath in this case. The evidence showed that whatever of fault there was in permitting the car to be loaded in the manner in which it was, was the fault of an inspector provided by the company, and no fault was attributed to the company in employing him. This court has held, not once, but repeatedly, that an inspector of cars, under such circumstances, is a fellow servant of the trainmen, and that no recovery can be had on account of his negligence. *Smith* v. *Potter*, 46 Mich. 258; *Irvine* v. *Flint & P. M. R. Co.* 89 Mich. 416. And the doctrine of nonliability for the fault of a co-employé has been also applied in other cases where the relations were analogous, and where the authority of the offending servant was quite as broad as is that of one whose duty it is to see that cars are properly loaded. *Hoar* v. *Merritt*, 62 Mich. 386; *Gardner* v. *Michigan Cent. R. Co.* 58 Mich. 584; *Greenwald* v. *Marquette, H. & O. R. Co.* 49 Mich. 197; *Quincy Min. Co.* v. *Kitts*, 42 Mich. 34; *Michigan Cent. R. Co.* v. *Dolan*, 32 Mich. 510. The case of *Smith* v. *Potter* was cited and its doctrine approved in *Peterson* v. *Chicago & N. W. R. Co.* 67 Mich. 102, and was also cited with approval in *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 481, 27 L. ed. 1004. But it is suggested that the case of *Smith* v. *Potter* has been overruled by *Van Dusen* v. *Letellier*, 78 Mich. 492; *Morton* v. *Detroit, B. C. & A. R. Co.* 81 Mich. 423; *Roux* v. *Blodgett & D. Lumber Co.* 85 Mich. 519. It is clear, as I think, that it was not the purpose of *Justice* Morse, who wrote the opinion in *Van Dusen* v. *Letellier*, to overrule the case of *Smith* v. *Potter*. In *Peterson* v. *Chicago & N. W. R. Co.*, *Justice* Morse recognizes the binding authority of *Smith* v. *Potter* and other kindred cases in the following language: "If the question were an open one in this state I should not be inclined to hold that either of these persons was a fellow employé of the plaintiff; but the law in this respect is well settled in this state, and the circuit judge followed the decisions of this court, citing them in his charge to the jury." In *Van Dusen* v. *Letellier*, the case of *Smith* v. *Potter* is distinguished, as is also the case of *Hoar* v. *Merritt*. All that is held by *Van Dusen* v. *Letellier* is that the employer owes a duty of providing a safe place for his employés to work, and that this duty cannot be delegated to a fellow servant. The case fully recognizes the distinction between the duty of furnishing a safe place and safe machinery to the employé and the duty of seeing that the machinery, appliances or place are properly used or employed. The same may be said of *Morton* v. *Detroit, B. C. & A. R. Co.*, 81 Mich. 423. This distinction is again recognized in *Rawley* v. *Colliau* (Mich.) 51 N. W. Rep. 350, and *Kehoe* v. *Allen*, 52 N. W. Rep. 740, (decided at the present term.) In *Morton* v. *Detroit, B. C. & A. R. Co.*, as the case was put to the jury, the sole question was whether the appliance in question was reasonably safe when originally provided by the defendant, and the circuit judge instructed the jury that the defendant's liability ceased when it provided a chain that was in the first instance reasonably safe. In *Irvine* v. *Flint & P. M. R. Co.* in an opinion by *Mr. Justice* McGrath, the court held distinctly that, if the company provided means for the inspection of the cars by a fellow servant, and the inspector neglected his duty, there could be no recovery. In the present case the injury resulted, not from any fault in the appliances used, but because, in making use of cars and machinery suitable to the purpose, a fellow servant of the plaintiff, engaged in the same general employment, within the rule in *Smith* v. *Potter*, neglected his duty. The case of *Smith* v. *Potter* has not, as I view it, been overruled by the case referred to, and certainly the court has not taken the pains to point out to the profession the fact that it has been overruled; on the contrary, its doctrine has been frequently recognized, and has become the settled law of the state. The circuit judge applied the doctrine to the case at bar, and the judgment should be affirmed.

**Grant**, *J.*, concurred with **Montgomery**, *J.*

John HEFFRON, *Appt.*,
*v.*
DETROIT CITY R. CO.

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

**A restriction that a street railway transfer ticket given without extra charge must be used within fifteen minutes** after it is punched on the first line, is not unreasonable or invalid in the absence of any contract to carry a passenger on both lines for a single fare without exception or conditions or any provision to that effect in the charter or ordinance or of any holding out to the public to this effect, although this might be subject to exception if no car came along within the time limited.

(July 1, 1892.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover damages for alleged wrongful expulsion of plaintiff from defendant's car. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **E. S. Grece,** for appellant:

The plaintiff had paid his fare and was entitled to ride to the Michigan Central Railway depot. The company, instead of taking him there on the first car which it placed at his disposal, by its agent, assaulted him and put him off its car, after he presented to its said agent the certificate received from another agent of the same company, showing he had paid the regular fare for a ride to his destination. This gave him a good cause of action.

*Hufford* v. *Grand Rapids & I. R. Co.* 7 West. Rep. 867, 64 Mich. 631; *Wilsey* v. *Louisville & N. R. Co.* 83 Ky. 511; Am. Dig. 1890, 487; *Elliott* v. *New York Cent. & H. R. R. Co.* 53 Hun, 78; *Carsten* v. *Northern Pac. R. Co.* 9 L. R. A. 688, 44 Minn. 454; *Pennsylvania Co.* v. *Bray*, 125 Ind. 229; *Eddy* v. *Harris*, 78 Tex. 661; *Eddy* v. *Rider*, 79 Tex. 53; *Georgia R. & Bkg. Co.* v. *Murden*, 86 Ga. 434; *Georgia R. & Bkg. Co.* v. *Dougherty*, Id. 744.

Liability for wrongful expulsion.

*Johnson* v. *Northern Pac. R. Co.* 46 Fed. Rep. 347; *Georgia R. & Bkg. Co.* v. *Eskew*, 86 Ga. 641; *Head* v. *Georgia Pac. R. Co.* 79 Ga. 358; *Baltimore & O. R. Co.* v. *Brambery* (Pa.) Nov. 5, 1888; *Chicago, St. L. & P. R. Co.* v. *Holdridge*, 118 Ind. 281; *Hall* v. *South Carolina R. Co.* 25 S. C. 564.

As to rules of companies.

*Butler* v. *Manchester, S. & L. R. Co.* L. R. 21 Q. B. 207, 28 Am. L. Reg. 81; *Ward* v. *New York Cent. & H. R. R. Co.* 56 Hun, 268.

The plaintiff was rightfully on the car and had a right to pursue his journey to the depot.

The assault upon him was unlawful and the action is properly brought.

*English* v. *Delaware & H. Canal Co.* 66 N. Y. 454, 23 Am. Rep. 69; *Tarbell* v. *Northern Cent. R. Co.* 24 Hun, 51; *Jeffersonville R. Co.* v. *Rogers*, 38 Ind. 116, 10 Am. Rep. 103, *Murdock* v. *Boston & A. R. Co.* 137 Mass. 293, 50 Am. Rep. 307; *Head* v. *Georgia Pac. R. Co.* 79 Ga. 358; *Alabama, G. S. R. Co.* v. *Heddleston*, 82 Ala. 218; *Kansas Pac. R. Co.* v. *Kessler*, 18 Kan. 523; *Burnham* v. *Grand Trunk R. Co.* 63 Me. 298, 18 Am. Rep. 220; *Hamilton* v. *Third Ave. R. Co.* 53 N. Y. 25; *Pittsburg, C. & St. L. R. Co.* v. *Hennigh*, 39 Ind. 506; *Palmer* v. *Charlotte, C. & A. R. Co.* 3 S. C. 530; *City & S. R. Co.* v. *Brauss*, 70 Ga. 368.

The rules of the company should be reasonable, if passengers are to be bound by them; and patrons ought not to be held responsible for the company's breach of its own regulations.

*Townsend* v. *New York Cent. & H. R. R. Co.* 6 Thomp. & C. 495, 4 Hun, 217.

Often cars are not on time as in this case, or, if they are, are too crowded to admit the passenger, and yet has the passenger no remedy for being expelled from a car but a suit for five cents damages?

Wheeler, Carriers, 130; *Lynch* v. *Metropolitan Elev. R. Co.* 90 N. Y. 77.

The mere acceptance of a ticket does not bind a passenger by its terms.

*Prentice* v. *Decker*, 49 Barb. 21; *Limburger* v. *Westcott*, 49 Barb. 283; *Great Western R. Co. of Canada* v. *Miller*, 19 Mich. 306.

Besides the actual damages sustained plaintiff is entitled to damages for the indignity done him, the annoyance, and to injured feelings, etc.

*Delaware, L. & W. R. Co.* v. *Walsh*, 47 N. J. L. 548; *Carsten* v. *Northern Pac. R. Co.* 9 L. R. A. 688, 44 Minn. 454.

*Messrs.* **Sidney T. Miller** and **John C. Donnelly** for appellee.

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

The plaintiff sues in trespass on the case, claiming damages on account of his ejection by a conductor from one of defendant's cars. The declaration, in substance, alleges that, on payment by any passenger of the regular fare, five cents, at any point where the cars are boarded on Woodward avenue, in Detroit, such passenger is entitled to ride on defendant's car from such point to the Michigan Central depot; and that, on payment of said five cents to the Woodward avenue conductor, such passenger becomes entitled to a ticket, to show he has paid his fare on the Woodward avenue line car, and which ticket entitles such passenger to ride on one of defendant's cars on Jefferson avenue, from said Woodward avenue, along said Jefferson avenue, to said depot. The plaintiff, on October 8, 1890, boarded one of defendant's cars on Woodward avenue, and paid the conductor five cents, and received from said conductor a ticket, to show that he had paid his fare on the Woodward avenue car, and which, presented to the conductor on the Jefferson avenue car, would entitle him to ride to said depot. And the plaintiff accordingly rode on

NOTE.—The rights of street railway passengers on transfer tickets do not seem to have been hitherto brought into litigation, at least so far as to establish precedents which have been reported. The constantly swelling current of passenger traffic on street railway lines which furnish transfer tickets makes decisions on the subject highly important. Following the above case is another case on this same subject. See Pine v. St. Paul City R. Co. (Minn.) *post*, 347.

defendant's car, on Woodward avenue, to the intersection of the Jefferson avenue line, and a few moments thereafter boarded one of defendant's cars on said Jefferson avenue, to complete his journey, and then and there seated himself in said car to be conveyed to said depot, as aforesaid; yet, plaintiff avers, notwithstanding he had paid the defendant its legal fare, as aforesaid, on said Woodward avenue, and had received said ticket, and voucher therefor, showing plaintiff had so paid his fare, and was entitled to ride to said depot, as aforesaid, on defendant's car which he had taken, and although he duly presented the said ticket to the conductor of said Jefferson avenue car, showing his right to ride thereon to said depot, when demanded by said conductor, defendant's agent operating said car, which ticket said conductor then and there refused to accept or receive as satisfaction of plaintiff's fare, and as showing his right to ride on said road in said car, and demanded of plaintiff that he pay another five cents, or get off said car, both of which plaintiff then and there refused to do, but insisted that he had paid his fare, and produced his said ticket, and offered the same to the said conductor of defendant's car, as showing that he had so paid his fare, and was entitled to ride on said car to said depot; but the said agent of defendant refused to take said ticket, or acknowledge the same in any way, but, on the other hand, there and then made an assault upon plaintiff, in the presence of several fellow passengers, and with great force and violence pushed and pulled plaintiff about, violently pushed and forced plaintiff from the car into the public street and highway, and then and there, in the presence of said divers passengers and persons on the street, accused plaintiff of fraudulently attempting to ride on defendant's car without paying his fare, and unlawfully attempting to obtain a passage on the said car without paying his fare, and of trying to defraud the defendant in so doing.

The proofs show that plaintiff paid his fare as alleged upon the Woodward avenue car, and asked the conductor for a "change-off" ticket to the Michigan Central depot. This ticket showed upon its face that it was "void unless used October 8, 1890, as indicated hereon." This indication, marked by the pointing of the index finger of a hand, read as follows:

"This slip will not be honored unless presented at the intersection of the Woodward avenue line and line punched in margin, within fifteen minutes of time punched, for a continuous trip only.

"S. Hendrie, Treas."

The plaintiff testifies that he got off of the Woodward avenue car at the corner of Woodward and Jefferson avenues, and waited fourteen minutes, and, no car coming along or being in sight going towards the depot on Jefferson avenue, he then went to the postoffice, going there on Jefferson avenue and Griswold street; mailed some letters, and came back, where he again waited for eleven minutes before he got a car. On presenting his ticket the conductor told him it was not good. Plaintiff asked what was the matter of it, and the conductor replied, "Read your ticket." Plaintiff said, "I am not obliged to read it." Conductor replied, "They are good only fifteen minutes after they are punched." Plaintiff then said, "I have been waiting a good deal longer than that for your car." The conductor then told him that he must pay the fare, or get off the car. Plaintiff refused to pay the fare, and said that he should not get off the car, unless he was put off. The conductor then put him off. The plaintiff did not resist, and was not injured physically. He had the money to pay the fare, but did not think he ought to pay it. He had used these tickets before, but never had read them, and did not read this one before he was ejected from the car. It will be seen that the proofs did not correspond with the allegations of the declaration, as plaintiff was not given a ticket which entitled him to ride on this car, except within a certain time; and from the declaration it would be inferred that there were no conditions attached to the ticket.

But, under the proofs, if the declaration had made proper averments to correspond therewith, we do not think the plaintiff was entitled to recover. The following section of the ordinance of the city of Detroit was put in evidence: "Sec. 30. The tracks upon Jefferson avenue, Woodward avenue, and Gratiot street shall each be considered and run as one route, and subject its passengers to the payment of a single fare each: provided, however, that all cars running north of Jefferson avenue shall run to and from Jefferson avenue, and the routes intersecting Woodward avenue shall be considered as making a portion of each of said routes respectively." The defendant company was under no obligation, by contract or ordinance, to take the plaintiff upon the Jefferson avenue line, from off the Woodward avenue line, to the Michigan Central depot, for the single fare of five cents, except upon the conditions printed on the face of the ticket; nor is there anything unreasonable in the requirement that the ticket must be used within fifteen minutes. The company had the right, under the ordinances of the city, to treat the Jefferson avenue line as a single road, and to charge five cents fare; but it saw fit to make a continuous fare of five cents from any point on the Woodward avenue line to the Michigan Central depot, if the transfer was made in fifteen minutes from one line to the other. In this case half an hour, at least, had elapsed. If no car had passed within that time, and the car from which plaintiff was ejected was the first one to pass after plaintiff had alighted from the Woodward avenue car, the plaintiff may, under a proper declaration, have an action against defendant, but no such state of facts was averred in the declaration in this case. It was the duty of the plaintiff to read the ticket. His failure to read it cannot give him any rights against the defendant which he would not have had had he read it. And it was also the duty of the conductor not to receive this ticket, and to require the payment of five cents fare, and neither he nor the company could be made liable for putting plaintiff off the car in the manner he was ejected, without physical hurt or damage. The case is ruled by *Frederick* v. *Marquette, H. & O. R. Co.* 37 Mich. 342, 26 Am. Rep. 531. This case is much stronger than that, because here there is no question but the conductor gave plaintiff

the right ticket,—the same ticket given to all others, and which was good, if used according to its terms and conditions. The case of *Hufford* v. *Grand Rapids & I. R. Co.*, 64 Mich. 631, 7 West. Rep. 867, is distinguishable in this: There the ticket was one purporting, on its face, to cover the distance to be traveled by Hufford. He paid the usual fare between the two places, and the ticket contained no printed exceptions or conditions restricting Hufford from using it at the time he presented it to the conductor. Its infirmity, if any, was not open to Hufford's plain observation, so that he was informed on its face that it was not good. There were punch marks upon it, but he did not know the significance of them. He asked the station agent about it, who told him the ticket was good. It was sold to him by the company's agent for a good ticket, and it was therefore held to be a good ticket. But there were no such representations to plaintiff in this case. He asked for a "change off" ticket; he received one, which plainly informed him, upon its face, that it must be used within a certain time or it would be void. As long as the defendant had made no contract with the plaintiff to carry him, without exception or conditions, on both lines to the depot for a single fare of five cents, while it had not held out to the public that it would do so, and when it was not obligated so to do by its own charter or the ordinances of the city of Detroit, there was no legal reason why it could not make the regulation that it would carry passengers to the depot on both lines, for a single fare of five cents, provided the transfer ticket was used within fifteen minutes after it was punched on the Woodward avenue line; and, there being no legal reason why this restriction should not be made, the passenger who accepts the ticket must abide by its terms.

*The judgment is affirmed*, with costs.

The other Justices concurred.

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## MINNESOTA SUPREME COURT.

Oran S. PINE, *Respt.*,
*v.*
ST. PAUL CITY R. CO., *Appt.*

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

*1 **By the ordinance of the city of St. Paul, granting certain franchises to the defendant, a passenger who has paid one fare on any line operated by the company in the city is entitled to a transfer** check or ticket entitling him to a continuous passage over any connecting or crossing line. Where such passenger applies for and accepts a transfer ticket for one of several continuous or crossing lines, plainly marked and designated, he will be limited to the line so selected, but where the route designated is not so limited; but is equally applicable to several lines, he will be entitled to be transported over either.

2. **Where a passenger is ejected by a conductor acting in good faith** in pursuance of the rules of the company, and upon due notice to him, and with the exercise of no more force than is reasonably necessary, the damages to be allowed, if a recovery is had, are compensatory only.

(June 19, 1892.)

APPEAL by defendant from an order of the District Court for Ramsey County overruling its motion for a new trial after verdict in favor of plaintiff in an action brought to recover damages for the alleged wrongful expulsion of plaintiff from defendant's street-cars. *Reversed.*

The facts are stated in the opinion.

*Messrs.* **McCafferty & Noyes**, for appellant:

It was plaintiff's duty to submit for the time being to the reasonable rules of the company, and after he had discovered the mistake in the issuance of the ticket, to quietly and peaceably leave the car or pay his fare and seek redress in a proper action for the mistake of the conductor who gave him a wrong ticket.

*Townsend* v. *New York Cent. & H. R. R. Co.* 56 N. Y. 295, 15 Am. Rep. 419; *Yorton* v. *Milwaukee, L. S. & W. R. Co.* 54 Wis. 234, 41 Am. Rep. 23; *Bradshaw* v. *South Boston R. Co.* 135 Mass. 407, 46 Am. Rep. 481; *Weaver* v. *Rome, W. & O. R. Co.* 3 Thomp. & C. 270; *Mackay* v. *Ohio River R. Co.* 9 L. R. A. 132, 34 W. Va. 65; *Petrie* v. *Pennsylvania R. Co.* 42 N. J. L. 449; *Edwards* v. *Lake Shore & M. S. R. Co.* 81 Mich. 364; *Frederick* v. *Marquette, H. & O. R. Co.* 37 Mich. 342, 26 Am. Rep. 531; *Chicago, B. & Q. R. Co.* v. *Griffin*, 68 Ill. 499; *Shelton* v. *Lake Shore & M. S. R. Co.* 29 Ohio St. 214; *Yorton* v. *Milwaukee, L. S. & W. R. Co.* 54 Wis. 234, 41 Am. Rep. 23; *McClure* v. *Philadelphia, W. & B. R. Co.* 34 Md. 532, 6 Am. Rep. 345; *Walker* v. *Dry Dock E. B. & B. R. Co.* 33 How. Pr. 327; *Dietrich* v. *Pennsylvania Street R. Co.* 71 Pa. 432, 10 Am. Rep. 711; *Downs* v. *New York & N. H. R. Co.* 36 Conn. 287, 4 Am. Rep. 77.

In the absence of malice in ejecting a passenger from the cars, damages must be compensatory only.

*Du Laurans* v. *First Div. of St. Paul & P. R. Co.* 15 Minn. 49 and cases cited.

The fact that the conductor, under the construction placed by the court upon the ordinance, acted illegally, is not a circumstance even, showing or tending to show that he acted with malice.

*Hoffman* v. *Northern Pac. R. Co.* 45 Minn. 53.

The jury gave a verdict of $400, which is excessive to extortion even allowing the element of vindictive damages to remain a factor.

*Finch* v. *Northern Pac. R. Co.* 47 Minn. 36.

*Head notes by VANDERBURGH, J.

NOTE.—Please see the case of Heffron v. Detroit City R. Co. (Mich.) *ante*, 345, reported next before the above case and involving the same subject of street railway transfer tickets.



See also 16 L. R. A. 345; 18 L. R. A. 335; 21 L. R. A. 649; 46 L. R. A. 614.

*Mr.* **M. L. Countryman,** for respondent: *Murdock* v. *Boston & A. R. Co.*, 137 Mass. 293, 50 Am. Rep. 307, shows what the law is where a passenger is ejected because an apparently valid ticket given him by an agent of the company is, under the "rules and regulations," in fact invalid.

In *Finch* v. *Northern Pac. R. Co.*, 47 Minn. 36, this court allowed $250 for a technical ejection, where no personal injury or indignity was suffered.

*Finch* v. *Northern Pac. R. Co. supra*, and *Serve* v. *Northern Pac. R. Co.* (Minn.) Jan. 18, 1892, establish the liability of the company in tort for the conductor's act in ejecting a passenger, notwithstanding the conductor obeyed "rules and regulations" and had no evidence of the passenger's right of exception to the rule.

See also *City & S. R. Co. of Savannah* v. *Brauss*, 70 Ga. 368; *Hubbard* v. *Grand Rapids & I. R. Co.* (Mich.) 18 Am. & Eng. R. R. Cas. 336.

In *Higgins* v. *Louisville, N. O. & T. R. Co.*, 64 Miss. 80, it was held that a verdict of $500 for carrying a passenger nearly three fourths of a mile past his station, on a dark and rainy night, thus compelling him to walk back, was not an excessive compensation.

In *St. Louis, A. & T. R. Co.* v. *Berry* (Tex. App.) Nov. 12, 1890, a verdict of $500 for mental suffering caused by delay in reaching destination was held not excessive.

In *Chicago, St. L. & P. R. Co.* v. *Holdridge*, 118 Ind. 281, a verdict of $200 was sustained in favor of a passenger who, without any force being used, was required to pay twenty-five cents extra in order to avoid being ejected.

In *Hardenbergh* v. *St. Paul, M. & M. R. Co.*, 41 Minn. 200, $400 was allowed for a technical ejectment, without actual force or injury.

In *Serve* v. *Northern Pac. R. Co., supra*, $550 was allowed in a case of ejectment where no personal violence was resorted to.

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

Action for damages for an alleged wrongful expulsion from one of defendant's street-cars. At the time of the injury complained of defendant was operating several lines of street-cars in the city of St. Paul, and among them was the Grand Avenue line, which intersects Wabasha street on West Seventh street. The St. Anthony Park, Fair Grounds and Hamline line extends over Wabasha and University avenues to Lexington avenue, and thence to Hamline; the Interurban line extends over Wabasha and University avenues to and beyond Lexington avenue; and the University avenue, Wabasha and West St. Paul line from West St. Paul over Wabasha and University avenues to Kent street, its western terminus, which is a considerable distance east of Lexington avenue. These lines all connect with the Grand Avenue line on Wabasha street. By the ordinance forming its contract with the city, and from which it derives its authority to run its cars and exercise its franchise in the city, the defendant is required "to issue a transfer check or ticket to any person who has paid one fare on any line operated by it in the city of St. Paul, which ticket entitles the passenger to a continuous passage over any connecting or crossing line operated by the company. No passenger shall be entitled to more than one transfer for one fare, and such transfer check shall be used only by the person receiving the same for a continuous passage, and shall be used upon the next car departing upon the connecting line upon which it is to be used." Under this ordinance, a passenger on the Grand Avenue line, going east, would be entitled to a transfer over any one of three other routes mentioned which he might select, and of course but one. If, for instance, such passenger should desire to go to Lexington avenue, he could take either the first or second lines mentioned running on Wabasha street and University avenue; but if he took passage on the third line the car would take him, in the same direction, no further than Kent street. On the day in question the plaintiff was a passenger on the Grand Avenue line, going east, and, having paid one fare, was entitled to, and applied for, a transfer ticket. He notified the conductor that he wanted to go to Lexington avenue, and asked for a transfer to that avenue. The conductor thereupon gave him a transfer check which on its face purported to be a transfer "from Grand Avenue line to line punched." And under the words "going east" thereon was printed in separate lines "N. on Interurban," "N. on Rondo," "N. on Rice," "University and Wab." (the latter word being an abbreviation for "Wabasha"), "N. on Lexington." The line actually punched was "University and Wab." There were no other words on the check to indicate the Hamline line, or the line to Lexington avenue, or that "the line punched" was the West St. Paul line. The plaintiff wanted a transfer good to Lexington avenue. The defendant might, therefore, have given him one over either the Interurban or Hamline line, and, by accepting a transfer ticket limited to either in accordance with the rules of the company, if properly expressed on the ticket, he could not complain that he was obliged to take the particular line indicated by the transfer ticket. In response to his request he was given a ticket which apparently entitled him to be carried over the University and Wabasha route as far as the car on that route which he might take should go. There was nothing on the face of it to show that the route or line punched was not the one that he desired. By its terms it presumptively gave him a legal right under the ordinance to ride on the cars of the Hamline line which ran over Wabasha street and the University avenue. The transfer check is furnished by the company, and the terms used must be most strongly construed against it; and when he asked for a ticket to "University and Lexington," and was given a transfer over "University and Wab.,"—that being a route leading directly to Lexington avenue,—it was rightly construed, as against the company by the trial court, as entitling the plaintiff to take a car over that route, and he was rightly on board the car from which he was ejected. This was the construction placed upon the transfer by the plaintiff, by the conductor who issued it, and by the conductor upon the Interurban car, who directed him to take the Hamline car. At the instance of the conductor of one of the

cars on the Interurban line, the plaintiff entered a car of the Hamline line. The conductor on the latter car refused to accept the transfer in question, in conformity with the rules of the company, which forbade him to accept a transfer check given for another line. As a matter of fact the first conductor made a mistake in the form of the transfer, the line punched being the West St. Paul line, as before stated. Under the regulations of the company, however, it became the duty of the conductor to reject the transfer and collect of the plaintiff the regular fare, because his transfer check was not good over the Hamline line. The plaintiff, having refused to pay his fare or leave the car, was removed by the aid of a policeman.

In order to the successful and orderly management of its business, it is proper for the company to adopt and enforce suitable regulations for the transfer of passengers, as enjoined by the ordinances. Whether a passenger has not a right to insist upon a transfer general in its terms and good for any connecting line he may elect, or whether the city council might require the transfer to be in that form, it is not necessary to decide in this case. If the passenger accepts a transfer plainly marked for a particular line, he is not entitled to take a car of another and different line. By accepting such a transfer he so far consents to the regulations of the company in respect to the route and line of cars designated, and the conductors on the several lines would be obliged, in obedience to the rules of the company, to distinguish between the transfers and require them to be used on the particular lines designated. But in this case, as we have seen, the transfer was not sufficiently explicit to limit its application to the West St. Paul line, as the company intended, and under the ordinance it was good for the line of cars which plaintiff took, running over University and Wabasha streets; that is to say, he was entitled to a transfer for the line he took and asked for, and the transfer accepted was sufficiently general to entitle him to use it thereon. His expulsion from the car was therefore wrongful. But the evidence does not present a case for the allowance of punitive damages, and upon this point the instructions of the court were erroneous. The conductor acted in obedience to the rules of the company. He so informed the plaintiff, and no more force was used than was absolutely necessary. Compensatory damages only were recoverable. The instructions were presumptively prejudicial on this point, and from the amount of the verdict it is apparent, we think, that it could not have been limited to compensatory damages merely. There must therefore be a new trial.

*Order reversed.*

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## NEBRASKA SUPREME COURT.

Clark D. GILLESPIE, Admr., etc., of Clark D. GILLESPIE, Deceased, *Plff. in Err.*,
*v.*
City of LINCOLN.

(.....Neb.....)

*1. **A city is not liable** at common law for the negligent acts of the members of its fire department.

2. **Plaintiff's intestate was struck and killed by a ladder wagon or truck belonging to the fire department** of the defendant city, through the negligence of the driver thereof, a member of said department, while driving along one of the streets of the city for the purpose of exercising a team of horses belonging to the department. *Held*, that the city is not liable.

(June 11, 1892.)

ERROR to the District Court for Lancaster County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by the negligence of defendant's servant. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **Charles O. Whedon,** for plaintiff in error:

Liability of a city for the acts of its employés

*Head notes by POST, J.

NOTE.—For *note* on liability of municipal corporation for negligent acts of firemen, see Dodge v. Granger (R. I.) 15 L. R. A. 781.

"is based upon the right which the employer has to select his servants, to discharge them if not competent, or skillful, or well-behaved, and to direct and control them while in his employ."

*Kelly* v. *New York*, 11 N. Y. 432.

The non-liability of cities for the negligent acts of fire departments is based in some states upon the language of the statute which in those states makes the maintenance of a fire department obligatory upon the city. If, however, the statute simply confers a power that the city is at liberty to exercise or not, at will; that is in no sense compulsory, but its exercise is purely voluntary, and if the city chooses to organize and control the department, it is unlike in its effects and consequences the exercise of a power imposed upon the city by legislative requirement—one is voluntary and the other would be compulsory, and this should make a difference in the two cases.

The language of our statute is permissive only, and what the city of Lincoln does regarding its fire department it does voluntarily.

This being true, the doctrine of *respondeat superior* applies, and the city would be liable.

The manner in which the driver followed the instructions given him is what constitutes the wrong. The public have the right to use the streets. The city is obliged to keep them in such shape and condition as will allow their use by the public.

*Lincoln* v. *Walker*, 18 Neb. 251; *Lincoln* v. *Gillilan*, Id. 119; *Lincoln* v. *Holmes*, 20 Neb. 33; *Lincoln* v. *Woodward*, 19 Neb. 259; *Plattsmouth* v. *Mitchell*, 20 Neb. 230.

Of what use is this requirement if the city

can keep its fire apparatus charging along the streets at a high rate of speed when no alarm of fire has been given? When a fire breaks out and an alarm is given, the knowledge almost instantly becomes general. Everybody is on the lookout to prevent injury. Fast driving then is not especially dangerous. But in exercising the teams the case is different, and for the city to order or allow its employés to run a dangerous truck at a high rate of speed when no emergency existed, is gross negligence for which the city should be held liable.

*Hutson* v. *New York*, 9 N. Y. 163, 59 Am. Dec. 526; *Todd* v. *Troy*, 61 N. Y. 506; *Clemence* v. *Auburn*, 66 N. Y. 334; *Evans* v. *Utica*, 69 N. Y. 166, 25 Am. Rep. 165; *Niven* v. *Rochester*, 76 N. Y. 619; *Weed* v. *Ballston Spa*, Id. 329; *Saulsbury* v. *Ithaca*, 94 N. Y. 27, 46 Am. Rep. 122; *Dewire* v. *Bailey*, 131 Mass. 169, 41 Am. Rep. 219.

When a municipal corporation is charged by its charter with the duty of keeping its streets in suitable condition for public travel, the agents of the corporation charged with that duty are bound to exercise an active vigilance in the performance thereof.

*Todd* v. *Troy*, *supra*; *Atlanta* v. *Perdue*, 53 Ga. 607; *Rosenberg* v. *Des Moines*, 41 Iowa, 415; *Chicago* v. *Hoy*, 75 Ill. 530; *Pomfrey* v. *Saratoga Springs*, 7 Cent. Rep. 44, 104 N. Y. 459.

The degree of care and foresight which it is necessary to use must always be in proportion to the nature and magnitude of the injury that will be likely to result from the occurrence that is to be anticipated and guarded against.

*New York* v. *Bailey*, 2 Denio, 433; *Smid* v. *New York*, 17 Jones & S. 126.

A person standing in the relation of master to one he has selected as his servant from a knowledge or belief in his skill, and who can remove him for misconduct, and whose orders the employé is bound to receive and obey, is liable for his acts of negligence in the business intrusted to him, whether such servant has been appointed directly, or through the intervention of an agent.

*Quarman* v. *Burnett*, 6 Mees. & W. 509; *Milligan* v. *Wedge*, 12 Ad. & El. 737; *Rapson* v. *Cubitt*, 9 Mees. & W. 710; *Sproul* v. *Hemingway*, 14 Pick. 1, 25 Am. Dec. 350.

One of the duties of a municipal corporation arising out of the voluntary adoption of its charter, is to use reasonable care in the conduct of any work which it undertakes and the accomplishment of which is within its corporate power.

*Chicago* v. *O'Brennan*, 65 Ill. 160; *Chicago* v. *Turner*, 80 Ill. 419; *Freeport* v. *Isbell*, 83 Ill. 440, 25 Am. Rep. 407.

When the city has the appointment and supervision of the employés, and the duty to be performed is for the benefit of the corporation, the city is liable for the wrongful or negligent act.

*New York* v. *Bailey*, *supra*; *Tormey* v. *New York*, 12 Hun, 542; *Walsh* v. *New York*, 41 Hun, 299.

And where the duty is imposed on the corporation, and the officers or departments are simply made by charter agents of the corporation.

*Martin* v. *Brooklyn*, 1 Hill, 545; *Polley* v. *Buffalo*, 20 N. Y. Week. Dig. 163; *Niven* v. *Rochester*, 76 N. Y. 619; *Barnes* v. *District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Ehrgott* v. *New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Deyoe* v. *Saratoga Springs*, 3 Thomp. & C. 504; *Groves* v. *Rochester*, 39 Hun, 5; *Pettengill* v. *Yonkers*, 25 N. Y. Week. Dig. 451.

Supposing the city had built an engine-house abutting on one of the principal streets in such a defective manner that it fell down upon a passer-by who was exercising the proper care and discretion in passing along the street. Would not the city be liable for any injury he might sustain? It would seem that this question must be answered in the affirmative. Wherein does the supposed case differ in principle from the one at bar?

*Briegel* v. *Philadelphia*, 135 Pa. 451; *Goodloe* v. *Cincinnati*, 4 Ohio, 513; *Rhodes* v. *Cleveland*, 10 Ohio, 160, 36 Am. Dec. 82; *McCombs* v. *Akron*, 15 Ohio, 479.

*Mr.* **C. E. Magoon,** also for plaintiff in error.

*Mr.* **E. P. Holmes,** *City Atty.*, for defendant in error.

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

This case comes into this court on a petition in error. The error assigned is the sustaining of a demurrer by the district court of Lancaster county to the petition of plaintiff in error, the material part of which is as follows: "That on and prior to the 29th day of May, 1889, the said defendant had an organized and paid fire department, and had and owned engines, hose, hose-carts, ladders, wagons, trucks, and other apparatus for the use by, and which was used by, said defendant and its said fire department in extinguishing fires. That said defendant then had and owned horses, which were used by said defendant in drawing said wagons, trucks, hose-carts, and engines to the place in said city where a fire might be burning, and for other purposes. That among other apparatus the said defendant then owned a large truck or wagon, upwards of twenty feet in length, which was used by the defendant in transporting about the city long ladders, used by said fire department. That said defendant, at the time of committing the wrongs hereinafter mentioned, had in its pay and employ one Peter Keykendall, who was under the direction and control of the defendant, and whose duty it was, under the direction of said defendant, to drive the team attached to said ladder truck or wagon about the city; and said wagon was not at the time hereinbefore mentioned, May 29, 1889, supplied with any brake or lock or other appliance for stopping said wagon when in motion, or to assist the horses to said wagon attached in stopping the same; that the distance between the front and hind wheels to said truck or wagon was about eighteen feet; that said wagon or truck, when loaded with ladders and other apparatus carried thereon, and with the driver thereon, weighed upwards of two thousand pounds. That Ninth street extends through said city from north to south, and intersects and crosses P, R, and S streets in said city, and said Ninth street and said P, R, and S streets have for many years last past been public streets in said city, and on said 29th day of May, 1889, said Ninth street was paved with wood, and between S

and P streets was a paved and smooth street, and from S to R street had a smooth and level surface, and was free from obstruction, and was paved with wood. That the said Peter Keykendall, under his employment, was by the defendant required to drive said ladder truck or wagon about the city when no fires were burning which required to be extinguished by said defendant or said fire department, for the purpose of exercising the horses to said wagon attached, and was also required to drive said horses attached to said wagon, when the same was heavily loaded, on and along the public streets of the said city at a furious rate of speed, and as fast as said horses could be made to run, without any regard whatever for the lives or safety of citizens of the city who might be upon the streets, and this when no fire or fires were burning which required the action of the defendant or its fire department to extinguish, for the sole and only purpose of exercising said horses. That on the 29th day of May, 1889, the said Peter Keykendall, then being in the employ of the defendant, and acting under the orders and direction of the defendant, drove a span of large, high-spirited, and powerful horses attached to said ladder truck or wagon about the public streets of said city, for the purpose of exercising said horses. Said wagon or truck was loaded with ladders and other apparatus, and the driver rode therein, and said wagon with its load weighed upwards of two thousand pounds; that said wagon was not on said day supplied with any lock or brake or other appliances for stopping or assisting in stopping said wagon when in motion, as the defendant then well knew. That said Keykendall on said day drove said span of horses to said wagon attached as aforesaid on and along said Ninth street at a furious and dangerous rate of speed, and as fast as said horses could be driven, when there was no fire burning which required the services of said fire department or any of its members or employés of said city to extinguish, but said horses were driven for exercise only; that Clark D. Gillespie, an infant of tender years, being then but six years of age, was at the time crossing said Ninth street near the place where said street intersects and crosses R street at the north side of said R street, and said span of horses were driven upon said Clark D. Gillespie, and he was thrown upon the pavement, and the front wheel of said wagon was driven over and across his body; that said boy, after being knocked down and run over by said horses, and by one of the front wheels of said wagon, raised his head and attempted to arise from the pavement, when he was struck and run over by one of the hind wheels of said truck or wagon and was instantly killed. That the killing of said boy was caused by the driving over him of said team and wagon as aforesaid. Plaintiff further says that at said time said team and wagon were not being driven to any fire which required to be extinguished, but were being driven on and along said street for the sole and only purpose of exercising said horses, under the direction and orders of the defendant, at a dangerous rate of speed, and were driven so fast that it was impossible for the said Clark D. Gillespie to escape being run over. That the said Clark D. Gillespie was the son of the plaintiff. That on the 22d of July, 1889, the plaintiff was by the county court of said Lancaster county duly appointed administrator of the estate of said Clark D. Gillespie, and gave the bond by said court required, and took the oath by law required in such case. That on or about the 22d of July, 1889, plaintiff presented to the city council his claim for damages sustained by the estate of said Clark D. Gillespie by reason of the killing of him, the said Clark D. Gillespie, together with the names of the witnesses and a statement of the time, place, nature, circumstances, and cause of the injury and damages complained of, which claim was verified by the oath of the plaintiff; that afterwards, and on or about the 12th of August, 1889, said claim was by the defendant and the mayor and council thereof, to which it was presented as aforesaid, rejected and disallowed. That by reason of the killing of said Clark D. Gillespie as aforesaid the estate of the deceased has sustained damages in the sum of $5,000, for which sum plaintiff prays judgment, with interest from the 12th of August, 1889, and for costs."

The contention of the defendant in error is that no liability exists on the part of a city like Lincoln for injuries occasioned by the negligent acts of members of its fire department. This exemption is placed upon the ground that, in performing their duties, firemen act in obedience to a legislative command, and, although appointed and paid by the city, they are to be regarded rather as officers charged with a public duty than as servants of the city. Public policy, it is claimed, forbids the imposition upon a city of liability for the negligence of this class of employés, since they are engaged in the discharge of a duty imposed by law for the welfare of the public, and from which the city, as a corporation, derives no benefit or advantage. Counsel for plaintiff in error, while not conceding the rule to be as stated, insists that it could have no application to the case at bar, for the reason that the statute under which the fire department of the city of Lincoln is organized and governed is permissive only, and whatever is done by the city in that respect it does voluntarily, and therefore the rule *respondeat superior* is applicable. To this proposition we cannot assent.

The provision on the subject is found in subdivision 33, § 67, of the charter of the city of Lincoln: "Cities governed under the provisions of this Act shall have power by ordinance to provide for the organization of a fire department, to procure fire engines, hooks, ladders, buckets, and other apparatus, and to organize fire engine, hook and ladder, and bucket companies, and to prescribe rules of duty and the government thereof, with such penalties as the council may deem proper, not exceeding $100, and to make the necessary appropriations therefor, and to establish regulations for the protection from and extinguishment of fires." This language, although permissive in form, is in one sense mandatory. True, it is not mandatory in the fullest sense of the word, since the duty of the city to provide protection to life and property from fire cannot be enforced by mandamus or other

remedy. It is not every duty imposed upon the state, or the different agencies thereof called "municipal corporations," that can be thus enforced. *Kentucky* v. *Dennison*, 65 U. S. 24 How. 66, 16 L. ed. 717; Dill. Mun. Corp. 4th ed. 98. It is none the less a duty on the part of the city because the law has not provided a means for its enforcement by the mandate of the court. There existed a moral or equitable obligation on the part of the defendant city to provide means of protection from fires within its limits, and in the discharge of that duty provision was made for its fire department. If defendant is to answer for the wrongful act of Keykendall, the driver of the ladder wagon, it must be upon the rule *respondeat superior*. It is clear that upon no other principle is it chargeable. In this connection, it should be noted that the claim is made by plaintiff that Keykendall, in driving the team at the time in question, was acting within the scope of his authority. Counsel says in his brief: "The exercising of the team was a proper thing to do. It lies in the way of a proper discharge of the functions of the department. It was not *ultra vires*. The way in which it was performed is what we complain of." Taking it for granted, then, that the driving of the team at the time in question was a proper exercise of the functions of the fire department of the city, and within the line of duty of the driver, we will proceed to examine some of the authorities bearing upon the question involved.

In Dill. Mun. Corp. 4th ed. 974, the rule is stated thus: "If the corporation appoints or elects them, can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and the maxim of *respondeat superior* applies. But if, on the other hand, they are elected or appointed by the corporation, in obedience to the statute, to perform a public service, not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the Legislature in the distribution of the powers of the government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or state officers, with such powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* is not applicable." Among the officers who are not servants of a city, within the foregoing rule, and for whose negligence it will not be chargeable, the learned author enumerates policemen, health officers, and firemen. The rule as to the liability of the latter the author states, in section 976, as follows: "The exemption from liability in these and the like cases is upon the ground that the service is performed by the corporation in obedience to an Act of the Legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no especial benefit in its corporate capacity; that the members of the fire department, although appointed, employed, and paid by the city corporation, are not the agents and servants of the city, for whose conduct it is liable, but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, without being expressly given. The maxim of *respondeat superior* has therefore no application." To the same effect, see 2 Thomp. Neg. 735; Shearm. & Redf. Neg. 295, 296.

*Hayes* v. *Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760, was an action to recover damages resulting from a fire occasioned by the negligent use of an engine employed in suppressing a fire in the neighborhood. *Chief Justice* Dixon, in the opinion, says: "Neither the charter of the city nor the general statutes of the state contains any peculiar provision inposing liability in cases of this kind, and the decisions elsewhere are numerous and uniform that no such liability exists." *Wilcox* v. *Chicago*, 107 Ill. 334, 47 Am. Rep. 434, is directly in point. In that case the plaintiff sought to recover for injuries occasioned by a collision between his carriage and a hook and ladder wagon of the city, through the negligence of the driver while in the discharge of his duty. In the opinion of the court, by *Judge* Walker, it is said; "To allow recoveries for the negligence of the fire department would almost certainly subject property holders to as great if not greater burdens than are suffered from damage by fire. Sound public policy would forbid it, if it were not prohibited by authority." In *Fisher* v. *Boston*, 104 Mass. 94, 6 Am. Rep. 196, the plaintiff received personal injuries through the negligent use of hose by a fire company of the city in extinguishing a fire on adjoining premises. *Judge* Gray, in the opinion of the court, says: "But the extinguishment of fires is not for the immediate advantage of the town in its corporate capacity, nor is any part of the expense thereof authorized to be assessed upon owners of buildings or other special class of persons whose property is peculiarly benefited or protected thereby. In the absence of express statute, therefore, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them than in the case of a town or highway."

In *Hafford* v. *New Bedford*, 16 Gray, 297, the plaintiff was struck and injured by a hose-cart on a sidewalk of a public street. The firemen in charge thereof had negligently drawn it along and upon the sidewalk from the engine house ten or fifteen rods distant. The city was held not liable. In *Jewett* v. *New Haven*, 38 Conn. 368, 9 Am. Rep. 382, the plaintiff, without negligence on his part, was struck and injured in a public street by a hose cart, which was being driven to the engine house for an additional supply of hose for use at a fire then raging, but at a dangerous rate of speed, and without the exercise of reasonable precaution for the safety of passers-by. It was held the rule *respondeat superior* did not apply, and the city was not chargeable.

In *Dodge* v. *Granger*, 17 R. I. —, 15 L. R. A. 781, a very recent case, on the authority of

cases above cited, the city was held not liable for injuries caused by contact with a ladder projecting across the sidewalk in front of an engine house, negligently permitted by the firemen to remain in that position while engaged in cleaning the house. This principle has been repeatedly applied to other officers or employés of municipal corporations, as in *Maxmilian* v. *New York*, 62 N. Y. 160, where plaintiff's intestate was killed by a collision with an ambulance wagon, which was caused by the negligence of the driver, an employé of the commissioners of public charities and corrections; *Haight* v. *New York*, 24 Fed. Rep. 93, where, following the last case, it is held that the city is not liable for damage caused by a collision with a steamboat owned by the city, but in the exclusive use of the board of charities and corrections; *Condict* v. *Jersey City*, 46 N. J. L. 157, where the deceased was killed through the negligence of a driver employed by the board of public works to remove garbage from the streets to a public dumping ground; *Calwell* v. *Boone*, 51 Iowa, 687, where the injury resulted from the wrongful act of a policeman paid by the city; *Ogg* v. *Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Brown* v. *Vinalhaven*, 65 Me. 402, 20 Am. Rep. 709, and *Barbour* v. *Ellsworth*, 67 Me. 294,—in each of which it was held that the city was not chargeable with the negligence of its health officers; *Burrill* v. *Augusta*, 78 Me. 118, 1 New Eng. Rep. 697, in which plaintiff's horse was frightened by the escape of steam from a fire engine, negligently allowed to remain in the street; *Elliott* v. *Philadelphia*, 75 Pa. 347, where plaintiff's horse was killed through the negligence of a police officer, by whom he had been arrested for violation of an ordinance of the city against fast driving; *Bryant* v. *St. Paul*, 33 Minn. 289, where the plaintiff fell into a vault negligently left open and exposed by the board of health. In the last case, the distinction between the class of officers above-mentioned and other agents of the city is clearly pointed out by Vanderburgh, *J.*, as follows: "The duties of such officers are not municipal or corporate duties with which the corporation is charged in consideration of charter privileges, but are police or governmental functions which could be discharged equally well through agents appointed by the state, though usually associated with and appointed by the municipal body." There are many cases in the reports of the states and the United States in harmony with the foregoing, among which are *Smith* v. *Rochester*, 76 N. Y. 506; *Van Horn* v. *Des Moines*, 63 Iowa, 447, 50 Am. Rep. 750; *O'Meara* v. *New York*, 1 Daly, 425; *Wheeler* v. *Cincinnati*, 19 Ohio St. 19; *Howard* v. *San Francisco*, 51 Cal. 52; *Ham* v. *New York*, 70 N. Y. 459; *Welsh* v. *Rutland*, 56 Vt. 228. The cases cited by plaintiff may be said to sustain the proposition that the law imposes upon a city the duty to keep its streets in a reasonably safe condition for use by the public, and for a neglect of that duty it will be answerable. They are plainly distinguishable from those to which we have referred, since the duty of the city with reference to its streets is a corporate duty. As said by *Judge* Folger, in *Maxmilian* v. *New York*, *supra*: "It is a duty with which the city is charged for its own corporate benefit, to be performed by its own agents, as its own corporate act." This distinction is made also in *Ehrgott* v. *New York*, 96 N. Y. 274, 48 Am. Rep. 622, one of the cases cited by plaintiff. To the extent that the exemption of a city from liability for acts of officers herein enumerated affects the general rule of liability for obstruction of the streets of the city, it must be held to be an exception thereto,—an exception based upon a public policy which subordinates mere private interests to the welfare of the general public.

*The judgment is right and is affirmed.*

The other Judges concur.

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## MASSACHUSETTS SUPREME JUDICIAL COURT

William A. TAPPAN
*v.*
BOSTON WATER POWER CO.

Edward I. BROWNE *et al.*
*v.*
SAME.

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

**1. The boundary line between owners of land on opposite sides of a channel** not more than 200 rods wide into which the tide flows, but from which it wholly ebbs and through which a fresh water stream flows is the middle of the tidal channel and not affected by the fresh water stream, although the Colonial Ordinance of 1641-7 which extends the ownership of the land on tidal waters to low water mark, if not more than 100 rods, furnishes no guide for the division, since the land to be divided is all above low water mark.

**2. Flats in the bed of a fresh-water stream into which the tide flows,** but from which it wholly ebbs at low water where they are between separate channels of the stream are to be divided between riparian owners by straight lines from the points where the division lines of the owners end on the bank drawn to and at right angles with the center line of the tidal channel at the ordinary stage of the waters.

**3. An objection that a disclaimer in an action by writ of entry was not filed** at the same time with a plea of *nul disseisin* comes too late when first made at the argument.

**4. Disclaimers in an action by writ of**

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NOTE.—*Ownership of flats, or land below high-water mark.*

Although the common-law rule limiting the title of an owner of lands upon navigable waters to high-water mark is changed in Massachusetts, the decision in the above case that this statutory change does not apply to the conflicting rights of owners on opposite sides of a fresh-water stream in which the tide flows but from which it wholly ebbs at low water, makes the further decision as to the ownership of flats in the bed of such a fresh-water stream one of general application, while the question as to whether the low-water

**entry are conclusive as between the parties** and their privies as to the right and title of the demandants to the lands included in the disclaimers.

*(Field, Ch. J., and Knowlton and Lathrop, JJ., dissent from propositions 1 and 2.)*

(June 24, 1892.)

REPORT from the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of two actions by writ of entry, brought to recover possession of certain mud flats, in each of which there had been a finding in favor of the tenants. *Reversed.*

The facts are stated in the opinion.

*Messrs.* **W. G. Russell** and **H. W. Putnam**, for demandants:

The demandants' title extends to the center of the creek at high water, *i. e.*, to the line midway between the ordinary high-water lines or lines of marsh.

"The low-water mark" under the ordinance is the mark or line where the sea, at its lowest ebb, touches the land. A tidal stream is—where the tide ebbs wholly from it—simply a tidal creek with a fresh-water stream flowing through it when the tide is out. In such a creek the Commonwealth has no title, the fresh-water stream is not the "low-water mark" of the colonial ordinance; and the opposite proprietors own in severalty, in equal shares proportionally to their frontage, the whole flats of the creek from shore to shore as parcel of their respective upland, as if there were no fresh-water stream there,—each owning to the *medium filum*, or center line of the creek.

*Sewall & D. Cordage Co.* v. *Boston Water Power Co.* 6 New Eng. Rep. 320, 147 Mass. 61; *Ashby* v. *Eastern R. Co.* 5 Met. 368, 38 Am. Dec. 426; *Rust* v. *Boston Mill Corp.* 6 Pick. 158; *Boston* v. *Richardson*, 13 Allen, 146; *Harlow* v. *Fisk*, 12 Cush. 302; *Valentine* v. *Piper*, 22 Pick. 85; *Walker* v. *Boston & M. R. Co.* 3 Cush. 1; *Gray* v. *Deluce*, 5 Cush. 9; *Wonson* v. *Wonson*, 14 Allen, 71.

It is only a depression or channel from which the tide does not ebb at low water that determines the direction and extent of the riparian proprietor's flats.

*Walker* v. *Boston & M. R. Co. supra; Atty-Gen.* v. *Boston Wharf Co.* 12 Gray, 553; *Sparhawk* v. *Bullard*, 1 Met. 95; *Drury* v. *Midland R. Co.* 127 Mass. 571; *Ashby* v. *Eastern R. Co. supra.*

The aim of the court in dividing flats is "to lay down such a line of division as to give to each riparian owner his fair and equal share," upon "the principle of giving an equal division."

*Walker* v. *Boston & M. R. Co. supra.*

The outward boundary of flats to which the side lines shall run is the *medium filum*, or center-line between the banks.

*Harlow* v. *Fisk* and *Boston* v. *Richardson, supra.*

The rule follows in principle the analogy of non-navigable rivers in which the riparian proprietors own in severalty to the center or middle-line between the shores,—the "shores," in the case of a tidal creek or river, being the mean high-water lines of the tide, or edges of the upland, and in the case of a non-navigable river, the ordinary water-lines of the fresh-water stream.

*Ingraham* v. *Wilkinson*, 4 Pick. 268, 16 Am. Dec. 342; *Bardwell* v. *Ames*, 22 Pick. 333; *Trustees of Hopkins Academy* v. *Dickinson*, 9 Cush. 544; *Knight* v. *Wilder*, 2 Cush. 199, 48 Am. Dec. 660; *Boscawen* v. *Canterbury*, 23 N. H. 188; *Plymouth* v. *Holderness*, cited in 28 N. H. 217.

The language of the ordinance, as repeatedly construed and applied by the courts, necessarily leads to the conclusion for which we contend.

*Watuppa Reservoir Co.* v. *Fall River*, 1 L. R. A. 466, 147 Mass. 548.

Before the ordinance was passed, *i. e.*, at common law, we bounded not by the fresh-water stream or its thread, but by the mean high-water mark of the sea, and the colony owned the flats from shore to shore.

*Com.* v. *Alger*, 7 Cush. 53; Gould, Waters, §§ 27, 42; *Porter* v. *Sullivan*, 7 Gray, 441.

The moment the ordinance was passed we bounded by "the [extreme] low-water mark" of the sea, not by the fresh-water stream or its thread. We therefore have never bounded by the fresh-water stream, either at common law or under the ordinance, and consequently, never by its thread. We have never been riparian proprietors on it, but always littoral proprietors on the sea, to speak with exactness. The ordinance grants to each littoral proprietor his "due share" (Wilde, *J.*, in *Rust* v. *Boston Mill Corp.* 6 Pick. 186), of the flats in severalty; and the bed of a fresh-water stream within that share,—whether running parallel with his line of upland or at any angle with it,—passes to him as much as it does when it falls within an original allotment of upland made to him in the book of possessions.

*Watuppa Reservoir Co.* v. *Fall River, supra; Rust* v. *Boston Mill Corp.* 6 Pick. 198; *Ashby* v. *Eastern R. Co.* 5 Met. 368, 38 Am. Dec. 426.

The dominant purpose of the ordinance is to establish a just, uniform, and definite rule of title in the soil of flats not exceeding 100 rods in extent from the upland, without reference to the rights of navigation or of access to the water.

*Walker* v. *Boston & M. R. Co.* 3 Cush. 1.

The demandants' title as riparian proprietors upon a fresh-water stream (assuming that they are such in law) extends to the thread of the fresh-water stream.

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mark intended by the statutory provision is to be regarded as the point to which the tide water recedes or that to which the fresh water of the stream recedes, is novel and peculiarly interesting.

For *notes* on the title and riparian rights of the owners of land bounded on navigable waters, see Fulmer v. Williams (Pa.) 1 L. R. A. 603; Parker v. West Coast Packing Co. (Or.) 5 L. R. A. 61; Case v. Loftus (Or.) 5 L. R. A. 684; Miller v. Mendenhall (Minn.) 8 L. R. A. 89; Eisenbach v. Hatfield (Wash.) 12 L. R. A. 632.

For *note* on boundaries of land bordering on a fresh-water stream, see Chandlos v. Mack (Wis.) 10 L. R. A. 207.

The western branch of the fresh-water stream was the wider and larger in volume.

The law gives us title to the thread of the western channel as the main or principal one, and including the island.

Phear, Rights of Water, 11, 12; Ang. Watercourses, § 45; *Claremont* v. *Carleton*, 2 N. H. 369, 9 Am. Dec. 88; *Greenleaf* v. *Kilton*, 11 N. H. 530; *Kimball* v. *Schoff*, 40 N. H. 190.

If, upon the facts, the two branches of the fresh-water stream are to be treated as substantially equal in width, the thread of the stream will be the center-line between the threads of the channels, and will bisect the island.

*Ingraham* v. *Wilkinson*, 4 Pick. 268, 16 Am. Dec. 342; *Trustees of Hopkins Academy* v. *Dickinson*, 9 Cush. 544; *Deerfield* v. *Arms*, 17 Pick. 41, 28 Am. Dec. 276.

*Messrs.* **Henry D. Hyde, George F. Richardson,** and **G. D. Braman,** for tenants:

As the demanded premises are situated below the ordinary high-water mark, the title of these premises before the Colonial Ordinance of 1347 was passed was in the Massachusetts Bay Company.

*Storer* v. *Freeman*, 6 Mass. 435, 4 Am. Dec. 155; *Com.* v. *Roxbury*, 9 Gray, 451.

The title of the demandants in this case must depend on the construction to be placed on this ordinance. The two limitations which appear in the ordinance are the low-water mark or 100 rods when the low-water mark is more than 100 rods.

These flats run in the direction of the nearest tidal channel, and such a channel forms the limit of the ownership of flats derived under this ordinance.

The rule is the same whether the water which remains in the channel is salt water or the fresh water of the stream above running through the bed of the fresh-water creek.

See *Sparhawk* v. *Bullard*, 1 Met. 95; *Ashby* v. *Eastern R. Co.* 5 Met. 368, 38 Am. Dec. 426; *Walker* v. *Boston & M. R. Co.* 3 Cush. 1; *Atty-Gen.* v. *Boston Wharf Co.* 12 Gray, 553; *Drury* v. *Midland R. Co.* 127 Mass. 571.

The burden in this case is on the demandants to show that there was no such channel between the edge or bank of their upland and the center of the westerly channel.

*Williams* v. *Ingell*, 21 Pick. 288; *Ashby* v. *Eastern R. Co.* 5 Met. 368, 38 Am. Dec. 426.

This they have failed to do, for it was expressly found that, "on the evidence the demandants did not by a fair preponderance of the evidence satisfy me that at any time before the waters of Muddy river were cut off, said waters ceased to flow in the easterly channel at the lowest spring tides." This channel, then, must be the limit of the demandants' flats.

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

These two actions involve the title to flats in Muddy river, in Boston, lying between marsh lands on the easterly and westerly sides of the river, which belong respectively to the demandants and tenants. Both were tried together, and depend on the same facts. Evidence was introduced by the parties of acts of ownership and possession by themselves and their predecessors in title relating to a part of the demanded premises; but the court was not satisfied that such acts had been exercised. The cases do not depend, therefore, at all upon possessory titles. The demandants also claimed title by accretion. The findings of the court would seem to have disposed of this claim, and it has not been argued.

The titles of the parties depend on the rights which owners of lands on opposite sides of a stream like Muddy river have to the interjacent flats in the natural condition of things under the Colony Ordinance of 1641–47. It appears that Muddy river is a fresh-water stream, and that prior to 1820 it had a large flow in the winter and spring, and a diminished flow in the summer, and ran unobstructed to Charles river. It was navigable at certain stages of the tide to a point above the demanded premises, and the tide ebbed and flowed to a point above them. Between the lands of the demandants in the second action and those of the tenants was an island, which at ordinary high tide was nearly or entirely covered by water, and which the presiding justice treated as flats. This island divided the river into two channels, which united below it,—one called the "easterly channel," which at high water ran nearer the lands of the demandants than the center of the stream; and the other called the "westerly channel," which ran nearer the lands of the tenants than the center of the stream at high water. The demanded premises lie between the edge of the marsh land of the demandants and the center of the westerly channel, and the distance between the two lines is less than 100 rods. At ordinary low water there was no water on the demanded premises except such as came from the flow of Muddy river, and that was confined to the two channels. The presiding justice was not satisfied that the tide ebbed from the easterly channel, before it did from the westerly channel, or that the waters of the river ceased to flow in the easterly channel at the lowest spring tides, or that they did or did not run through the westerly channel at the lowest spring tides. Certain dams were built in Charles river in 1820 and 1821, which thereafter affected the flow of Muddy river. The extent to which they affected it is not material. In 1885, Muddy river was cut off at Brookline avenue, and tide water was cut off by the Back Bay park. It is not stated where the line of low tide was. We do not know whether it was where Muddy river emptied into the Charles, or above or below that point. It is evident that it was below the demanded premises, for it is found that at ordinary low tide the only water that flowed over them was that of Muddy river, flowing in the two channels above named.

At common law the title of the owner of land bounding on tide water only extends to ordinary high-water mark. *Com.* v. *Charlestown*, 1 Pick. 182; *Porter* v. *Sullivan*, 7 Gray, 441; *Com.* v. *Roxbury*, 9 Gray, 477, 483, 491; *Com.* v. *Alger*, 7 Cush. 53, 65, 66.

This applies to a stream discharging fresh water, but in which the tide ebbs and flows. The test whether or not it is to be regarded as tide water is whether there is a regular

rise and fall under the influence of the tide. *Atty-Gen.* v. *Woods*, 108 Mass. 436, 11 Am. Rep. 380; *Peyroux* v. *Howard*, 32 U. S. 7 Pet. 343, 8 L. ed. 707; *Lapish* v. *Bangor Bank*, 8 Me. 85.

The Colony Ordinance of 1641–47, however, extended the title of all proprietors of land adjoining creeks, coves, and other places where the tide ebbs and flows to low-water mark, if not more than 100 rods. It is under the title thus conferred that the demandants claim. The tenants have disclaimed in both cases as to the land between the edge of demandants' marsh land, and the center of the easterly channel. They contend that that channel is the demandants' boundary, and that their line does not go beyond the nearest tidal channel, whether that be one in which only fresh water flows at low tide, or one from which the tide does not wholly ebb. They rely for this upon certain expressions in cases that have been decided by this court; and they are obliged in effect to concede that under it the title to the land between the channels may still be in the Commonwealth. We do not think the cases to which the tenants have referred us maintain the proposition on which they rely, or show that the low-water mark intended by the ordinance is the low-water mark of the fresh-water stream.

In *Sparhawk* v. *Bullard*, 1 Met. 95, 107, there was a question respecting the existence of a creek alleged to have separated the land demanded from the upland and flats belonging to the demandants. The jury was instructed that, "if they should find there was naturally and originally any creek in which the tide ebbed and flowed, and from which it did not ebb entirely at the times when from natural causes it ebbed the lowest, this would constitute a boundary of the flats beyond which the demandants would not by law be entitled to recover." These instructions, which had been given originally by Shaw, *Ch. J.*, and were adopted by Morton, *J.*, in a later trial of the same case, were excepted to, but this court held that they were correct. In *Ashby* v. *Eastern R. Co.*, 5 Met. 368, 370, 38 Am. Dec. 426, which was decided only two years and a half or thereabouts after *Sparhawk* v. *Bullard*, the opinion was given by *Chief Justice* Shaw, and certainly no intention is manifested to overrule that case. On the contrary, we think it conforms to it. In this case also the question was whether the land of the petitioner went to a channel. In defining what was meant by a channel the chief justice used the following language: "If this part of flats called 'South River' had no channel running through it,—that is, no depression from which the tide did not ebb at low water,—then it must have been a cove. . . . " It is evident that the word "channel" is used in this sense throughout the opinion, and that he does not mean to say that a channel formed by a stream of fresh water, out of which the tide ebbed at low water, would constitute a boundary to flats.

In *Walker* v. *Boston & M. R. Co.*, 3 Cush. 1, 22, the same rule is laid down as in *Sparhawk* v. *Bullard*, and that case is cited in support of it. *Chief Justice* Shaw gives the opinion in this case also, and he says: "It appears by the case that the stream running from the tide mills along through the westerly part of these flats is a natural channel or creek, from out of which the tide does not ebb. It must therefore be a terminus to a claim of flats in that direction."

In *Atty-Gen.* v. *Boston Wharf Co.*, 12 Gray, 558, the rule laid down in *Sparhawk* v. *Bullard* is again affirmed in these words: "A natural or original creek, in which the tide ebbed and flowed, and from which it did not ebb entirely at the time when from natural causes it ebbed the lowest, would constitute a boundary of the flats."

In *Drury* v. *Midland R. Co.*, 127 Mass. 581, the court says that a creek from which the tide does not wholly ebb was a natural boundary, and bounded the claims of all adjacent proprietors of flats. See also *Porter* v. *Sullivan*, 7 Gray, 448, 449; *Harlow* v. *Fisk*, 12 Cush. 304.

There is no suggestion in these cases that a tidal channel from which the tide ebbs, and through which a fresh-water stream flows at low tide, will constitute a boundary to flats, or that the fresh-water stream will constitute low-water mark. And we think it plain that a channel, to be a boundary to flats, must be one from which the tide does not ebb at low water. It is expressly found in the cases at bar that the tide ebbs from the channel over the demanded premises at low water, and it does not, therefore, constitute a boundary to demandants' flats. It appears that it also ebbs from the other channel. It is immaterial on this point whether the tide ebbed from one channel sooner than the other, or whether there was or was not fresh water flowing in either or neither or both of them at low water, or whether one channel was wider than the other, or whether at one stage of the tide more water flowed in one than in the other, and at another stage of the tide this was reversed. The controlling fact is that the tide wholly ebbed from both channels at low water. The ordinance relates, so far as concerns the point which we are now considering, to land adjoining "creeks, coves, and other places upon and about salt water, where the tide ebbs and flows." It establishes that the proprietor of such land "shall have propriety to low-water mark when the sea doth not ebb above a hundred rods, and not more, wheresoever it ebbs further." By low-water mark is meant the lowest line made by the receding tide with the land; not the lowest line which a stream of fresh water emptying into the sea, or a cove, or tidal river makes with the land. It has nothing to do with a fresh-water stream, or with a tidal channel through which only fresh water flows at low tide. Nothing in the ordinance indicates an intention to preserve the fresh-water stream or channel as a boundary below ordinary high-water mark; and the cases cited show it has not been done in applying it. The channel would not be the boundary, even above high-water mark. The rules of proprietorship on a fresh-water stream may furnish, in a given case, the best analogy for the division of interjacent

flats on a stream below a point where the tide ebbs and flows, but beyond that they have no force.

How, then, in these cases, are these flats to be divided? The ordinance itself furnishes no guide. It simply declares a rule of property, leaving the court to make the division in such manner as appears to be just and reasonable. *Walker* v. *Boston & M. R. Co.* 3 Cush. 22; *Gray* v. *Deluce*, 5 Cush 12. In applying it, the aim has been to secure a fair and equal division of the flats among those to whom they belonged. *Walker* v. *Boston & M. R. Co.* 3 Cush. 22. No fixed plan has been or can be adopted which will operate with equal justice in all cases. Certain general rules have been laid down, but even these yield to the circumstances of particular cases. Thus, for instance, it is said that the flats are to extend to low-water mark, (*Porter* v. *Sullivan*, 7 Gray, 442, 443; *Wonson* v. *Wonson*, 14 Allen, 71; *Sewall & D. Cordage Co.* v. *Boston Water-Power Co.* 147 Mass. 64, 6 New Eng. Rep. 320,) that they must be in front of the upland, when practicable, to which they are appurtenant, and also, when practicable, of equal width at the low-water line with the upland at the high-water line, (*Gray* v. *Deluce*, 5 Cush. 9, 12; *Porter* v. *Sullivan*, 7 Gray, 441–443;) and, in the case of a cove, from which the tide ebbs, and where there is no channel, they are to be divided by straight lines from the external lines of each proprietor's upland to a base line across the mouth of the cove, so as to give each proprietor a distance upon the base line proportioned to the width at the ordinary high-water mark of his upland. *Rust* v. *Boston Mill Corp.* 6 Pick. 158.

In the present case the line of low water is below the demanded premises. The flats are in the bed of a stream, which extends some distance below the demanded premises before entering Charles river. It is obviously impracticable to extend the lines of division to low-water mark, or to follow the rules of division laid down for flats in a cove. The most satisfactory analogy would seem to be that presented by a fresh-water stream or river, where the line of division between opposite proprietors is the thread of the stream. *Ingraham* v. *Wilkinson*, 4 Pick. 268, 273, 16 Am. Dec. 342; *Bardwell* v. *Ames*, 22 Pick. 333, 354; *Trustees of Hopkins Academy* v. *Dickinson*, 9 Cush. 544, 552; *Knight* v. *Wilder*, 2 Cush. 199, 207, 208, 48 Am. Dec. 660; *Boston* v. *Richardson*, 13 Allen, 154. In such a case each proprietor owns an equal share of the bed of the stream in proportion to his line on the margin and in front of or adjacent to his upland. Ang. Watercourses, § 11. The principle of division between them is, as in the case of flats, that of equality, and the division is effected by drawing lines at right angles from the termini of the side lines on the shore to and at right angles with the thread of the stream. *Knight* v. *Wilder*, 2 Cush. 209, 48 Am. Dec. 660. In a somewhat similar case respecting this very river it was said that the title of the riparian owners extended to the thread of the stream. *Sewall & D. Cordage Co.* v. *Boston Water-Power Co.* 147 Mass. 61, 64, 6 New Eng. Rep. 320. And it seems to have been the view of the court in cases where the tide wholly ebbed at low water from a tidal creek that a boundary by it would convey the title to the flats to the center of the creek, (*Harlow* v. *Fisk*, 12 Cush. 302, 306; *Boston* v. *Richardson*, 13 Allen, 146, 159;) although in one case the margin of the creek was held to constitute the boundary. *Chapman* v. *Edmands*, 3 Allen, 512. This case, however, depended on the peculiar language used in the deed which was thought to exclude the creek. By the thread of the stream is meant the center line from one bank to the other, not when swollen by floods or diminished by drought, but in its ordinary and natural condition. This may or may not coincide with the channel. That is immaterial. And it is immaterial also whether there is one channel or more than one. *Trustees of Hopkins Academy* v. *Dickinson*, 9 Cush. 544, 559; *Pratt* v. *Lamson*, 2 Allen, 275, 285; *Boscawen* v. *Canterbury*, 23 N. H. 189; Ang. Watercourses, §§ 10, 11; Gould, Waters, § 198. What the result might be if it should appear that the land in the middle of the river between the marsh land of the demandants in the second case and that of the tenants was an island, we need not now consider. For the purposes of the trial it was treated by the presiding justice as flats, and this view seems to have been acquiesced in by all parties. Assuming that it is to be regarded as flats we think the demandants are respectively entitled to recover so much as falls within straight lines drawn from the termini on its banks at the ordinary stage of the water of the side lines of their respective marsh lands to and at right angles with the center line of the stream.

The remaining question is whether judgment should be entered for the tenants on their disclaimers. The tenants first pleaded *nul disseisin*, more than a year after the disclaimers were filed. The demandants object that they should have been filed as specifications of defense with the plea of *nul disseisin*. But no objection appears to have been made at the time of filing, or at any time before argument in this court, that they should not be considered as having been filed as specifications of defense under the plea of *nul disseisin*. We think the objection comes too late, and that they must be regarded as having been so filed. The pleas of *nul disseisin* put in issue the title of the demandants, but admitted possession by the tenants. *Higbee* v. *Rice*, 5 Mass. 352, 4 Am. Dec. 63; *Burridge* v. *Fogg*, 8 Cush. 182. The disclaimers admitted the title and right to possession of the demandants of the tracts described in them. *Oakham* v. *Hall*, 112 Mass. 539. The effect of the pleas of *nul disseisin* with the disclaimers was therefore to admit on the part of the tenants the title and right to possession of the demandants to so much of the demanded premises as lies easterly of the center of the easterly channel, and to claim title in themselves as to the rest of the demanded premises. The demandants could thereupon have discontinued these actions as to the parts dis-

claimed. *Johnson* v. *Rayner*, 6 Gray, 108. They did not do so, and the cases went to trial upon the pleadings as they stood. The tenants having disclaimed as to a part of the demanded premises, the only issue on the disclaimers was not whether they had any right or title to those portions, but whether they had asserted any right or done any act inconsistent with their disclaimers. *Merrimack River Locks & Canals Proprs.* v. *Nashua & L. R. Co.* 104 Mass. 10. The finding of the court was generally in favor of the tenants, and there is nothing to show that on this branch of the case it was erroneous. The tenants are therefore entitled to judgment upon their disclaimers, and for their costs from the time of filing them. Pub. Stat. chap. 173, § 9. This does not give them title to the tracts disclaimed. The disclaimers are conclusive as between them and the demandants and their privies as to the right and title of the demandants to the lands included in the disclaimers. *Oakham* v. *Hall*, 112 Mass. 539; *Prescott* v. *Hutchinson*, 13 Mass. 440; *Porter* v. *Rummery*, 10 Mass. 64. If, therefore, the demandants eventually should succeed in also establishing their title to so much of the demanded premises as lies between the easterly channel and the thread of the stream, they will have established their title, as between themselves and the tenants and their privies, to all of the demanded premises that fall within the lines previously described. Stearns, Real Act. 2d ed. 197. While a disclaimer filed as a specification of defense under the present method of pleading in real actions is not, strictly speaking, a plea, it was treated as having the same effect as one in *Oakham* v. *Hall*, *supra*, and the judgments in these cases would have relation to it. In *Cole* v. *Eastham*, 124 Mass. 310, the court regarded the pleadings as intending to raise only the question whether the tenant had such possession of the demanded premises as to exclude the demandants, or entitle them to consider themselves disseised, and accordingly directed judgment for the demandants for possession, and for the tenant for his costs. We think upon the main question *the finding should have been*, upon the facts reported, *for the demandants* to the center of the stream, and that, in accordance with the terms of the report, the findings must be set aside, and a new trial granted, and it is so ordered.

The *Chief Justice* and **Knowlton** and **Lathrop**, *JJ.*, are of opinion that when land bounds on a running stream which is within the ebb and flow of the tide, and out of which the tide wholly ebbs, but which at ebb tide is still a stream with well-defined banks, the Colonial Ordinance of 1641–47 does not extend the boundary of the land of the riparian or littoral owners across the stream or beyond the line of low water of the stream.

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## OHIO SUPREME COURT.

Charles CRAIG, *Plff. in Err.*,
*v.*
STATE OF OHIO.

(.....Ohio St.....)

***The provisions of section 7316, Rev. Stat.,** which provide that "if the offense charged is murder, and the accused be convicted by confession in open court, the court shall examine the witnesses, and determine the degree of the crime, and pronounce sentence accordingly," are constitutional and valid.

*Head note by the COURT.

(May 10, 1892.)

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment sentencing defendant to suffer death for having committed murder in the first degree. *Affirmed.*

Statement by **Bradbury**, *J.*:

At the October Term, 1890, of the court of common pleas of Hamilton county, an indictment was found by the grand jury charging the plaintiff in error with the crime of murder in the first degree. He

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NOTE.—*Statute allowing plea of guilty in capital case.*

In view of the history of criminal procedure with its strict rules designed for the protection of accused persons, but which in recent times often proves an obstruction of justice, the constitutionality of a statute permitting a plea of guilty in a capital case is a question of much interest.

We know of no direct precedent for the above decision, but it is in line with a tendency which is fortunately growing stronger, both in and out of the legal profession, to secure a simpler and swifter procedure in criminal cases to prevent the frequent miscarriage of justice by reason of technical rules and of the long delays which often nullify the effect of a conviction even if it is finally obtained.

It will be noticed that the question in the above case as to the necessity of a jury arises by reason of the statutory provision making it the duty of the court to hear witnesses and determine the degree of the offense and that the court holds that, except for this, the plea of guilty would warrant the imposition of a capital sentence without any further proceedings.

For *notes* on the general question of the constitutional right to trial by jury, see Grand Rapids & L. R. Co. v. Sparrow (Mich.) 1 L. R. A. 430; Anderson v. O'Donnell (S. C.) 1 L. R. A. 632.

As to the right of an accused to waive a trial by jury, see *note* to King v. State (Tenn.) 3 L. R. A. 211.

For *note* on the constitutional right to jury for assessment of damages on default, see Dean v. Willamette Bridge R. Co. (Or.) 15 L. R. A. 614.

For *note* as to jury trial on appeal as satisfying the constitutional right to trial by jury, see Miller v. Com. (Va.) 15 L. R. A. 441.

For *note* on the constitutional right to trial by jury in equitable cases on account of a demand for damages, see Lynch v. Metropolitan Elev. R. Co. (N. Y.) 15 L. R. A. 287. R. A. R.

was afterwards arraigned, and pleaded not guilty. A jury was drawn, summoned, and in attendance for his trial on November 17, 1890, when in open court, by leave thereof, and by the advice of counsel, he withdrew his plea of not guilty, in the following words: "And thereupon the defendant, Charles Craig, after being fully advised in the premises by his counsel, and being cautioned by the court, pleaded guilty as charged in the indictment herein. . . ." The court thereupon proceeded, under section 7316, Rev. Stat., to hear evidence "and determine the degree of the crime, and pronounce sentence accordingly." After hearing the evidence, the court found the grade of the homicide to be murder in the first degree, and sentenced the prisoner to suffer death. The proceedings and evidence were embodied in a bill of exceptions, and the cause taken to the circuit court on error, where the judgment of the lower court was affirmed. Thereupon proceedings were begun in this court to obtain a reversal of both of said judgments.

*Mr.* **Wade Cushing** for plaintiff in error.

*Mr.* **D. Thew Wright** for defendant in error.

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

The only question arising on the record is the constitutionality of that provision of section 7316, Rev. Stat., which requires the court, where, upon a charge of murder, the accused confesses his guilt in open court, to "examine witnesses, and determine the degree of the crime, and pronounce sentence accordingly." The record discloses that the plaintiff in error, voluntarily, by the advice of counsel, and after being cautioned by the court, entered a plea of guilty; and then, without objection or protest, permitted the court of common pleas to hear evidence offered by the state, and submitted evidence himself, tending to show the degree of the crime he had committed. That this action of the court was warranted by the statute above quoted, is clear. Counsel for plaintiff in error contends, however, that the General Assembly transcended its constitutional powers in enacting that statute; that the right, upon an indictment for a felony, especially if capital, to be tried by a jury, is so sacred that the accused could not waive it, even when authorized by a statute enacted by the Legislature for that purpose. The denial, in criminal cases, of the power of waiver, has, in many instances, been carried to an extreme, if not absurd, length. The doctrine had its origin at a period in the history of the law of England when offenses that would now be regarded as comparatively trivial were, upon conviction, visited with death, and when the criminal procedure was as crude and imperfect as the Criminal Code was harsh; the accused being allowed, upon the trial of an issue of not guilty, neither counsel nor witnesses to aid him in his defense. The judges, frequently more humane than the law, were reluctant in many instances to pronounce the sentence of death prescribed by the statute, and were ready to seize upon any irregularity occurring in the course of the procedure to save the life of the prisoner, when neither the nature of the offense of which he had been convicted nor the circumstances of its commission, indicated any considerable depravity or viciousness of character. In addition to this the judge was, in theory at least, the counsel for the accused, and if, through the act, advice, or omission of the judge, the accused was induced to omit making an available objection, or consented to relinquish a right, this was deemed not an act of the accused, but of the court, and the law would not permit the party to suffer for it. Bishop, Crim. Proc. 20. In this state, however, the court is no longer, in fact, the adviser or counsel of the accused. Instead, other counsel is guaranteed to him, and, if he is indigent, provided at the public expense. He is entitled to compulsory process to secure the attendance of witnesses in his behalf, and may, under the sanction of a judicial oath, if he so chooses, detail to the court and jury every fact or circumstance known to him that may bear on the question of his guilt or innocence. Every reasonable facility is thus provided for a complete and thorough investigation of the charge against him, which is the surest shield of innocence. Also the penalties prescribed for violations of our criminal laws are more humanely and reasonably apportioned according to the character and magnitude of the crime to which they are respectively attached. Under this state of the law there can be but little sound reason for maintaining a doctrine, defensible mainly, if not solely, by the circumstances under which it originated, and which have long since ceased to exist; and therefore, as might be expected, courts and Legislatures view with diminishing respect that strict ancient doctrine on the subject of waiver in proceedings and trials of even the higher grades of crimes.

A plea of guilty is not an unusual proceeding in criminal prosecutions. The accused is arraigned to afford him an opportunity either to admit or deny the truth of the accusation. The subsequent proceedings are within his control, and depend upon his plea. By a plea of not guilty, he denies and puts in issue every material fact alleged in the indictment, thus imposing upon the prosecutor the burden of proving them. 1 Bishop, Crim. Proc. 799; 1 Chitty, Crim. Law, 471; Wharton, Crim. Pl. 408; *People* v. *Aleck*, 61 Cal. 137. On the other hand, a plea of guilty, from an early period in the history of criminal procedure, both in England and in the several states of the Union, has been regarded as an admission of every material fact well pleaded in the indictment dispensing with the necessity of proving them, and authorizing the court to proceed to judgment. 4 Bl. Com. 329; 1 Chitty, Crim. Law, 429; *Crow* v. *State*, 6 Tex. 334; 1 Bishop, Crim. Proc. 795.

It may be true that a court of common pleas, in the exercise of its discretion, may refuse to accept a plea of guilty of a capi-

tal or other infamous offense, or even in a prosecution for a misdemeanor, until it has ascertained, by an examination of witnesses, whether or not the accused is of sound mind, and free from the influence of promises and hopes unduly raised on the one hand, and of threats and intimidation wrongfully made or used upon the other. This course was pursued in Massachusetts at an early day in at least one capital case. *Com.* v. *Battis*, 1 Mass. 94. But the exercise of this humane discretion by the court before permitting a plea of guilty to be entered in no way detracts from the force or effect of the plea when it has been finally accepted. In the case before the court, the indictment charged upon the accused both deliberation and premeditation. The plea of guilty was, in its nature, as much a judicial confession of the truth of those two allegations as of any other contained in the indictment, and but for the provisions of section 7316, Rev. Stat., making it the duty of the court to hear witnesses and determine the degree of the offense, would have warranted a capital sentence. That provision, therefore, confers upon the accused a benefit, instead of depriving him of a right, by forbidding that extreme sentence which would otherwise follow his plea, until the court hears evidence, and ascertains that it is warranted by the facts as well as by the plea.

The contention made on behalf of the plaintiff in error as we understand it goes, however, a step further. It is insisted that the framers of the Constitution of 1851 intended to make the punishment for crime, at least in its higher grades, an act of society, to be accomplished only through the intervention of a jury, the special representatives of society. This doctrine would exclude a plea of guilty, and force upon the accused as well as the state a trial by jury to establish facts about which there was no dispute. It was, no doubt, competent for the framers of the Constitution to provide that no person shall be convicted or punished for an offense by his own confession, or in any other mode than by a trial by jury; but the history of the struggle by which the right to trial by jury was established does not afford sufficient ground to require us to construe a constitutional provision, that in terms merely guarantees to the accused a right to a trial by jury, as absolutely prohibiting any other mode of trial, even with the consent of the accused. The only provisions in the Constitution of 1851, of this state, relating to trial by jury, are found in sections 5 and 10 of the Bill of Rights. Section 5 provides simply that "the right of trial by jury shall be inviolate," while section 10 provides that "in any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury." The same provisions of the Constitution that secure a trial by jury to the accused in capital cases also secure it to one charged with a misdemeanor punishable with imprisonment. Section 10, art. 1. The constitutional guaranty in the one case is no stronger than in the other, and this court very soon after the adoption of the Constitution held that, in a prosecution for a misdemeanor, "the constitutional right of trial by jury is not infringed when the option is given to the accused to have the issue tried by the court or the jury, and he submits the cause to the court." *Dillingham* v. *State*, 5 Ohio St. 280; *Dailey* v. *State*, 4 Ohio St. 57. There is no necessary conflict between these cases and that of *Williams* v. *State*, 12 Ohio St. 622. In the latter case the plaintiffs in error were indicted for altering bank notes, and, pleading not guilty, they waived a jury trial, and consented to be tried by the court. They were convicted, and sentenced to imprisonment in the penitentiary. The attorney-general submitted to a reversal of the judgment and sentence, upon the ground "that upon the trial of an issue raised by a plea of not guilty, in the higher grades of crime, it is not in the power of the accused to waive a trial by jury, and, by consent, submit to have the facts found by the court, so as to authorize a legal judgment and sentence upon such finding." The court neither gave a reason nor cited an authority for the proposition. The case was no doubt correctly decided, for whether the defendants could or could not waive a trial by jury, in a prosecution of that character, the court of common pleas had no authority to try the case without one. It was a mode of trial unknown to the law. The Legislature had not clothed the court with that form of jurisdiction, and no act or consent of the accused could create or confer a jurisdiction not established by law. The question would have been very different had the General Assembly, by statute, authorized the court, with the consent of the accused, to hear the evidence and render judgment accordingly, and the record had disclosed their consent. The power of the court to hear evidence and determine the degree of the crime is maintained in Pennsylvania. *Jones* v. *Com.* 75 Pa. 403. California has a statute similar to the provisions of section 7316, Rev. Stat., now under consideration, and the supreme court of that state has held that the examination after a plea of guilty to an indictment for murder, to ascertain the degree of the crime, is not a trial, and the legality of the inquiry was sustained. *People* v. *Noll*, 20 Cal. 164. And in *People* v. *Lennox*, 67 Cal. 113, it was held that a plea of guilty in a prosecution for murder is a waiver of trial by jury.

But, whatever may be the rule elsewhere, in this state all legislative power is, by the Constitution of 1851, vested in the General Assembly, (sec. 1, art. 2,) subject, of course, to any limitations that may be found in other parts of that instrument. It is only necessary, therefore, in order to determine whether in any particular instance the General Assembly has transcended its power, to inquire (1) if the act is, in its essential character, legislative; and, (2) if so, whether

it is prohibited by the Constitution; and if it is found to be legislative in its nature, and not prohibited by the Constitution, it must be held to be within the power of the General Assembly. The power to clothe the courts of the state with jurisdiction to hear and determine causes is in its character legislative; and, as we have already seen, there is no constitutional prohibition against vesting in the court of common pleas the power to examine witnesses, and ascertain the degree of the crime, where, in an indictment for murder, the defendant enters a plea of guilty. Therefore it necessarily follows that the proceeding, whether it possesses the essential attributes of a trial or not, authorized by the provisions of section 7316, Rev. Stat., now under consideration is constitutional and valid.

*Judgment affirmed.*

## CALIFORNIA SUPREME COURT.

R. T. DUNLAP, *Respt.*,
*v.*
John STEERE, *Appt.*

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

**A suit in equity will lie to set aside a judgment quieting title to real estate which was taken by default after notice by publication** where defendant had no actual notice of the action until the time for making a defense therein had elapsed and plaintiff had no title to the property but knowingly set out a false statement of cause of action in his complaint and in the affidavit for publication.

(December 14, 1891.)

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County in favor of plaintiff and from an order denying a motion for a new trial in an action brought to quiet title to real estate and to annul a judgment which had adjudged the title to be in defendant. *Affirmed.*

The facts are stated in the opinions.

*Messrs.* **Wells, Monroe & Lee,** for appellant:

The judgment roll in *Steere* v. *Dunlap*, No. 3281, of the superior court of the county of Los Angeles, which is in evidence, works an estoppel in favor of the defendant in this case.

Equity will not take cognizance on the same grounds of the very point which a court of competent jurisdiction in the case has considered and decided.

*Sweatman* v. *Stratton*, 74 Tex. 76; *Simpson* v. *Hart*, 1 Johns. Ch. 91, 1 L. ed. 70; *Ross* v. *Wood*, 70 N. Y. 11; *Greene* v. *Darling*, 5 Mason, 207.

A decision of a court of competent jurisdiction is *res adjudicata*.

*Simpson* v. *Hart*, *supra*; *Beecher* v. *Bennett*, 11 Barb. 381; *Greenup* v. *Crooks*, 50 Ind. 419; *Shepardson* v. *Cory*, 29 Wis. 39.

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NOTE.—*Relief from judgments rendered on publication of process.*

The statute authorizing constructive service usually provides that a defendant against whom a judgment is rendered upon such service may apply within a certain period to open the same and make his defense under certain restrictions. Applications for relief under these statutes are not included here.

Where it appears from the judgment roll that the judgment is void by reason of defective publication of process, the judgment will be set aside on motion at any time. People v. Greene, 74 Cal. 400, (in this case fourteen years after entry of the judgment). People v. Pearson, 76 Cal. 400 (eleven years). See People v. Harrison, 84 Cal. 607.

Where the judgment is void by reason of a defective order for the publication of process, it may be vacated upon motion after the expiration of the term at which it was rendered, when the rights of third parties have not intervened. Park v. Higbee (Utah) July 12, 1890.

Where the judgment is not void on its face it will not be vacated upon motion, after the time limited by statute, but a separate action must be resorted to. People v. Harrison, *supra*; People v. Goodhue, 80 Cal. 199. Hanson v. Hanson (Cal.) March 11, 1889, although not mentioned in People v. Harrison, 84 Cal. 607, is in effect overruled by it on this point.

Equitable jurisdiction to cancel and set aside or restrain judgments and decrees of any court which have been obtained by a fraud practiced upon the court and the losing party, is well settled and familiar. Pom. Eq. Jur. 2d ed. § 319.

16 L. R. A.

Where a husband by falsely representing that his wife's residence was unknown, obtained an order for publication of process in an action for divorce and by wilfully depriving her of actual notice and opportunity to defend secured a judgment of divorce, equity will annul such judgment (Johnson v. Coleman, 23 Wis. 452), or it will be set aside on motion. Everett v. Everett, 60 Wis. 200.

Equity will relieve against a judgment and grant a recital, where it was fraudulently procured by publication of process and concealed from the defendant until the time fixed by statute for opening a judgment so obtained has elapsed. Clark v. Ellsworth (Iowa) Feb. 3, 1892.

Equity will grant relief against a judgment in an attachment suit obtained by a creditor against his nonresident debtor upon service by publication and compel a restoration of property held by the creditor by virtue of a sale under such judgment, where it appears that jurisdiction of the person of the debtor could have been easily obtained or actual notice of the suit given him, but that the intent of the creditor was, by keeping the debtor in ignorance of the suit, to prevent a defense and thus get a judgment upon an outlawed claim. Herbert v. Herbert (N. J.) Oct. 28, 1891; Herbert v. Herbert, 47 N. J. Eq. 11.

The New York statute fixing the time within which a defendant, "except in an action for divorce" may come in and defend, where service of summons was by publication, does not deprive the court of power to open a judgment by default in a divorce case where service is by publication but places such judgment on the same footing as one rendered upon personal service of process. Brown v. Brown, 58 N. Y. 609. J. G. G.

See also 18 L. R. A. 240.

Where a court has jurisdiction *ejusdem generis*, its judgment in any case is not void, because its invalidity cannot appear without an inquiry into the facts; an inquiry which the court itself must be presumed to have made, and which will not therefore be permitted to be reviewed collaterally.

*Fisher* v. *Bassett*, 9 Leigh, 119, 33 Am. Dec. 232; *Brittain* v. *Kinnaird*, 1 Brod. & B. 432; *Grignon* v. *Astor*, 43 U. S. 2 How. 319, 11 L. ed. 283; *Wyatt* v. *Steele*, 26 Ala. 649; *Stoddard* v. *Johnson*, 75 Ind. 30.

It must be conclusively presumed that the pleadings and evidence sustained the judgment and the judgment having passed it must be executed, unless it be an absolute nullity upon its face, by reason of showing affirmatively a want of jurisdiction.

*Dickson* v. *Wilkinson*, 44 U. S. 3 How. 61, 11 L. ed. 493; *Robbins* v. *Bacon*, 1 Root, 548; *Vredenburgh* v. *Snyder*, 6 Iowa, 39.

Equity will not entertain a bill to set aside a void judgment.

*Chipman* v. *Brown*, 14 Cal. 158; *Logan* v. *Hillegas*, 16 Cal. 200; *Murdock* v. *De Vries*, 37 Cal. 527; *Gates* v. *Lane*, 49 Cal. 266.

Where the court of original jurisdiction has decided the jurisdictional fact, the order and judgment based upon it will be valid until reversed by an attack by some direct proceeding. It cannot be questioned collaterally.

*Little* v. *Chambers*, 27 Iowa, 522; *Forbes* v. *Hyde*, 31 Cal. 348; *Ligare* v. *California S. R. Co.* 76 Cal. 613.

Nowhere throughout the complaint has plaintiff averred that he has a defense to the claim upon which the judgment which he seeks to set aside was rendered, and inasmuch as such an averment is necessary to give a court of equity jurisdiction for the purpose of setting aside a judgment, the complaint states no cause of action for the purpose of setting aside a judgment.

*Rotan* v. *Springer*, 52 Ark. 80; *Osborne* v. *Gehr*, 29 Neb. 661; Freem. Judgm. § 498; 3 Pom. Eq. Jur. § 1364, *note 1*; *Colson* v. *Leitch*, 110 Ill. 504; *Gregory* v. *Ford*, 14 Cal. 138, 73 Am. Dec. 639; *Taggart* v. *Wood*, 20 Iowa, 236; *Secor* v. *Wood*, 8 Ala. 500; *Saunders* v. *Abritton*, 37 Ala. 716.

Where fraud is relied upon for the purpose of impeaching and setting aside a judgment, it must be an intentional concealment or intentional act of fraud, done for the purpose of misleading and taking an undue advantage of the opposite party.

*Ward* v. *Southfield*, 3 Cent. Rep. 196, 102 N. Y. 287; *Verplanck* v. *Van Buren*, 76 N. Y. 247; *Hunt* v. *Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Ross* v. *Wood*, 70 N. Y. 8; *Smith* v. *Nelson*, 62 N. Y. 286; Bigelow, Fraud, ed. 1888, p. 87; Freem. Judgm. § 344; *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. ed. 93.

The complaint does not suggest fraud, and without it the facts in the sheriff's return and the affidavit of Steere must be taken as true, and so taken, they gave the court jurisdiction even if false.

*Taylor* v. *Lewis*, 2 J. J. Marsh. 400, 19 Am. Dec. 135; *Thomas* v. *Ireland*, 88 Ky. 581; *Sargeant of Ct. App.* v. *George*, 5 Litt. 199.

The judgment debtor is precluded by the judgment of the court from calling in question the sufficiency of the publications, and the affidavits on which they are based.

*Essig* v. *Lower*, 120 Ind. 239; *Jackson* v. *State*, 1 West. Rep. 269, 103 Ind. 250; *Evansville, I. & C. S. L. R. Co.* v. *Evansville*, 15 Ind. 395; *Riley* v. *Waugh*, 8 Cush. 220; *Cooper* v. *Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Henderson* v. *Brown*, 1 Cal. 92, 2 Am. Dec. 164; *Vail* v. *Owen*, 19 Barb. 22; *Youngman* v. *Elmira & W. R. Co.* 65 Pa. 278; *Sheldon* v. *Wright*, 5 N. Y. 497.

The judgment in *Steere* v. *Dunlap* must be held to include an adjudication that the tax-deed was valid.

*Marion County Comrs.* v. *Welch*, 40 Kan. 767; Freem. Judgm. § 330; *Bradford* v. *Bradford*, 5 Conn. 127; *Gates* v. *Preston*, 41 N. Y. 113.

The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral to the matter tried by the first court, and not to a fraud in a matter upon which the decree was rendered.

*Re Griffith*, 84 Cal. 107; *Perkins* v. *Wakeham*, 86 Cal. 580; *Allen* v. *Currey*, 41 Cal. 321; *Amador Canal & Min. Co.* v. *Mitchell*, 59 Cal. 176; *Ede* v. *Hazen*, 61 Cal. 360; *Zellerbach* v. *Allenberg*, 67 Cal. 298; *Mastick* v. *Thorp*, 29 Cal. 447; *Boston* v. *Haynes*, 33 Cal. 32; *Phelps* v. *Peabody*, 7 Cal. 52; *Pico* v. *Cohn*, 13 L. R. A. 336, 91 Cal. 129.

A mistake or ignorance of law is not sufficient to authorize the setting aside of a judgment taken against a party through his mistake, excusable neglect, etc.

*Skinner* v. *Terry*, 107 N. C. 103.

*Messrs.* **Chapman & Hendrick,** for respondent:

If a judgment has been obtained through fraud, mistake, or accident, and the defendant in the action, having a valid defense on the merits, has been prevented from maintaining it by fraud, mistake, or accident, and there has been no negligence on his part, equity will grant relief against it.

3 Pom. Eq. Jur. § 1364, and *note 1*, p. 400.

When the remedy by motion is lost by lapse of time, without the laches of the party, equity will freely grant relief although a new trial would have been granted or the judgment vacated in the court in which it was begun upon motion.

*Guy* v. *Ide*, 6 Cal. 101.

There are many cases which show that where there is a judgment by default, without personal service or actual notice of the pendency of the action, a meritorious defense and the lapse of such time as to preclude the remedy by motion are all that is necessary to show in a bill in equity for relief against the judgment.

*Gregory* v. *Ford*, 14 Cal. 141; *Gibbons* v. *Scott*, 15 Cal. 286; *Logan* v. *Hillegrass*, 16 Cal. 201; *Peterson* v. *Weissbein*, 65 Cal. 42; *Farrington* v. *Brown*, 65 Cal. 320; *Harnish* v. *Bramer*, 71 Cal. 155; Freem. Judgm. 3d ed. § 100.

**De Haven, J.,** delivered the opinion of the court:

The action is one in equity, and is in effect to set aside a former judgment be-

tween the parties, wherein the alleged title of the defendant herein to the land described in the complaint was quieted as against all claims of the present plaintiff. The findings of the court below show that this judgment was obtained by default, and upon a service of the summons therein by publication, and that the present plaintiff had no knowledge of the pendency of that action, or of the rendition of said judgment, until more than one year after its date. The court also finds, and the evidence is sufficient to sustain these findings, that in point of fact the plaintiff here was the owner of the property involved in that action, and that not only was the defendant here without title, but that he knew that the allegations of the complaint filed by him for the purpose of obtaining the judgment referred to were wholly false. The question, therefore, presented, is whether a judgment thus obtained is beyond the reach of successful attack in a court of equity. The legal effect of this judgment, if premitted to stand, is to devest plaintiff of all title to his property, in favor of one who has succeeded by a compliance with the mere forms of law in obtaining such judgment, and that, too, without the knowledge of plaintiff, and therefore when it was morally impossible for him to defeat it. We think the plaintiff is entitled to the relief which he asks, not only upon authority, but upon the plainest principles of justice. "In general, it may be stated that in all cases where, by accident or mistake or fraud or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere, and restrain him from using the advantage which he has thus improperly gained." Story, Eq. Jur. § 885. In order to justify the application of this rule, it must appear not only that the judgment against which relief is sought is unjust and unconscionable in itself, but that the person against whom it was rendered was not guilty of negligence in omitting to make his defense in the original action. The facts as found by the court below bring this case fully and clearly within the operation of the rule of equity just cited. In the first place the defendant practiced a fraud upon the court, as well as the defendant, in procuring the order for the publication of the summons in the action referred to. Under section 412 of the Code of Civil Procedure, a plaintiff is entitled, under certain circumstances, to procure such an order; but, in order to be so entitled, he is required by that section to first present to the court or judge, either in the form of a verified complaint or an affidavit, a statement of facts showing that a cause of action exists in his favor against the defendant. Such an affidavit was presented in this case, but it necessarily results from the findings of the court that not only was the defendant's affidavit false in this respect, but that defendant knew that it was false. An affidavit of this character is always *ex parte*. The absent defendant is not present to impeach it, and if it is sufficient in form the court cannot disregard it, but is compelled to accept its statements as true, and make the order which is demanded. Under such circumstances a plaintiff who seeks to avail himself of the statutory mode for a constructive service of summons must at least exercise good faith in his representations to the court or judge. He must at least believe that the affidavit which he presents is true. The presentation of a willfully false affidavit for the purpose named is itself an act of fraud; and when the judgment which rests upon it is itself unconscionable, and was obtained without the knowledge of the defendant therein, it should be set aside.

It is claimed, however, that the fraud here complained of is concluded by the judgment itself; that whether the defendant had a good title to the land in controversy was the very matter involved in the former action, and the judgment therein is conclusive upon the plaintiff; and in support of that the case of *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. ed. 93, and other similar cases, are cited. But the rule there announced is only applicable where the former judgment was the result of a trial between the parties, or where the one against whom the judgment was rendered had actual notice of the pendency of the action, and neglected to submit his proofs. The case of *United States* v. *Throckmorton* was one where a retrial was sought of a case which had been once fully tried, and can have no kind of bearing here, where the plaintiff never had his day in court, or any opportunity to make his defense to the false and fraudulent claim upon which the judgment against him was based. Not having any knowledge of the pendency of that action, it was an absolute impossibility for him to protect his rights therein, and his failure to defend was not a negligent omission on his part. It is this difference in the cases which brings the plaintiff here within the protection of the exception to the general rule which was acted upon in *United States* v. *Throckmorton*, *supra*, and the existence of which exception was not only admitted in the opinion of the court in *United States* v. *Throckmorton*, but was applied in the later case of *United States* v. *Minor*, 114 U. S. 238, 29 L. ed. 112. In the case of *Adams* v. *Secor*, 6 Kan. 542, it was held by the supreme court of that state that a judgment based upon a false and fraudulent claim should be set aside where the defendant therein had only been served by publication, and did not have actual notice of the pendency of the action. In the case of *Tomkins* v. *Tomkins*, 11 N. J. Eq. 512, the court, while refusing relief upon the facts before it, recognized the justice of relieving a defendant from an unjust judgment obtained without his knowledge. It is there said: "The usual ground upon which a court of equity refuses to interfere with a judgment is because the defendant should have protected himself in the court where the judgment was obtained. In a case like the present, of foreign attachment, where the proceeding is *in rem*, and the judgment is obtained without the knowledge of the

defendant, and the proceedings are all necessarily *ex parte*, it would be hard, indeed, if this court could not interpose to protect a party against the fraud of the plaintiff. The propriety of this court's interfering in such cases is too obvious to require its vindication." In the case of *Irvine* v. *Leyh*, 102 Mo. 200, 209, the supreme court of Missouri states what we deem the true rule to be applied here. After referring to the case of *United States* v. *Throckmorton*, *supra*, the court says: "The principle thus so strongly stated in the cases cited proceeds upon the ground that the party had an opportunity to appear and interpose the defense in the suit in which the judgment conplained of was rendered. The cases before cited are those in which the defendant in the first suit appeared, or had actual notice of the suit, and might have interposed the fraud as a defense. In all such cases the issues made by the pleading, or which might have been made, are justly regarded as settled and merged in the judgment, leaving collateral matters only open to investigation. But in our opinion the rule of the cases cited cannot be applied in all of its strictness to a case where the defendant has been brought in by newspaper notice only, and had no actual notice of the suit, and as a consequence had no real opportunity to defend. The rule must be applied to those cases where the reason upon which it is founded admits of its application. But to entitle the plaintiffs to the relief which they asked and procured in the case, it is not enough for them to simply show that Leyh had no valid cause of action against them. They must at least show that the claim was founded upon or conceived in fraud, and that the machinery of the law was resorted to for the purpose of enforcing what was known to be a fraudulent demand." The facts found by the court here fully satisfy the rule as held in the case just cited. That rule, it seems to us, gives to one obtaining a judgment against another without a trial, and without his knowledge, sufficient protection Its application to the facts of this case must result in an affirmance of the order appealed from.

*Appeal from judgment dismissed; order denying motion for new trial affirmed.*

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

**Beatty, *Ch. J.*:**

I concur. It appears that Dunlap was, without any fault of his own, deprived of the opportunity of interposing a perfect defense to the action of *Steere* v. *Dunlap*, and it is alleged in the complaint herein, and found by the court, not only that the allegations of the complaint in the former action were untrue, but that Steere at the time knew they were false. The evidence is sufficient to sustain this finding, at least so far as the complaint in the former action counted upon a title by prescription; but there is nothing to show that Steere in fact knew that his tax-title was void, though such knowledge is by the law imputed to him. The case, then, presents these features: Steere sues Dunlap upon a claim which he knows to be false. He obtains an order for publication of summons based upon the two grounds that Dunlap has departed from the state, and cannot after due diligence be found within the state. His affidavit is in itself sufficient to justify a finding that these grounds exist; and a judgment entered upon Dunlap's default, after publication of summons, is not void, and cannot be set aside upon motion unless the motion is made within a year. Code Civ. Proc. § 473. Can it, then, be annulled by suit in equity after the year? I think it clear, on principle, that in a case where no rights of innocent third parties are involved a judgment so obtained ought to be set aside upon the ground that it was fraudulently obtained; the fraud consisting in taking a default judgment upon a claim made in bad faith against a defendant who, without any fault on his part, is prevented from interposing a perfect defense. The findings of the superior court, therefore, which are supported by the evidence, are themselves sufficient to support the judgment; and the order denying defendants' motion for a new trial should be affirmed.

**McFarland, *J.*:**

I dissent, and concur in the opinion of Commissioner Vanclief, prepared in department, a copy of which is hereto attached; and I desire to say further that, in my opinion, there is no sufficient evidence to support the latter part of the following finding of the court: "And the said John Steere was not then the owner of the said property, nor any part thereof, and had no right, title or interest of any sort therein, all of which he well knew." In Steere's complaint in the original action, he first averred ownership and possession of the land, and afterwards also averred adverse possession in himself and grantors for five years; and it fully appears that he relied upon paper title founded on a certain tax-deed, as well as upon adverse possession,—if, indeed, he introduced any evidence at all about adverse possession, which does not appear. In the present action, Dunlap avers that the only claim which Steere had was a certain tax-deed, which he sets out in full in his complaint together with the certificate of purchase which preceded it, in order to show that it did not, in law, convey title; the contention being that the deed, although good on its face, did not accomplish its purpose, because it did not follow the recitals of the certificate, and the recitals of the certificate showed an irregularity in the assessment. Assuming this to be the law, the attack upon Steere's deed is, at least, extremely technical; and it does not support the finding of fraudulent personal intent against him, viz., that "he well knew" that "he had no right, title, or interest of any sort" in the property described in his deed. The only other evidence tending to support the said finding relates to Steere's possession; and, assuming that it shows a want of adverse possession, under the views above expressed, there was no warrant for the general finding that he well knew that he had no right or interest of any sort. There are other reasons, why, in my opinion, the

former judgment should not be disturbed, but I consider further discussion unnecessary.

The following is the opinion of **Vanclief, C.**, in department:

"Action to quiet plaintiff's title to two lots in the town of Santa Monica, in the county of Los Angeles, and for this purpose to annul a former judgment of the same court between the same parties as to the same lots, and to enjoin its execution. Judgment passed for the plaintiff, and the defendant appeals from the judgment, and from an order denying his motion for a new trial. The judgment was rendered September 24, 1888, and the appeal from it was taken July 18, 1890, and should, therefore, be dismissed; but the appeal from the order was taken within sixty days from the time the order was made.

"The principal question, and the only one that need be considered, is, Was the former judgment conclusive of the rights of the parties to the land in question? This question arises on the appeal from the order by defendant's exception to the sufficiency of the evidence. The former action was by the present defendant, Steere, against the plaintiff here, to quiet the alleged title of Steere to the lots in question; and the judgment therein was rendered against the defendant (plaintiff here) by default. The service of summons in that action having been made by publication, it is contended that the affidavit upon which the order of publication was made is defective and untrue in material particulars. The following is a copy of that affidavit: 'John Steere, being duly sworn, says: That he is the plaintiff in the above-entitled action. That the complaint in said action was filed with the clerk of said court on the 25th day of June, 1884, and summons thereupon issued. That said action is brought to obtain a decree of said court quieting the plaintiff's title to that certain tract or parcel of land lying and being situate in the county of Los Angeles, state of California, and particularly described as lots X and W, in block 193, in the town of Santa Monica, as designated on the map of said town. That in said decree it be declared and adjudged that plaintiff is the owner of said premises, and that the defendants, or either of them, have no estate or interest whatever in or to said land and premises. And affiant further says that said plaintiff is the owner in fee of said premises, and said plaintiff and his grantors have been for more than five years continuously in the open, notorious, and adverse possession of said premises claiming the same adversely to all the world. That the defendants claim some interest in said premises adverse to plaintiff, but the said claims of defendants are without any right whatever, and that the said defendants, or either of them, have no right, title, or interest in said land or premises, or any part thereof. Reference is had to the verified complaint of plaintiff on file herein, in which the cause of action is fully set forth. That said defendant R. T. Dunlap, cannot, after due diligence, be found within this state. That the said R. T. Dunlap has departed from this state, and cannot after due diligence, be found within this state, and this affiant, in support thereof, states the following facts and circumstances: That the summons which was issued in said action was given to the sheriff of Los Angeles county, and said sheriff made diligent search for said defendant, R. T. Dunlap, but could not find him, and said sheriff informed affiant that he did not know where said defendant Dunlap was or where he could be found; that affiant has searched for said defendant, R. T. Dunlap, and has inquired of a great many of the citizens and residents of Los Angeles county—among them, M. B. Boyce, Wm. Flores, and John Milner—as to the whereabouts of said defendant, R. T. Dunlap, and as to his residence; that each of said persons so inquired of informed affiant that they did not know where said defendant, Dunlap, was, where he resided, or where he could be found; that said M. B. Boyce claims to be the agent of said R. T. Dunlap, but even he informed this affiant that he did not know where said Dunlap was, or where he could be found; that affiant does not know where said R. T. Dunlap resides, where he is, or where he can be found; that affiant has made diligent inquiry to find said defendant, but cannot, after due diligence, find him within this state; that this affiant therefore says that personal service of said summons cannot be made on said defendant, R. T. Dunlap, and prays for an order that service of the same may be made by publication. John Steere.' The order of publication was in the usual form, requiring the summons to be published two months in a proper newspaper, and it was published as required by the order. More than one year after the rendition of the former judgment the defendant (plaintiff in this action) moved the court in which it was rendered to set it aside, and for leave to answer, upon his affidavit, stating substantially the same facts alleged in his complaint herein. This motion was denied, and no exception was taken to the order denying the same, and no appeal has been taken therefrom. As one of the express objects of this action is to set aside the former judgment, and to enjoin its execution, that judgment is fully set out in the complaint, and the judgment roll in that action was introduced as evidence in chief by the plaintiff. The defendant also pleaded the former judgment as a bar to this action.

"1. It appears that the former action was commenced by H. K. S. O'Melveny, as attorney for plaintiff, and that his name was indorsed on the summons as attorney for plaintiff; that before the order of publication was made an order substituting Messrs. Wells, Van Dyke & Lee as attorneys for plaintiff was made; but that the summons was published as originally issued, with the name of O'Melveny indorsed thereon as attorney for plaintiff. It is contended by respondent that the name of Wells, Van Dyke & Lee should have been indorsed on the summons as published, and that the omission so to indorse them is a fatal defect in the

publication. The provision of the Code requiring the name of plaintiff's attorney to be indorsed on the summons relates to the summons as issued by the clerk, and was complied with in this case. As there is no requirement that the names of attorneys afterwards substituted for or added to the original attorney for plaintiff shall be indorsed on the summons, I think the summons was properly published in the form in which it was issued.

"2. No other defect in the form or substance of the affidavit is pointed out by counsel, and none is perceived; but it is alleged that the statements therein that Dunlap had departed from this state, and that, after due diligence, he could not be found within this state, are not true; and the court so found. The only evidence to sustain this finding is the testimony of the plaintiff, Dunlap, to the effect that, although he departed from this state in 1879, he returned to Inyo county, in this state, in the spring of 1881, where he openly and publicly resided and worked as a miner and farmer from that time until 1887; that he never during that time saw the newspaper in which the summons was published, nor had any actual notice of the publication of summons, or of the pendency of the former suit; that he left Mr. Boyce in charge of the lots when he departed from the state, but did not inform Boyce that he intended to leave, or where he was going; and that he never communicated with Boyce or any other person in Los Angeles county during his absence until 1887. This testimony has no tendency to prove that the affidavit was not made in good faith. The affidavit is sufficient to show that, 'after due diligence,' Dunlap could not be found 'within the state.' This, with the other facts therein stated, justified the order of publication. Code Civ. Proc. § 412; *Forbes* v. *Hyde*, 31 Cal. 348; *Ligare* v. *California S. R. Co.* 76 Cal. 610. The publication of the summons according to the order was service of it upon the defendant, having the same effect as if served by either of the other modes prescribed by the Code, (Code Civ. Proc. §§ 413, 416), except that in case of service by publication alone the defendant, on a proper showing, may be allowed to answer to the merits of the action at any time within one year after the rendition of the judgment. Id. § 473. After the expiration of one year the judgment by default, upon service of summons by publication, is just as conclusive as if it had been rendered upon personal service, and will not be opened or set aside by a court of equity except on the ground of fraud, accident, mistake, or surprise by which, without any fault or negligence on his part the defendant was prevented from making a meritorious defense. *United States* v. *Throckmorton*, 98 U. S. 68, 25 L. ed. 96; *Zellerbach* v. *Allenberg*, 67 Cal. 298; *Amador Canal & Min. Co.* v. *Mitchell*, 59 Cal. 179; *Mastick* v. *Thorp*, 29 Cal. 448; *Boston* v. *Haynes*, 33 Cal. 32; *Phelps* v. *Peabody*, 7 Cal. 52. Upon a sufficient affidavit the court found and determined that the defendant in the former action could not, 'after due diligence, be found within the state,' and so recited in the order of publication. This judicial determination of the fact is conclusive as against the mere testimony of the plaintiff that he was in Inyo county in this state at the time the former action was commenced, and when the order of publication was made, and that in his opinion personal service might have been made upon him there by the exercise of due diligence. There is no pretense that the plaintiff in the former action knew or had any reason to believe that the defendant was in Inyo county. Nor is there any evidence tending to prove that the acts of diligence stated in the affidavit were not performed, or to show fraud or bad faith on the part of the plaintiff in that action in procuring the order of publication. Nor is there any averment or evidence of any mistake, accident, or surprise, in the legal sense of those terms, by which the plaintiff herein, without fault or negligence on his part, was prevented from making his defense in the former action. That service of summons by publication is proper in an action to quiet title to land in this state was expressly decided in the late case of *Perkins* v. *Wakeham*, 86 Cal. 580.

"It follows that, for aught that appears by the record in this case, the former judgment is conclusive evidence that the appellant is the owner of the lots in question, and that the findings of the trial court to the contrary are not justified by the evidence. I think the appeal from the judgment should be dismissed, that the order denying a new trial should be reversed, and a new trial granted."

**Paterson, *J.*:**

I dissent on the ground that the evidence does not justify the decision.

I recognize the correctness of the rule stated in the cases cited by *Mr. Justice* De Haven; but, to make it applicable, it should clearly appear from the evidence that the party charged with fraud deliberately commenced and prosecuted his action with the intent to defraud his adversary, and knowing that his claim was baseless in law and in fact. In this case the evidence, in my opinion, fails to show that the defendant, in prosecuting his action against Dunlap, acted in bad faith. His complaint was filed on June 25, 1884. Summons was issued on the same day, but the affidavit for publication was not made until February 7, 1885. This does not show great activity on the part of Steere in attempting to consummate the fraud with which he is charged. No wrong can be predicated upon the fact that the summons was published in the Weekly Censor. The judge decided the question as to the paper in which the summons should be published. The default of the defendant in that action was entered on May 18, 1885. This action was not commenced until November 30, 1887. Mr. Dunlap testified that he left Boyce in charge of the property at Santa Monica, as his agent, in January, 1878. There was a house on the property at the time, and the land was fenced. Plaintiff testified, also, that he received rent for the property only one year, and the reason why

he made no inquiries about it was because he had lost the address of Boyce. This is a singular excuse, and shows great negligence. The town of Santa Monica is so small that probably every man in the town knows every other inhabitant thereof; and it would have been easy to discover the whereabouts of his agent, if he had made any inquiry. Boyce testified that the plaintiff left the property in his charge to sell, and meantime to collect the rents; that the last time he saw Dunlap was in January, 1878; that Steere took actual possession of the property, and made improvements on the house, in the fall of 1885. He testified further that Steere called upon him several times, and inquired very earnestly where Dunlap could be found; that he came to see about getting service on him; that Steere was inclined to push matters, and that he (Boyce) was a little indifferent about the matter; that Steere claimed to have a tax-deed for the property, and asked him (Boyce) how soon he could hear from Dunlap, and that he told him he thought he would hear from him in three, four, or five, weeks, probably. Milner, under whom Steere claims, paid the taxes on the property for the years 1879–80, 1880–81, 1882–83, 1883–84; and, when the defendant purchased from him, he repaid the amount of taxes which Milner had thus paid. Milner's certificate of sale from the tax collector was dated March 4, 1879. The evidence is entirely consistent with the theory of the good faith of Steere in the prosecution of his suit. The circumstances show that he believed himself to be the owner of the land. He paid a valuable consideration for the tax-title, and he and his grantor paid the taxes assessed upon the land every year, except two, after 1878. If he had desired to perpetrate a fraud upon Dunlap, it is not at all probable that he would have importuned Boyce so often to discover the very fact which would have effectually prevented him from making the affidavit, and procuring the order for publication. It is said that it must be presumed he knew his tax-deed was invalid. I do not think any such presumption should be indulged; but, if it can, it certainly is not sufficient to convict him of a willful and deliberate attempt to defraud, when it is admitted or appears that he paid a valuable consideration for the tax-title, and endeavored in good faith to give the defendant in the action personal notice of the claim set up. The worst construction that can be fairly put on the conduct of Steere is that he had a doubt as to the validity of his title, and sought the aid of the court to settle the matter in his favor. This he had the right to do. He knew that plaintiff was claiming through his agent the right of possession, and to collect the rents. There is no evidence that any one ever advised Steere that his tax-deed was invalid. Probably not one man in a thousand, outside of the profession, would have known that the deed was void. The question of ownership, and the question whether one has held adverse possession, are questions so mixed with law that a statement in relation thereto by a layman should not be regarded with great strictness.

I concur: **Garoutte, J.**

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## RHODE ISLAND SUPREME COURT.

Charles U. COTTING, Exr., etc., of Mary M. Bourne, Deceased,
*v.*
Anna D. DESARTIGES *et al.*

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

1. **The law of the domicil of the donor of a power given by will must govern** as against the law of the domicil of the donee in determining whether or not the will of the latter is an execution of the power.
2. **The establishment by express statute both in England where a will was made and in New York where the testator was domiciled** of the rule that a general devise is sufficient to execute a power of appointment cannot prevail in respect to a trust fund held under the will of the donor whose domicil was in Rhode Island as against the contrary rule which in the absence of a statute prevails in the latter state.
3. **An intent to execute a power of appointment does not appear** in a will which makes no reference to the power although the bequests somewhat exceed the amount of the testator's estate and his relations with the donor are so intimate as to raise a presumption that he knew of the power.

(March 28, 1892.)

BILL in equity by Charles U. Cotting for instructions as to the disposition of the residuary estate which had been given by Mary M. Bourne, deceased, to Charles Allen Thorndike Rice, for life, and which remained after his death.

The facts are stated in the opinion.

*Messrs.* **William P. Sheffield** and **John E. Parsons** as trustee of Mrs. Bourne's estate.

*Messrs.* **H. B. Closson** and **John E. Parsons,** for complainant, as executor of Rice:

According to the rules formerly prevailing in England and built up by various decisions of their chancery courts chiefly since our Revolution, Mr. Rice's will is not upon its face a sufficient execution of the power.

4 Kent, Com. p. 334; *Blagge* v. *Miles,* 1 Story, 426.

2 Chance, Powers, § 1597, states that it appears quite clear, however, at this day [1831], and a reference to the authorities will, it is apprehended, show that it has been considered clear for nearly two centuries, that the rule is

NOTE.—For *note* on execution of power to appoint by will, see Patterson v. Lawrence (Ga.) 7 L. R. A. 143.

For *note* on what law governs wills, see Cook v. Winchester (Mich.) 8 L. R. A. 822.



See also 18 L. R. A. 458; 42 L. R. A. 140.

not thus confined. Indeed, it may well be asked why, admitting that the intention can be discovered to pass all, the intention should not prevail in the one case as well as in the other. What rule of law or construction would be thereby violated?

The will must be construed with reference to the condition of testator's estate at the time of his death.

Wigram, Wills, § 103; O'Hara, Wills, § 7; *Gold* v. *Judson*, 21 Conn. 616.

It is immaterial whether or not Mr. Rice at the time when he made his will knew of the existence of the power of the appointment.

The will speaks the testator's wishes and intentions at the time of his death. Whatever the language required to execute the power, if the will contains it the power is executed, and the relative dates of the creation of the power and the execution of the will are wholly immaterial.

*Boyes* v. *Cook*, L. R. 14 Ch. Div. 53; Redf. Wills, § 30, fol. 14, p. 387; 1 Jarman, Wills, *676, Bigelow's *note; Stillman* v. *Weedon*, 16 Sim. 26; *Livingston* v. *Gordon*, 84 N. Y. 136.

The question, What constitutes a sufficient execution of a power of appointment? is an open one in Rhode Island, and in this case the court is free to announce which rule is the law of this state.

See *Phillips* v. *Brown*, 6 New Eng. Rep. 710, 16 R. I. 279.

The court is enabled therefore, in announcing the rule to be followed here, to range itself on what is now on all hands admitted to be both the right and the victorious side in one of the most interesting struggles known to the law.

At a time subsequent to the American Revolution, prior to which time the law had been much more liberal, there were made in the English chancery courts a series of decisions which resulted in establishing for the first time the rule that a will was a good execution of a power only when the power or the subject of the power was referred to in explicit terms.

In 1837 an Act of parliament declared that a general residuary devise should, in the absence of anything to indicate a contrary intention, be held to have been intended to execute a power of appointment as well as to dispose of what alone was technically the testator's own property. The Act has been since followed with the utmost liberality of construction.

*Boyes* v. *Cook*, L. R. A. 14 Ch. Div. 52; *Cofield* v. *Pollard*, 3 Jur. N. S. 1203; *Patch* v. *Shore*, 2 Drew. & S. 589; *Hodsdon* v. *Dancer*, 16 Week. Rep. 1101.

In most of the states in which the courts declared themselves irremediably committed to the early English rule, the Legislatures came to their relief with statutes similar to the Act of parliament (1 Vict. chap. 26, § 27) already referred to.

It was in Massachusetts that the most interesting and successful struggle against the English doctrine took place.

*Judge* Story, sitting in the federal courts, had in the oft-cited case of *Blagge* v. *Miles*, 1 Story, 426, been disposed to bow to the weight of the English decisions.

In the Massachusetts courts, however, the question did not arise until *Amory* v. *Meredith*, 7 Allen, 397, and the court, in an elaborate opinion, refused outright to acknowledge the doctrine of the English cases to be the law of Massachusetts, and since that time in a most interesting series of decisions, has without any assistance from the Legislature, firmly established the law of Massachusetts on the subject of powers to be as liberal as that of England or New York to day.

In Connecticut alone it has happened that there having been an early case, in which, as the court said in a later one, "the rule was enforced without protest," and which the court, when in the later case the question came up for discussion reluctantly felt itself bound to follow, the Legislature has so far neglected to interpose its relief.

And even in this case (*Hollister* v. *Shaw*, 46 Conn. 248), the decision to adhere to the earlier one was by three judges only of the five, the other two dissenting.

The following are some of the authorities which are relied upon to substantiate the foregoing statements:

1 Vict. chap. 26, § 27; *Boyes* v. *Cook*, L. R. 14 Ch. Div. 53; *Re Comber*, 11 Jur. N. S. 969; *Re Mason's Will*, Id. 835; *Earle* v. *Barker*, 11 H. L. Cas. 280; *Wilkinson's Trust*, L. R. 8 Eq. 487, L. R. 4 Ch. App. 587; *Hawthorn* v. *Shedden*, 3 Sm. & G. 293; *Stillman* v. *Weedon*, 16 Sim. 26; 1 N. Y. Rev. Stat. 731, § 126; *White* v. *Hicks*, 33 N. Y. 383; *Hutton* v. *Benkard*, 92 N. Y. 295; *Mott* v. *Ackerman*, Id. 539; *Van Wert* v. *Benedict*, 1 Bradf. 114; Hawkins, Wills, 2d ed. p. 27, Sword's *note; Aubert's Appeal*, 1 Cent. Rep. 105; 1 Jarman, Wills, p. 676, Bigelow's *note;* 1 Redf. Wills, § 21, pl. 32, p. 271; Schouler, Wills, § 526; *Willard* v. *Ware*, 10 Allen, 263; *Sewall* v. *Wilmer*, 132 Mass. 131; *Cumston* v. *Bartlett*, 149 Mass. 243; *Funk* v. *Eggleston*, 92 Ill. 515, 34 Am. Rep. 136; *Andrews* v. *Brumfield*, 33 Miss. 108; *Bredell* v. *Collier*, 40 Mo. 287.

It must be by the law of New York, the testator's domicil, that his will must be construed to determine what was his intention in regard to the execution of the power.

1 Jarman, Wills, 5th Am. ed. p. 2, Bigelow's *note;* 2 Greenl. Ev. § 671; *Lapham* v. *Olney*, 5 R. I. 415; *Enohin* v. *Wylie*, 10 H. L. Cas. 1; *Ford* v. *Ford*, 70 Wis. 19.

The execution of a power of appointment which is sufficient according to the law of the testator's domicil is sufficient everywhere.

*D'Huart* v. *Harkness*, 11 Jur. N. S. 633; *Re Alexander*, 6 Jur. N. S. 354; *Ela* v. *Edwards*, 16 Gray, 92; 1 Redf. Wills, § 30*a*, pl. 25, *411; Story, Confl. L. 9th ed. p. 655, § 473, *note a*.

*Messrs.* **Francis B. Peckham, Middleton S. Burrill, John E. Burrill** and **George Zabriskie** for respondents, heirs of Mrs. Bourne.

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

The complainant, trustee under the will of Mary M. Bourne, late of Newport, deceased, brings this bill, practically a bill for instructions, for the distribution of the trust fund, and the case is submitted on bill, answer, and proofs. The will was dated September 30,

1879, and admitted to probate in Newport, January 16, 1882. The testatrix bequeathed one sixth of her residuary estate to the complainant in trust for the benefit of her grandson Charles Allen Thorndike Rice during his life, and upon his decease to transfer and pay over the same to his issue, if he should leave any, as he should appoint "by will, or instrument in the nature thereof, executed in the presence of three or more witnesses; and, if he leaves no issue, to and among such persons, and upon such uses and trusts, as he shall so appoint;" and, in default of such appointment and issue, to and among those who should then be heirs-at-law. The grandson died in New York, May 16, 1889, without issue, leaving a will executed in England, September 17, 1881, which was duly probated in New York, where he was domiciled at his death. The will did not specifically dispose of the trust fund, which was subject to Mr. Rice's appointment, nor make any mention of it. The complainant is both trustee under the will of Mrs. Bourne and executor of the will of Mr. Rice. In the latter capacity he claims the right to receive and distribute the fund, as one which passes by appointment to the legatees under Rice's will. On the other hand, the heirs of Mrs. Bourne contend that there is a default of appointment, and so, under her will, the fund goes to them. The issue now raised, therefore, is whether there has been an execution of the power by the general residuary clause of Mr. Rice's will. Upon this issue our first inquiry must be by what law the execution of the power is to be determined. It is admitted that both in England, where the will was executed, and in New York, where the donee of the power was domiciled, there are statutory provisions to the effect that a general devise or bequest will include the property over which the testator has power of appointment, and will operate as an execution of such power, unless an intention not to execute the power shall appear by the will. If, therefore, the question is to be determined either by the law of England or New York, the power has been executed. Clearly, the mere accident that Mr. Rice's will was executed in England while he was temporarily there awaiting a steamer cannot control its operation by impressing upon it the law of the place where it was made. It was neither the domicil of the testator, nor the *situs* of the property nor the forum where the question comes for determination. *Caulfield* v. *Sullivan*, 85 N. Y. 153. The property in dispute being personal property, which, strictly speaking, has no *situs*, the question must be decided either by the law of New York, the domicil of the donee of the power, or of this state, the domicil of the donor. The will is a Rhode Island will. It disposes of property belonging to a resident of Rhode Island. The trustee under the will is, in effect, a Rhode Island trustee, and jurisdiction over the trustee and the fund is here. The fund in question belonged to Mrs. Bourne, and never belonged to Mr. Rice. True, he had the income from it for life, and power to dispose of it at death,—practically the dominion of an owner,—and yet it was not his.

The fund, then, being a Rhode Island fund, disposable under a Rhode Island will, it follows, naturally and necessarily, that the fact of its disposition must be determined by Rhode Island law. The question is not what intent is to be imputed to the will of Mr. Rice, but what intent is to be imputed to the will of Mrs. Bourne. She authorized a disposition of her property by an appointment, and it is under her will that the question arises whether an appointment has been made. Her will is to be adjudged by the law of her domicil. So far as assumptions of intent may be made, it is to be presumed she intended the appointment to be made according to the law of her domicil, and not by the law of New York or England, or any other place where the donee of the power might happen to live. It is not the fact of Mrs. Bourne's ownership of the property, which points to the law of this state as the criterion, but the fact that her will is the controlling instrument in the disposition of the property. Precisely this question arose in *Sewall* v. *Wilmer*, 132 Mass. 131, where *Judge* Gray remarked that the question is singularly free of direct authority. In that case a Massachusetts testator gave to his daughter a power of appointment of certain property. The daughter lived in Maryland, where she died leaving a will devising all her property to her husband, but making no mention of the power. In Massachusetts this was an execution of the power, but in Maryland it was not; and the question arose, which law should govern? It was held that the will of the father was the controlling instrument, and hence that the law of his domicil was to apply. The same decision was made in *Bingham's App.*, 64 Pa. 345, which is cited in *Sewall* v. *Wilmer* with approval. In England, also, it has been held that the validity of the execution of a power is to be determined by the law of the domicil of the donor of the power. *Tatnall* v. *Hankey*, 2 Moore, P. C. 342; *Re Alexander*, 6 Jur. N. S. 354.

The principle on which these cases proceed is that to which we have already alluded, viz., that the appointer is merely the instrument by whom the original testator designates the beneficiary, and the appointee takes under the original will, and not from the donee of the power. The law of the domicil of the original testator is therefore the appropriate test of an execution of a power.

The case of *D'Huart* v. *Harkness*, 34 Beav. 324, 328, apparently holds the contrary, but, we think, only apparently. In that case property was held under an English will, with power of appointment, by will, in a woman domiciled in France. She died leaving a holograph, which was valid as a will in France, but not in England. Under the Will Act, it was admitted to probate in England, as a foreign will, which gave it all the validity of an English will. The probate in England was held to be conclusive that it was a good will, according to English law; and, being a will, it executed the power. The case was really decided by the law of England. While there are numerous decisions upon the general rule that a will is to be governed by the law of the testator's domicil, such decisions are not to be confounded with the present question,—which testator is the one to be considered in the case of a testamentary power? We know of no

case which applies the law of the domicil of the donee of the power without reference to that of the donor. For these reasons we think the law of the domicil of the donor of the power should control, and hence that the law of Rhode Island must govern in this case.

What is the law of Rhode Island relating to the execution of a power? In *Phillips* v. *Brown*, 16 R. I. 279, 6 New Eng. Rep. 710, the general rule of construction, laid down by Kent, both as to deeds and wills, that if an interest and a power coexist in the same person, an act done without reference to the power will be applied to the interest, and not to the power, was examined and followed. The same rule was also followed in *Grundy* v. *Hadfield*, 16 R. I. 579, and in *Brown* v. *Phillips*, 16 R. I. 612. In *Matteson* v. *Goddard* (R. I.) Index, HH. 98, it was held that a general residuary clause in a will did not execute a subsequently created power of appointment. While those cases are not decisive of this one, the reasoning upon which they rest is equally applicable, viz., where nothing appears to show an intent to execute a power the court cannot infer an intent to do so. This was the almost uniform rule prior to the adoption of statutes upon this subject. In New York and in England it was thought that the rule often defeated the intention of testators, who probably intended to dispose of everything they had power to dispose of; and so Acts were passed which carried property over which one had a power of appointment, by a general gift of his own property, unless an intention not to execute the power appeared. We do not see that the reason upon which such statutes are based is conclusive. It is equally open to conjecture that one who means to execute a power will signify in some way an intention to do so. If a computation could be made, it would doubtless appear that in the execution of powers a large majority of wills make proper reference to the power. The statute gives an arbitrary direction, against which, it seems to us, the reason is stronger than for it. The rule already recognized in this state is as applicable to wills as to deeds, and, in our opinion, it should be so applied. The same rule is laid down in *Mines* v. *Gambrill*, 71 Md. 30; *Hollister* v. *Shaw*, 46 Conn. 248; *Funk* v. *Eggleston*, 92 Ill. 515; *Bilderback* v. *Boyce*, 14 S. C. 528; and cases cited in our previous opinions.

The same rule also prevailed in England, New York, and Pennsylvania prior to the passage of statutes. In Massachusetts alone was a contrary rule adopted by the court. The law, therefore, has been practically uniform, except as it has been changed by statutes. It is urged that these statutes show a tendency of opinion which the court should follow by adopting the rule of the statutes. The opportunity to make law is alluring, but it tempts beyond the judicial path. As our province is to declare law, rather than to make it, we deem it our duty to adhere to the rule which is commended to us by reason and precedent, until, as elsewhere, it shall be changed by legislative authority. If such a rule be the wiser one, the Legislature can enact it; but, outside of a statute, it is hard to see upon what ground a court can decree an intention to execute a power, when in fact no such intention is in any way evinced.

Applying to this case, then, the rule that to support an execution of a power something must appear to show an intent to execute it, we come to the inquiry whether such an intent appears. To solve this, we must look to the will itself, and not to extrinsic facts, except as they enter into and give color to the will. In the will there is no reference to the power, but it is urged that an intention to execute the power is to be inferred from its contents and the circumstances of its execution. It is claimed that Rice's relations with his grandmother were so intimate as to raise a presumption that he knew the contents of her will, especially in view of the fact that his bequests exceeded the amount of his own estate. Rice's will was made at Liverpool, pursuant to a suggestion from the complainant that, owing to the will of his grandmother, he ought not to cross the ocean without making his will. He received $625,000 outright under his grandmother's will, besides the income of one sixth of the residuary for life, with the power of appointment. If he knew of this power, it is most natural that he would in some way have referred to it. If he knew the amount absolutely bequeathed to him, or expected a large bequest, it would account for all the legacies in his will. After he knew of the power of appointment, he did not change his will. Perhaps his mind so dwelt upon the legacy of $625,000 that he gave no thought to a possible appointment of one fifth of that amount in the residuary clause; or perhaps, after hearing of the power, he intended some time to make a disposition of it. But, however it was, he gave no sign as to the power. The fact that at the time of his death his estate was somewhat less than his bequests is not significant; for evidently he was not a close financier, and gave little heed to the depreciation of his estate. The deficiency, however, is not so marked as to raise a presumption in favor of the execution of the power, even if we could properly look to that fact for that purpose. This and several other interesting legal questions have been raised and ably presented upon the point of intention, but we do not deem it necessary to pass upon them, inasmuch as we do not find from the facts any sufficient or satisfactory evidence of an intention to execute the power. We therefore decide that *the fund in question did not pass so by appointment under the will of Mr. Rice, and therefore belongs to the heirs of Mrs. Bourne*, according to the terms of her will.

*Decree accordingly.*

## MICHIGAN SUPREME COURT.

Theodore S. NICHOLS *et al., Appts.*,
*v.*
ANN ARBOR & YPSILANTI STREET R. CO.

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

1. **Mere usurpation of corporate authority** to construct a street railway will not entitle an abutting owner to maintain an injunction suit to prevent such construction.
2. **On the question whether or not a railway operated by a steam motor in a public street is an additional burden** which an abutting owner may enjoin, the court is divided, two in the affirmative, two in the negative, and one holding that it is not settled.
3. **Compensation must be made to the owner of the fee** before a railway can be constructed along a highway by cutting and filling, using ties and T-rails, and leaving a ditch on each side so as to practically block up for ordinary uses the portion of the highway where it is located.

(July 28, 1891.)

APPEAL by complainants from a decree of the Circuit Court for Washtenaw County in favor of defendant in a suit brought to enjoin the laying of rails in the street in front of complainants' premises unless compensation was made to them for the taking of their rights therein. *Reversed.*

The facts are stated in the opinion.

*Mr.* **A. J. Sawyer,** for appellants:

Where a compliance with the statute is a condition precedent to the formation of the corporation, then a corporation does not exist until it has complied with the statute, and the court will not recognize it as a corporation.

*New York Cable Co.* v. *New York*, 6 Cent. Rep. 56, 104 N. Y. 1.

No authority to form a corporation can be derived from a statute of this nature until the conditions upon which the authority is offered by the state have been complied with.

2 Morawetz, Priv. Corp. § 737; 1 Morawetz, Priv. Corp. § 57; *New York Cable Co.* v. *New York, supra; Mansfield C. & L. M. R. Co.* v. *Drinker*, 30 Mich. 124; *Peninsular R. Co.* v. *Tharp*, 28 Mich. 506; *Tuttle* v. *Michigan A. L. R. Co.* 35 Mich. 247; *Atty-Gen.* v. *Hanchett*, 42 Mich. 436; *Doyle* v. *Mizner*, 42 Mich. 332; *Burton* v. *Schildbach*, 45 Mich. 504; *Mok* v. *Detroit Bldg. & Sav. Asso. No. 4*, 30 Mich. 511.

The dedication of a street to the public does not authorize it to be used for an ordinary railroad track, and the municipal representation cannot authorize it to be so used without compensation to adjacent owners.

*Grand Rapids & I. R. Co.* v. *Heisel*, 38 Mich. 62, 47 Mich. 393, 31 Am. Rep. 306; *Reidinger* v. *Marquette & W. R. Co.* 63 Mich. 29; *Reichert* v. *St. Louis & S. F. R. Co.* 51 Ark. 490; *Imlay* v. *Union Branch R. Co.* 26 Conn. 249; *Nicholson* v. *New York & N. H. R. Co.* 22 Conn. 73, 56 Am. Dec. 390; *Indianapolis, B. & W. R. Co.* v. *Hartley*, 67 Ill. 439, 16 Am. Rep. 624; *Kucheman* v. *C. C. & D. R. Co.* 46 Iowa, 366; *Gray* v. *First Division of St. Paul & P. R. Co.* 13 Minn. 315; *Phipps* v. *Western Maryland R. Co.* 66 Md. 319; *Chamberlain* v. *Elizabethport S. C. Co.* 41 N. J. Eq. 43; *Williams* v. *New York Cent. R. Co.* 16 N. Y. 97, 69 Am. Dec. 651; *Lawrence R. Co.* v. *Williams*, 35 Ohio St. 168; *Ford* v. *Chicago & N. W. R. Co.* 14 Wis. 609; *Southern Pac. R. Co.* v. *Reed*, 41 Cal. 256.

If the track runs in the traveled track of the highway, and is made to conform to the grade of the street, and its ties and timbers are beneath the surface of the road, and its iron is on a level with the surface of the highway, then, in its mode of construction, it is a street railway.

C. L. §§ 3552, 3553.

The purpose is to operate this road, and it is operated with a steam motor, drawing trains of cars, running at twenty miles an hour, making regular hourly trips of sixteen to twenty miles each. We submit that does not come within the lines of a street railway, but is a steam commercial railway in all the essential features which constitute a commercial railway an increased burden.

*East End Street R. Co.* v. *Doyle*, 88 Tenn. 747; *Strange* v. *Hill & W. D. St. R. Co.* 54 Iowa, 669; *Stanley* v. *Davenport*, Id. 463; *Lahr* v. *Metropolitan Elev. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 268; *Hot Springs R. Co.* v. *Williamson*, 136 U. S. 121, 34 L. ed. 355.

An injunction is proper to restrain the continuous unlawful use of complainant's land by a railroad company until it has paid the damages.

*Murdock* v. *Prospect Park & C. I. R. Co.* 73 N. Y. 579; *Riedinger* v. *Marquette & W. R. Co.* 62 Mich. 29.

*Mr.* **B. M. Thompson** for appellee.

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

The bill is filed in this cause to restrain and enjoin the defendant from placing ties and laying rails, and operating its railway, over and along the complainants' land, situate in the public highway, and running cars and trains of cars propelled by steam, or any other motive power, upon said highway, along and in front of complainants' premises. The bill sets forth substantially that two of the complainants reside in the township of Ann Arbor, Washtenaw county, and the complainant, Lucy L. Granger, resides in Bay City; that they are the children and only heirs-at-law of Erasmus D. Nichols, deceased, who was the owner in his lifetime of certain lands situate in that township, having a frontage on the highway of about 40 rods, and that complainants, as such heirs-at-law, are the owners of said lands; that on the 30th day of August, 1890,

NOTE.—For *notes* on the right of abutting owners to damages for interference with their right of access to streets, see Egerer v. New York Cent. & H. R. R. Co. (N. Y.) 14 L. R. A. 381; Selden v. Jacksonville (Fla.) 14 L. R. A. 370.



See also 25 L. R. A. 654.

the defendant railway company filed in the office of the secretary of state a paper purporting to be the articles of association of the Ann Arbor & Ypsilanti Street-Railway Company, and that said company purposed to run a railroad from Ann Arbor to Ypsilanti, upon and along the south side of the public highway between said cities, called the "Ann Arbor & Ypsilanti Road," and that it has graded along the south side of said road from the terminus of said road, in the city of Ypsilanti, to the city limits of the city of Ann Arbor, and is laying the ties and railroad track or iron thereon, excepting a few rods along and in front of premises owned by one John A. Bohnet in the township of Pittsfield, and the premises of the complainants, which lie adjacent to the city of Ann Arbor; that said grading and placing ties, and laying of the iron, is on the south side of said highway nearly the whole distance, except from what is known as the stone school-house to the limits of said city of Ann Arbor, over which last distance it is on the westerly side of said highway; that said grading along the line of said highway comes within three or four feet of the fence on the south and west sides of the same; that said defendant has completed the construction of said road, except along the premises of the complainants and said Bohnet, and purposes and intends, when the same is completed, to run trains of cars thereon, drawn by steam-engines, for the purpose of conveying passengers and freight upon and along and over said railway.

Complainants show by their bill, and charge, that the defendant, under its articles of association, if the same are valid, has the right to use on said railroad an engine or motor to be operated by steam; that under the said articles, if the same are legal and binding, the said company is not only permitted to carry passengers, but is authorized to use the said road for the transportation of freight and property. The complainant, Theodore S. Nichols, shows and charges in the bill that one William Campbell, claiming to act for the defendant or some other corporation, applied to him for his consent and permission to build its said road upon and along said highway, and that he signed some paper which was then and there presented to him by the agent of said company, giving his consent to the building of some railway; but avers that the said agent falsely and fraudulently represented to him that the proposed road was simply a street railway, and that the motive power to be used thereon was to be either electricity or animal power; and, in reliance upon the statements so made by the agent of the defendant, he subscribed the paper presented to him, the contents of which he is now unable to state, but avers that by reason of said false and fraudulent representations the said paper is and of right ought to be null and void, and of no binding force and effect whatever. The complainants Ella E. Nichols and Lucy L. Granger charged that they have given the defendant no consent or permission to construct and operate said railway in said highway in front of their premises, and that said railway has obtained no lawful consent of the supervisor and commissioner of highways of said township, but that the same was obtained upon false and fraudulent representations; that the motive power to be used by said street-railway company was to be either animal or electricity, and that therefore, whatever consent was given by said commissioner or supervisor was of no binding force or effect whatever; that the paper purporting to give the consent of said supervisor and commissioner does not in any particular comply with the statute requiring the consent of the supervisor and commissioner; and that the acts and doings of the defendant, as set forth, have been done without warrant of law, and are not only an invasion of the rights of the complainants, but are also an unlawful appropriation of the public highway for railroad purposes; that the statute under which said pretended company was organized is no longer in force, and that there is no statute in this state which authorizes the formation of any such corporation as the said defendant claims to be; that the defendant, as a corporation, has no legal existence, and has no right to enter upon any of the highways of this state, and build thereon a railroad of any description; that the paper purporting to be the consent of said supervisor and commissioner to build said road was not executed in accordance with any action theretofore taken by the township board of said township, nor was the same made and executed at any meeting of said township board. Complainants claim by their bill that the construction and operation of said railway will cause a serious and lasting damage and injury to the said real estate, and that the corporation is not personally responsible for any judgment for damages; that the location of said track within two or three feet of the road fence, upon the west line of said highway, makes it necessary for them, in order to get into their fields or to their houses and barns situate thereon, to cross the track of said railway; that their houses front upon said highway, and are only a distance of ninety feet from the line of said highway, and that it will be impossible to hitch horses or other animals in front of their said premises without danger of their being killed or injured by the cars of the defendant; that the construction and operation of said railway will largely decrease the value of their real estate, and, if allowed to be constructed and put into operation, will occasion them irreparable injury to their use of the road over which said railway runs; that they are forced to come to Ann Arbor or Ypsilanti to market all the produce and crops from said farm; that the only highway over which they can pass to either city is this highway, and, if defendant is permitted to complete the construction and continue the operation of said road along said highway, it will be and remain a continuous cause of injury and damage to the complainants, and a permanent obstruction in said highway, and an object of fright to their teams while engaged in marketing their produce and crops from said farm; that the construction and operation of said rail-

road will decrease the value of complainants' property at least $3,000. Complainants further charge that the defendant intends to proceed at once to the construction of said road along said highway, and to place thereon ties and railroad iron, and to run over and upon the same steam-engines and cars for the transportation of passengers and freight thereon, drawn by steam-engines, as often as one train every hour.

Defendant demurred to part of this bill, and answered as to the remainder. The causes of demurrer are: (1) That it appears upon the face of the bill that the defendant has been and is duly incorporated. (2) That this court has no jurisdiction in the cause to hear and determine the question of the incorporation of the defendant.

By way of answer, the defendant admits that it has graded its road-bed from a point in the city of Ypsilanti near the Michigan Central Railroad to the south boundary line of the city of Ann Arbor; that all of said road within the city of Ypsilanti is completed, and nearly the whole of said road from Ann Arbor to Ypsilanti has been tied and ironed, and is now ready to be operated as a street railway. The defendant denies by its answer that its said railroad is in any correct sense a commercial railroad for the transportation of passengers and freight upon which ordinary steam-engines operate, and passenger-cars are to be used and operated, and says it is strictly and simply a street railroad for the conveying of passengers to and from the cities of Ann Arbor and Ypsilanti and intermediate points, and that the insertion in its articles of incorporation of authority to carry freight was designed merely to authorize defendant to carry light articles of merchandise for the benefit and accommodation of its passengers and others who may desire to have light articles of merchandise, purchased in Ann Arbor or Ypsilanti, transported to their homes in said city, or on the line of said road; that the motor to be used on said road is no larger than a street-railway car, makes a less noise in operation than the electric car with overhead wires, emits little or no steam or smoke, and is as unobjectionable in every way as an ordinary street railway propelled by animal power. Defendant further claims by its answer that it has obtained the right to use said highway from the proper authorities; that it has also obtained a right of way from all the persons owning land upon the said highway on the south and west sides thereof, except for a distance of about 40 rods across lands owned by one John A. Bohnet; that it admits that it obtained said right of way for the construction and operation of a street railway, and not for a commercial road. Defendant further says by its answer that it obtained the right of way and consent to construct and operate its said road in said highway across the lands described in said bill as complainants' lands from the said complainant, Theodore S. Nichols, and it denies that in obtaining such consent and right of way it made any false representations whatever to said Theodore S. Nichols; that said complainant, Theodore S. Nichols, in giving the defendant such right of way and consent to construct and operate its said road, did so without restriction or limitation as to the rights of any other person who was an owner of said premises in common with himself; and that under and by virtue of such consent and right of way so given by the complainant, Theodore S. Nichols, it has a right of way for the construction and operation of its said road as to all of the complainants. The defendant denies by its answer that the construction and operation of said road will cause any damage whatever to the lands in said bill of complaint, but says that they will be greatly increased in value by the construction and operation of said road. Defendant further claims that it has expended in grading its road, tieing and ironing the same, or become liable for, over $50,000, and that all of such expense has been incurred by the defendant, acting upon the consent and agreement of the said Theodore S. Nichols, giving defendant the right of way across the premises described in the bill, and that, unless it is permitted to complete and operate its said road, it will thereby suffer great loss and damage, and that said loss and damage will amount to over $10,000.

The testimony in the case was taken in open court before his honor, *Judge* Peck, then sitting in that court, who, upon the conclusion of the case, entered a decree dismissing complainants' bill, but without prejudice to the right of the complainants to procede in an action for damages. From this decree complainants appeal.

The defendant corporation was organized under chapter 94, How. Ann. Stat. Its articles of association recite that the corporators desire to become incorporated under the provisions of chapter 94, How. Ann. Stat., being Act No. 148, Sess. Laws 1855, as amended by Act No. 91, Pub. Acts 1871, entitled "An Act to Provide for the Construction of Train Railways," as added to by Act No. 14, Sess. Laws 1861, as amended by Act No. 188, Sess. Laws 1867, which provides for "the incorporation of persons for the constructing, owning, maintaining, and operating of train railways or roads for the conveyance of persons or property to be operated by horse or other animal power, or by electric or other motive power, or by any combination of them, or by steam, as shall be determined by the board of directors, and for the purpose of constructing and operating railways through the streets of any town or city in this state, and to fix the duties and liabilities of such corporation."

Chapter 94, as it originally stood prior to the amendments, was Act No. 148, Sess. Laws 1855. As it originally was passed, it provided for the incorporation of train railway companies. In 1861, the Legislature, by Act No. 14 of that session, so amended the chapter that it provided for the organization of companies under the Act to construct and operate railways in and through the streets of any town or city within the state. The Act was again amended in 1867 by adding three new sections, to stand as sections 38, 39, and 40. Act No. 188, Sess. Laws 1867. By section 40 it was provided "that cars on

the street railway of any company organized under this Act may be operated by steam, or by any power other than animal power, whenever the municipal authorities of the city where such railway is situated shall authorize the same."

The question of the incorporation of street railways under this Act came before this court in *Taylor* v. *Bay City Street R. Co.* 80 Mich. 79, and in *Detroit City R. Co.* v. *Mills*, 85 Mich. 634. In the last-named case the constitutionality of this chapter and the several amendments was questioned, and the Act upheld. We shall not, therefore, discuss the constitutional questions raised as to the Act, or the proper and legal organization of the defendant company. If the defendant company is not legally and properly organized under the Act, or if the company is attempting to exercise corporate franchises not conferred by the Act, it is a matter between the defendant company and the state. The mere usurpation of corporate authority does not confer upon an individual the right to bring suit, to restrain an unlawful exercise of authority. If the state chooses to waive it, or permit the action, no others can complain, so long as personal or property rights of the individual are not invaded or affected.

The two principal questions raised by complainants' counsel are: (1) That the use of steam as a motive power is an additional burden or servitude upon their lands. (2) That the mode or manner of construction of the road-bed constructed by the defendant company is also an additional burden or servitude upon their lands.

The testimony shows that the motor used is what is known as "Porter's Noiseless Motor;" that it is operated by steam, and inclosed like an ordinary street-car, and about the same size, and makes less noise than an ordinary electric street-car with overhead wires. It is so arranged that the steam makes a continuous circulation, making no noise by emission of steam, and that the smoke is consumed. It was held in *Detroit City R. Co.* v. *Mills*, *supra*, that an ordinary street railway is not an additional burden or servitude where the fee of the street is in the abutting owner, and there is almost a *consensus* of judicial opinion in this direction. *People* v. *Kerr*, 27 N. Y. 188; *Clinton* v. *Cedar Rapids & M. R. R. Co.* 24 Iowa, 455; *New Albany & S. R. Co.* v. *O'Daily*, 13 Ind. 353; Dill. Mun. Corp. 723. It was also held in that case by this court that the use of electricity as a motive power did not create an additional servitude or burden upon the lands of the abutting owners. The manner in which the road of the defendant company is to be operated by the use of this steam-motor, as it is, is no more of a burden or servitude upon the lands of the abutting owners than an electric car with its overhead wires. It is no more obstruction to the street, and no more of an object calculated to frighten horses passing and repassing upon the highway. Section 40, Act 1867, above quoted, expressly provides for the use of steam as a motive power upon street railways operated in cities, whenever the municipal authorities authorize it.

In *Briggs* v. *Lewiston & A. Horse R. Co.*, 79 Me. 363, 4 New Eng. Rep. 546, the use of steam as a motive power upon street railways was expressly recognized. We think the complainants are not entitled to the relief asked for by their bill, by reason of the use of steam as a motive power in the manner in which it is shown the defendant used it. It appears that before the defendant company was organized a company known as the "Ann Arbor, Ypsilanti & Detroit Street-Railway Company" had procured from the township board of the township of Ann Arbor the right and privilege to construct, maintain, and operate this street railway by reason of permission granted to it in writing by the supervisor and commissioner of highways of that township, granting permission and right to locate, establish, construct, and maintain its road over that highway, and to use thereon animal, motor, or electric power. Some question is raised by complainants' solicitor in this record as to the authority thus granted. Without entering upon that question at length, it is sufficient to say that we are satisfied that there was proper authorization by the township to construct, maintain, and operate this road by the defendant, and, unless the complainants are in some manner affected in their private and property rights, the defendant cannot be interfered with by them in the operation of its road.

The second question raises the important point in this case, and that is the manner or mode in which the defendant's road is constructed in and along the highway. A street railway, the rails of which are laid to conform to the grade of the surface of the street, and which is otherwise so constructed that the public is not excluded from the use of any part of the street as a public highway, carrying passengers, stopping at street crossings to receive and discharge them, is a street railway, whether it be operated by horses or electric power, or by steam-motor, such as is shown to be used by the defendant in this case. The testimony shows, however, that since issue was joined in this case, the defendant company has completed the construction of its road, which had been mostly completed at the time the bill was filed; that the road, as constructed, runs along upon the highway within two or three feet of the road fence upon complainant's land; that the roadbed does not conform to the grade of the street, nor pass over and along the surface of the ground next to the fence, but that the grade for the roadbed is made by cuts and fills. In some places the cuts are two feet in depth, and the fills as great. Ditches are dug along the side of the roadbed on either side. Upon the roadbed so constructed ties are placed to the number of from 2,000 to 2,300 to the mile. Upon these ties is placed a T-rail, such as is ordinarily used in the construction of a railroad for commercial purposes, except that the T-rail is somewhat lighter. The complainants claim that this is a use of their property not warranted by the Act under which the company is organized, and a taking of their private property for public uses without

compensation; that it depreciates the value of their lands, in that they are unable to pass over from the highway to their lands without crossing this roadbed at great inconvenience; and that they are unable to hitch horses or other animals along the highway fence. The complainants' lands have a frontage on the highway of about forty rods. The Act under which the defendant is incorporated confers no powers upon it to construct, maintain, and operate such a road without compensation to the property owners abutting thereon, and the township authorities could confer upon the defendant no such power. It is from its mode of construction in all essentials a commercial road, and not an ordinary street railway. It is not constructed as street railways are usually constructed, on a level with the surface of the street, so that vehicles may pass and repass over it. As constructed, it blocks up the highway so far as the complainants' use of it is concerned in going to and from their premises, and is an additional burden upon their lands. The rule is well established in this state that the dedication of a street to the public does not authorize it to be used for an ordinary railroad track and the municipal authorities cannot authorize it to be so used without compensation to the adjacent owners. *Grand Rapids & I. R. Co.* v. *Heisel*, 38 Mich. 62, 47 Mich. 393, 31 Am. Rep. 306; *Riedinger* v. *Marquette & W. R. Co.* 62 Mich. 29. It was said by *Mr. Justice* Cooley in *Grand Rapids & I. R. Co.* v. *Heisel*, *supra:* "A street railway for local purposes, so far as constituting a new burden, is supposed to be permitted because it constitutes a relief to the street; it is in furtherance of the purpose for which the street is established, and relieves the pressure of local business and local travel, instead of constituting an embarrassment. It is enough that the use of the street for a city railway is a proper use and therefore a lawful use." *Brooklyn City & N. R. Co.* v. *Coney Island & B. R. Co.* 35 Barb. 364; *Brooklyn Cent. & I. R. Co.* v. *Brooklyn City R. Co.* 33 Barb. 420; *People* v. *Kerr*, 27 N. Y. 188; *New Albany & S. R. Co.* v. *O'Daily*, 12 Ind. 551; *Brown* v. *Duplessis*, 14 La. Ann. 842; *Elliott* v. *Fair Haven & W. R. Co.* 32 Conn. 579; *Hobart* v. *Milwaukee R. Co.* 27 Wis. 194. Speaking further in that case, the learned justice said: "But we cannot say the same in the case of the ordinary railroad. In such case it cannot be questioned that the laying of the railroad track in the highway without first legally appropriating the land for the purpose, and without making compensation, is a legal wrong to the adjacent owner; the track to him is wrongfully laid."

In *Riedinger* v. *Marquette & W. R. Co. supra*, a bill was filed to restrain the defendant company from constructing a railroad over and across Front and Superior streets in the city of Marquette. The bill was dismissed in the court below, and complainants appealed to this court, where, upon a hearing, a decree was entered for perpetual injunction against this use of the street, unless within six months measures should be taken to condemn the complainant's rights in the street, and compensate them therefor. Defendant contends, however, that the complainant Theodore S. Nichols is estopped from making this claim by reason of a release of the right of way over complainant's premises. The writing is not put in evidence, and complainant contends that it was procured by fraudulent representations; that at the time of its execution the defendant company represented to him that they were to build a street railway similar to that in the city of Ann Arbor; and upon this understanding he consented to the construction of the road in front of his premises. We think the complainant borne out by this record in that claim, and that the complainants are not estopped from insisting upon their rights here to have a road—if one is to be built at all by defendant—such as was represented to him would be built; that is, an ordinary street railway, conforming to the grade of the street. In view of these facts as to the mode in which the road is constructed, we are satisfied that the complainants are entitled to the injunction prayed.

*The decree of the court below will be reversed*, and decree entered in this court granting a perpetual injunction to the complainants, enjoining and restraining the defendant corporation from maintaining and operating its road in the manner in which it is constructed across the complainant's premises. Complainants will recover the costs of both courts.

**Grant, *J.***, concurred with **Long, *J.***

**Morse, *J.*:** I think this case should be reversed, but I do not think that the law, as yet, has been settled in this state that an electric street railway is not an additional burden to the highway, and I am satisfied that a steam railway is such a burden. The injunction should be granted as prayed.

**McGrath, *J.***, concurred with **Morse, *J.***

**Champlin, *Ch. J.*:** I concur in the reversal upon the ground stated in the opinion of *Mr. Justice* **Long,** but I do not concur in that part of the opinion which states that it is settled law in this state that a street railway, operated by steam or electricity, is not an additional servitude upon a street or highway.

Petition for rehearing and modification of opinion denied.

## MINNESOTA SUPREME COURT.

George JOANNIN *et al.*, *Appts.*,
*v.*
David OGILVIE *et al.*, *Respts.*

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

*1. **There may be duress with respect to real property** as well as personal, so as to render a payment on account of it involuntary, so that the money may be recovered back.

2. **So held where a party filed a mechanics' lien against property** upon an unfounded claim which the owner paid under protest, in order to clear the title of record, so that he might consummate a loan upon the property which he had negotiated in order to raise money to pay a prior overdue mortgage and other pressing debts, he having no other available means of raising the money.

(May 20, 1892.)

APPEAL by plaintiffs from a judgment of the District Court for St. Louis County in favor of defendants, in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

Defendants in their answer admitted the execution of the note and set up as a counterclaim that plaintiffs were indebted to defendant, Ogilvie, the principal debtor in the note, in a sum greater than the amount due on it, and stated as a ground for such indebtedness that Ogilvie was the owner of a lot of land in the City of Duluth, against which plaintiffs filed an illegal claim to a mechanics' lien; that because of the necessity upon defendant to clear up the title he paid the amount of the claim and that therefore he had a right to recover back the amount so paid. The trial court made the following finding of facts:

"1. That defendant, David Ogilvie, executed the note in words and figures set forth in plaintiffs' reply to defendant's answer, and that said note had the signature of defendant, F. H. Barnard, on the back thereof, when received by plaintiff. And that no part of the same has been paid.

"2. That said note was given for the sole and undivided debt of the defendant Ogilvie to the plaintiff, and that defendant, Barnard, received no consideration for his indorsement thereof and was in said transaction merely surety for Ogilvie.

"3. That the materials sold by the plaintiffs to A. H. Thompson, which were used in the contracts of buildings of defendant, Ogilvie, were sold on the sole and individual credit of said A. H. Thompson, to be resold by him as retail dealer, and with no understanding on plaintiffs' part as to whom they were to be resold by said Thompson, or as to where they were to be used.

"4. That the said materials, furnished by Thompson to Ogilvie, were sold on open accounts, as called for, and at retail, with no understanding as to any particular price, or quantity to be sold, or time of delivery, or place in which they were to be used, and same were fully paid for by defendant, Ogilvie, prior to time of filing plaintiffs' lien statement, and without any knowledge on Ogilvie's part of any claim of plaintiffs on account of said material.

"5. That A. H. Thompson was neither contractor nor agent for defendant Ogilvie in the furnishing of any of said materials.

"6. That on January 31, 1890, plaintiffs filed in the office of register of deeds of St. Louis county a lien statement duly verified claiming lien against Lots 93 and 95, Block 47, Duluth proper third division for the said materials in the sum of $682,50 and interest thereon from November 25, 1889, at seven per cent per annum, said lien statement being fully set forth in the answer of defendant herein.

"7. That on or about March 19, 1890, defendant Ogilvie paid to the plaintiffs $698.50 for the purpose of procuring a release from the said records of said lien which sum was the full account of plaintiffs' claim.

"8. That defendant Ogilvie at the time of said payment was indebted in large sums of money to different persons on notes and accounts aggregating not less than $20,000. What accounts were not due had been extended for a short time, on promise of payment out of loans then being negotiated by Ogilvie on the property against which said lien was filed. Those premises were incumbered by a past-due mortgage for $10,000, the owner of which was threatening foreclosure on default of immediate payment.

"Other of Ogilvie's creditors were threatening suit. Ogilvie had no available means or property by which to meet these various demands, except the property against which the said lien was filed. Prior to the filing thereof Ogilvie had perfected arrangements and executed mortgages for permanent loans on said property in the total sum of $15,000, to be com-

*Head notes by MITCHELL, J.:

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NOTE.—*Duress by lien on real property.*

The instances in which duress by exercise of authority over real estate is recognized are rare. One of the most common arises in cases of tax assessments and liens for a collection of authorities as to which, see State v. Nelson, 4 L. R. A. 300, and *note*, 41 Minn. 25.

The principal case presents a state of facts so peculiar that no similar decision has been discovered.

In Gates v. Dundon, 42 N. Y. S. R. 660, a contract for building a house was let to one who abandoned it before its completion. Persons who had furnished materials for it then threatened that if their claims were not paid they would file liens against the building and that if they did so others would do the same which would embarrass the owner in procuring money to finish it. He therefore gave his note for the amount of the claim which in fact included materials used in other buildings. When suit was brought on the note a verdict was returned for defendant on the ground that the note was procured by duress and on appeal this verdict was permitted to stand.

For *notes* on what constitutes duress, see Shattuck v. Watson (Ark.) 7 L. R. A. 551; De La Cuesta v. Insurance Co. of North America (Pa.) 9 L. R. A. 631.

H. P. F.

pleted when title to the property appeared clear of incumbrance. Of these sums only $2,000 had been advanced thereon and further sums were refused to defendant until and unless the plaintiffs' lien should first be cleared from the records. Defendant could not get the money anywhere else. These permanent loans were the only available resources defendant had with which to meet his said obligations and avoid suits and foreclosures of his property.

"9. Defendant, Ogilvie, protested to plaintiffs against the payment of their claim as unjust, illegal, and groundless, and demanded release of their lien as aforesaid, and plaintiffs refused to release same unless their claim was first paid in full. Defendant never admitting the justice of plaintiffs' claim, but solely to avoid greater and threatened losses to his property interests, and serious financial injury to himself, paid the same.

"10. Plaintiffs knew before filing their lien statement that Ogilvie was negotiating loans on said property, and that the same were not at that time completed, and that Ogilvie could not complete the same while their lien was of record or without payment thereof.

"11. That as security for the payment of the said note of defendant to plaintiffs, defendant Ogilvie transferred to plaintiffs thirty shares of the capital stock of the Northwestern Investment Company, certificate No. 287, dated March 25, 1891, and same is held by plaintiffs and is of the value of three hundred (300) dollars.

"That defendant Ogilvie otherwise transferred to plaintiffs two shares of the capital stock of the St. Louis Investment Company, dated May 28th, 1891, as security for payment of said note, and said stock is held by plaintiffs, and is of the value of two hundred(200) dollars."

As conclusions of law the court finds:

"1. That plaintiffs' said claim of lien against lots 93 and 95, block 47, Duluth Proper, third division, as in answer set forth, was invalid, and that they had no just or legal claim against defendant, Ogilvie, or his property.

"2. That the payment of plaintiffs' claim by defendant Ogilvie, was made under such stress and necessity as amounted to compulsion and made it involuntary, and that he is entitled to recover back the money so paid, and to offset against plaintiffs' claim on their note, the said sum of $698.50, with interest thereon of seven per cent per annum from March 19th, 1890, and to have a judgment against plaintiffs for the sum of two hundred and sixty-four dollars, being the balance due after deducting the amount due on said note. Also for his costs and disbursements in this action, and for the cancellation of said note and the assignment and delivery to defendant, Ogilvie, of said stock, or for its value if not delivered on demand.

"3. Defendant, Bernard, is entitled to judgment against plaintiffs dismissing their action against him, and for his disbursements herein.

"Let judgment be entered accordingly."

*Messrs.* **John H. Brigham** and **H. P. Greene** for appellants.

*Mr.* **J. B. Richards** for respondents.

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

The findings in this case are so specific as to constitute a sufficient statement of the facts, and an examination of the record satisfies us that, on all material points, they are fully justified by the evidence. That plaintiffs' claim of a lien on the land of the defendant Ogilvie was wholly unfounded is conceded. *Merriman* v. *Jones*, 43 Minn. 29. Therefore the only question is whether the payment of the claim was voluntary, or whether it was made under such compulsion or constraint that it is to be deemed in law involuntary, so that the money may be recovered back. In examining the authorities upon the question as to what pressure or constraint amounts to duress justifying the avoiding of contracts made, or the recovery back of money paid, under its influence, one is forcibly impressed with the extreme narrowness of the old common-law rule on the one hand, and with the great liberality of the equity rule on the other. At common law, "duress" meant only duress of the person, and nothing short of such duress, amounting to a reasonable apprehension of imminent danger to life, limb, or liberty, was sufficient to avoid a contract, or to enable a party to recover back money paid. But courts of equity would unhesitatingly set aside contracts whenever there was imposition or oppression, or whenever the extreme necessity of the party was such as to overcome his free agency. The courts of law, however, gradually extended the doctrine so as to recognize duress of property as a sort of moral duress, which might, equally with duress of the person, constitute a defense to a contract induced thereby, or entitle a party to recover back money paid under its influence. And the modern authorities generally hold that such pressure or constraint as compels a man to go against his will, and virtually takes away his free agency, and destroys the power of refusing to comply with the unlawful demand of another, will constitute duress, irrespective of the manifestation or apprehension of physical force. The rule is that money paid voluntarily, with full knowledge of the facts, cannot be recovered back. If a man chooses to give away his money, or to take his chances whether he is giving it away or not, he cannot afterwards change his mind; but it is open to him to show that he supposed the facts to be otherwise, or that he really had no choice. Pollock, Cont. 556.

In *Farguson* v. *Winslow*, 34 Minn. 384, this court held that "when one in order to recover possession of his personal property from another, who unjustly detains it, is compelled to pay money which is demanded as a condition of delivery, such payment, when made under protest, is deemed to have been made compulsorily or under duress, and may be recovered back, at least when such detention is attended with circumstances of hardship or of serious inconvenience to the owner."

Again, in *De Graff* v. *Ramsey County*, 46 Minn. 319, it was said: "There is a class of cases where, although there be a legal remedy, a person's situation, or the situation of his property, is such that the legal remedy would not be adequate to protect him from irreparable prejudice; where the circumstances and the necessity to protect himself or his property otherwise than by resort to the legal remedy may operate as a stress or coercion upon him

to comply with the illegal demand. In such cases his act will be deemed to have been done under duress, and not of his free will."

*Fargusson* v. *Winslow*, *supra*; *State* v. *Nelson*, 41 Minn. 25, 4 L. R. A. 300, and *Mearkle* v. *Hennepin County*, 44 Minn. 546,—are instances where the danger of irreparable or serious prejudice was considered so great and the legal remedy so inadequate as to practically leave the party no choice but to comply with the illegal demand, and hence to render the payment involuntary. It may be stated generally that whenever the demandant is in position to seize or detain the property of him against whom the claim is made without a resort to judicial proceedings, in which the party may plead, offer proof, and contest the validity of the claim, payment under protest, to recover or retain the property, will be considered as made under compulsion, and the money can be recovered back, at least where a failure to get or retain immediate possession and control of the property would be attended with serious loss or great inconvenience. *Oceanic Steam Nav. Co.* v. *Tappan*, 16 Blatchf. 297.

As was said as long ago as *Astley* v. *Reynolds*, 2 Strange, 915, "plaintiff might have such an immediate want of his goods that an action of trover would not do his business. Where the rule *volenti non fit injuria* is applied, it must be when the party has his freedom of exercising his will, which this man had not. We must take it he paid the money relying on his legal remedy to get it back again."

It has been said that, to constitute a payment under duress, "there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money." *Brumagim* v. *Tillinghast*, 18 Cal. 265; *Radich* v. *Hutchins*, 95 U. S. 210, 24 L. ed. 409. Beyond these and similar statements of general principles, the courts have not attempted to lay down any definite and exact rule of universal application by which to determine whether a payment is voluntary or involuntary. From the very nature of the subject, this cannot be done, as each case must depend somewhat upon its own peculiar facts. The real and ultimate fact to be determined in every case is whether or not the party really had a choice,—whether "he had his freedom of exercising his will." The courts, however, by a gradual process of judicial exclusion and inclusion, have arranged certain classes of cases on one or the other side of the line. For example, payment of an illegal tax, in order to prevent issuing a warrant of distress in the nature of an execution, and upon which the party has no day in court or opportunity to defend, is held not voluntary. Such were the cases of *Dakota County Comrs.* v. *Parker*, 7 Minn. 267 (Gil. 207), and *Preston* v. *Boston*, 12 Pick. 7. So, also, the payment of an illegal demand in order to obtain possession of personal property detained otherwise than by judicial process, and where the immediate want of the property was so urgent that an action of replevin "would not do the owner's business." Such was the case of *Fargusson* v. *Winslow*, *supra*. Also the payment of an illegal tax in order to get a deed on record, as in the case of *State* v. *Nelson*, *supra*; or the payment of illegal fees in order to secure the exercise of its jurisdiction by the probate court in the administration and settlement of an estate, where the delay was liable to result in serious loss, as in the case of *Mearkle* v. *Hennepin County*, *supra*. On the other hand, it is well settled that the mere refusal of a party to pay a debt or to perform a contract is not duress, so as to avoid a contract procured by means of such refusal, although the other party was influenced in entering into it by his financial necessities. Such was the case of *Cable* v. *Foley*, 45 Minn. 421; also *Miller* v. *Miller*, 68 Pa. 486; *Hackley* v. *Headley*, 45 Mich. 569; *Goebel* v. *Linn*, 47 Mich. 489, 41 Am. Rep. 723, and *Silliman* v. *United States*, 101 U. S. 465, 25 L. ed. 987,—cited by plaintiff. It will be noted that in the last case referred to the party entered into the new contract, not for the purpose of obtaining possession of his property (the barges), but to secure payment of money due him from the government. So, also, the fact that a lawsuit is threatened or property has been seized on legal process in judicial proceedings to enforce an illegal demand will not render its payment compulsory, at least in the absence of fraud on the part of the demandant in resorting to legal process for the purpose of extorting payment of a claim which he knows to be unjust. The ground upon which this doctrine rests is that the party has an opportunity to plead and test the legality of the claim in the very proceedings in which his property is seized. Under this class fall the following cases cited by plaintiffs: *Forbes* v. *Appleton*, 5 Cush. 115; *Benson* v. *Monroe*, 7 Cush. 125, 54 Am. Dec. 716; *Taylor* v. *Board of Health*, 31 Pa. 73; *Oceanic Steam Nav. Co.* v. *Tappan*, *supra*. Also the payment of an illegal license to follow a particular business, where the party could not have been subjected to any penalties without judicial proceedings to enforce them, in which he would have an opportunity to contest the legality of the license, or where the license was exacted for a business the pursuit of which was not a natural right, but a mere privilege, which might be granted or withheld, at the option of the state. To this class belong the following cases cited by plaintiffs: *Cook* v. *Boston*, 9 Allen, 393; *Emery* v. *Lowell*, 127 Mass. 138; *Mays* v. *Cincinnati*, 1 Ohio St. 268; *Custin* v. *Viroqua*, 67 Wis. 314. The same has been held as to money paid under threats of distress for rent, in the absence of fraud or any other fact, except that no rent was due. The theory seems to be that the party's remedy is to replevin, and try the question of liability at law. Such was the case of *Colwell* v. *Peden*, 3 Watts, 327, also cited by plaintiffs.

But all these cases in which the payment was held voluntary are clearly distinguishable from the case at bar. The distinguishing and ruling fact in this case was the active interference of plaintiffs with defendant's property by filing the claim for a lien, which effectually prevented the defendant from using it for the purposes for which he had immediate and imperative need. It was this active interference with the property, and not the necessitous

financial condition of the defendant, which constituted the controlling fact. The latter was only one, and by no means the most important, of the circumstances in the case. Counsel for plaintiffs seems to assume that the filing of the claim for a lien was the commencement of a judicial proceeding for its enforcement, and therefore, within the doctrine of cases cited by him, that the subsequent payment of the claim was voluntary, because defendant might have interposed his defense in these proceedings. But this is clearly wrong. Filing a lien is in no sense the commencement of judicial proceedings. The only remedies open to defendant were either to commence a suit himself to determine the validity of plaintiffs' claim, or wait, perhaps a year, until the latter should commence a suit to enforce it. But with a large indebtedness hanging over him, an overdue mortgage on this very property upon which foreclosure was threatened, with no means to pay except money which he had arranged to borrow on a new mortgage which he had executed on this same property, $13,000 of which was withheld and could not be obtained until plaintiffs' claim of lien had been discharged of record, it is very evident that neither of the remedies suggested "would do defendant's business." He was so situated that he could neither go backward nor forward. He had practically no choice but to submit to plaintiffs' demand. Had it been goods and chattels which plaintiffs had withheld under like circumstances, there would be no doubt, under the doctrine of *Fargusson* v. *Winslow*, *supra*, but that the payment would be held to have been made under duress. But while filing the lien did not interfere with defendant's possession of the land, yet it as effectually deprived him of the use of it for the purposes for which he needed it as would withholding the possession of chattel property. It has been sometimes said that there can be no such thing as duress with respect to real property, so as to render a payment of money on account of it involuntary. But this is not sustained by either principle or authority. In view of the immovable character of real property, duress with respect to it is not likely to occur as often as with respect to goods and chattels. But the question in all cases is, Was the payment voluntary? and for the purpose of determining that question there is no difference whether the duress be of goods and chattels, or of real property, or of the person. *Fraser* v. *Pendlebury*, 31 L. J. C. P. 1; *Pemberton* v. *Williams*, 87 Ill. 15; *Close* v. *Phipps*, 7 Man. & G. 586; *White* v. *Heylman*, 34 Pa. 142; *State* v. *Nelson*, *supra*. Considerable stress is placed upon defendant's silence and apparent acquiescence for a considerable time after he paid plaintiffs' claim. This might have some bearing upon the question whether the payment was voluntary or involuntary; but if it was in fact the latter, and a cause of action to recover back the money accrued to defendant, it would be neither waived nor barred by his subsequent silence or delay in asserting his right of action.

*Judgment affirmed.*

16 L. R. A.

Frederick W. STEEG, *Respt.*,
*v.*
ST. PAUL CITY R. CO., *Appt.*

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

***1. The servants of a street-car company who control the movements of its cars are bound to use due care** in starting the same so as to allow passengers a reasonable opportunity to get safely on board, regard being had to the circumstances of each case.

**2. Evidence held sufficient to warrant the submission of the case to the jury** and to sustain the verdict rendered.

(June 10, 1892.

APPEAL by defendant from an order of the District Court for Ramsey County overruling its motion for a new trial after verdict in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servants. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **Henry J. Horn** for appellant.

*Mr.* **O. E. Holman,** for respondent:

As a carrier of passengers for hire the defendant was bound to exercise the highest degree of care and diligence consistent with the nature of his undertaking, and it is responsible for the slightest neglect.

*Smith* v. *St. Paul City R. Co.* 32 Minn. 2.

A carrier must allow his passengers a reasonable time in which to get on and off; and a person who is feeble or infirm is entitled to more than the ordinary time for this purpose, taking into account also the distance and other difficulties of access to the vehicle. As soon as a passenger has fairly entered the vehicle the carrier may start, without waiting for him to reach a seat, unless there is some special reason for doing so, as in the case of a weak or lame person, or of a passenger on the outside of a coach. The carrier must also use prudence in starting, and not set off with a sudden and violent jerk.

2 Shearm. & Redf. Neg. 4th ed. § 508.

The instruction was proper.

2 Shearm. & Redf. Neg. §§ 508, 520; *Nichols* v. *Sixth Ave. R. Co.* 38 N. Y. 131, 97 Am. Dec. 780; *Bucher* v. *New York Cent. & H. R. R. Co.* 98 N. Y. 128; *Eppendorf* v. *Brooklyn City & N. R. Co.* 69 N. Y. 195, 25 Am. Rep. 171.

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

This action is for damages for the alleged negligent management of a street-car, by reason of which plaintiff claims to have suffered personal injuries. The accident occured while the plaintiff was in the act of getting on, or just after he had got on, to the car, and before he had taken his seat, and he claims that he

*Head notes by VANDERBURGH, J.

NOTE.—As to duty to see that passenger reaches a place of safety before starting street-car, see Akersloot v. Second Ave. R. Co. (N. Y.) 15 L. R. A. 489.

was thrown off, or caused to slip off, the car, by a sudden and premature movement of the car caused by the carelessness of defendant's servants in charge of it. The accident occurred on the Selby avenue cable line in the city of St. Paul, and on the "grip car," with which was connected a passenger coach or "trailer." The grip car in question was provided with a step or foot-board running lengthwise of the car, by means of which passengers could reach the platform at each end of the car or the seats between. On this occasion the plaintiff attempted to reach the platform upon the front end of the car, so as to take an empty seat there. The plaintiff's hands were both incumbered with packages, and his testimony shows that as soon as he stepped upon the foot-board the car started, and, feeling his footing insecure, he hastily laid down the packages on the platform and caught hold of the front post of the grip car, when, through a sudden jerk of the car, he lost his balance and slipped off, and was dragged a short distance along the side of the car, whereby he received the injuries complained of. The plaintiff testifies that he did not have an opportunity to reach the platform before the car started, and he was unable to save himself from falling off. He is substantiated in the main by other witnesses; but witnesses on the part of the defendant, who observed the accident, testify to a different state of facts, and their evidence is in sharp conflict with that of the plaintiff, and tended to prove that the plaintiff had actually reached the platform, and, after the car was in motion, of his own accord stepped down upon the foot-board to arrange his tools, and while so doing slipped and fell off. The question whether the car was started up before the plaintiff had time to get safely on board the car was then one for the jury. It appears that the conductor and the "grip man" who had control of the movements of the train observed plaintiff before and while he was getting on, and knew the circumstances attending his attempt to board the car, and the fact that his hands were full. The question whether they exercised due care in starting and handling the cars to assure his safety was one for the jury. This disposes of the first and most important assignment of error.

The counsel for defendant asked the court to charge the jury that passengers riding on the platforms or steps of a street-car assume the additional risk of any accident therefrom. There was no prejudicial error in the court's refusal to give the instruction as asked, because the court had already clearly charged the jury on the subject, and the instruction given was specially pertinent to the evidence presented to the jury. The instruction also asked, that the sudden movement or "jerk" of a street-car in starting was not negligence if it necessarily resulted from the appliance of the grip, had no basis in the evidence, as there was no evidence tending to show that it was necessary or usual, and defendant's witnesses denied that it in fact took place in this instance.

The court also instructed the jury that "the trainmen were bound to allow plaintiff a reasonable time to get safely upon the car, and, the plaintiff having packages in his hands, they were bound to conduct themselves in starting the train in reference to that fact. These trains are not, of course, ordinarily expected to make long stops. But if anything is apparent in the condition of the passenger, so that he would be likely to be thrown or injured by a motion of the car, then proper regard for his safety might require a train to be held in position to avoid it. Care and negligence, in any case, depend upon the circumstances of the particular case. The care, both by the plaintiff and defendant, must depend largely upon the circumstances." There was no error in the instruction as given. The defendant, as a common carrier, was legally obliged to exercise extreme diligence and care, and was bound to allow the plaintiff a reasonable time and opportunity to get safely on board, and it was negligence to start the train sooner. The fact that his movements were somewhat incumbered by packages in his hands might reasonably require more delay and care in starting the train in order to assure his safety, as in the case of aged or infirm persons. 2 Shearm. & Redf. Neg. § 508. No further questions in the case require to be noticed.

*Order affirmed.*

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## OHIO SUPREME COURT.

PITTSBURGH, CINCINNATI & ST. LOUIS R. CO., *Plff. in Err.*,
*v.*
STATE OF OHIO.

(.....Ohio St.....)

***The Act of April 15, 1889** (Rev. Stat. § 251*a*), requiring "every corporation or company operating a railroad or any part of a railroad within this state," to pay to the commissioner of railroads and telegraphs a "fee" of $1 per mile for each mile of track operated by it within this state, contravenes sections 2 and 5 of article 12 of the Constitution of this state.

*Head note by the COURT.

(March 2, 1892.)

ERROR to the Circuit Court for Franklin County to review a judgment affirming a judgment of the Court of Common Pleas, in

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NOTE.—*Constitutionality of laws charging the expense of police regulations on the business to be regulated.*

A very recent decision of the United States Supreme Court decides that electric companies are not deprived of due process of law by requiring them to pay the salaries of the sub-way commissioners as provided in the New York statutes, and that such a requirement does not violate the 14th



See also 27 L. R. A. 710.

favor of the state in a proceeding brought to compel payment by defendant of certain statutory fees. *Reversed.*

Statement by **Bradbury, J.:**

On May 1, 1890, the state of Ohio by its attorney-general, in an action theretofore begun and then pending in the court of common pleas of Franklin county, filed the following amended petition:

"The plaintiff says: That the defendant is a corporation duly incorporated under the laws of the state of Ohio, having its principal office in the city of Columbus, in said state, and that on the first day of September, 1889, it operated two hundred and seventy-four and sixty-three hundredths (274.63) miles of railroad within the state of Ohio.

"That on the 16th day of October, 1889, said defendant filed its annual report, duly verified, for the year ending on the 30th day of June, 1889, in the office of the commissioner of railroads for this state.

"That it was the duty of the defendant to have filed said report on the first day of September, 1889, and to have paid on that day to the commissioner of railroads, a fee of one dollar ($1) per mile for each mile of track operated by it within the state of Ohio; but that the defendant failed and refused, and still fails and refuses, to make said payment, or any part thereof, to the commissioner or anyone for him.

"Plaintiff says that by reason of the failure of the defendant to make said payment, or any part thereof, there is due it from the defendant the sum of $274.63, for which it asks judgment, with interest from the first day of September, 1889.

"David K. Watson, Attorney-General."

To this amended petition a demurrer was interposed by the railway company which was overruled by the court, and the railway company not desiring to plead further, a judgment was rendered against it for the amount claimed with interest, which judgment was affirmed by the circuit court in a proceeding brought in that court by the railway company to obtain its reversal; whereupon the present proceedings were begun in this court to reverse the judgment of both of said courts.

*Messrs.* **Watson, Burr & Livesay** and **J. H. Collins** for plaintiff in error.

*Mr.* **David K. Watson,** *Atty-Gen.*, for defendant in error.

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

The constitutionality of the Act of the General Assembly of the state of Ohio, passed April 15, 1889 (86 Ohio Laws, 351), is involved in the determination of the case. That Act reads as follows:

"Section 1. *Be it enacted by the General Assembly of the state of Ohio,* That section 251 of the Revised Statutes be supplemented as follows:"

"Sec. 251*a*. At the time of filing the report required by section 251, every corporation or company operating a railroad, or any part of a railroad, within this state, shall pay to the commissioner a fee of $1 per mile for each mile of track, whether main, branch, double or side track, operated by them within this state. Any corporation or company failing to pay such fee at the time prescribed shall forfeit and pay a sum of not less than $1,000 and not more than $5,000. All fees received by the commissioner under this section shall be paid by him into the state treasury, upon an order from the auditor of state."

Section 251, Revised Statutes, to which the section above quoted is supplementary, requires the president, etc., of any railroad situate in whole or in part within this state, to file in the office of the commissioner of railroads and telegraphs, a report containing a minute and elaborate account of its business and transactions for the preceding year.

The constitutionality of the section imposing a fee of $1 per mile of track, is assailed on two distinct grounds: (1) That it contravenes section 2, article 12, of the Constitution of this state, which provides that "laws shall be passed, taxing by a uniform rule, all moneys, credits, investments . . . and also all real and personal property, according to its value in money. . . ." (2) That it violates section 5 of the same article (12) which provides that "no tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only it shall be applied."

If this exaction from railroad companies imposed according to trackage, is a tax, within the meaning of the Constitution, then it falls within the inhibition of both of those sections of our Constitution. Within the inhibition of section 2, because the railway property, including tracks, within the state, is taxed by the general taxing laws of the state, at its true value in money, and the tracks of a railroad, being part of its property, is subjected to a burden not imposed upon any other property within the state, and not imposed "according to its true value in money;" and within the inhibition of section 5, because it fails to state the object for which the tax is levied. The question of the constitutionality of the section,

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Amendment of the United States Constitution. People v. Squire, 145 U. S. 175, 36 L. ed. 666.

This was an affirmance of the decision of the New York Court of Appeals in 10 Cent. Rep. 437, 107 N. Y. 593.

So it was held by the same court that charging the expenses of a railroad commission upon the several railroads within a state according to their gross income proportioned to the number of miles in the state did not violate such constitutional provisions. Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051.

The same court had previously held that a statute requiring railroad companies to pay the fees for the examination of railroad employés in respect to color blindness did not deprive them of property without due process of law as it merely imposed upon them the expenses necessary to ascertain whether their employés possessed the physical qualifications required by law. Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352.

So the requirement by state law of a fee from each vessel passing a quarantine station to pay for examination as to her sanitary condition is lawful and is not a tonnage tax in violation of the Federal Constitution nor a regulation of commerce. Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health, 118 U. S. 455, 30 L. ed. 237.

therefore must depend upon whether it shall be held to levy a tax or not, within the meaning of the Constitution, and counsel direct their argument in great measure, to the discussion of this point.

Counsel for the state contends at one stage of his argument, that the exaction is not a tax, but, instead, partakes more of the nature of, and should be treated as, an assessment levied according to benefits, which, it is claimed, accrue to the railroads operated within the state, by the provisions of the Act creating the office and prescribing the duties of the commissioner of railroads and telegraphs.

We are so accustomed to associate the doctrine of assessments, levied upon property according to the benefits that may accrue to it, with its usual subjects of application, some improvement of a local character, such as sidewalks, grading and paving highways, and constructing and maintaining ditches and the like, that the two are with difficulty separated in our mental operations; but, nevertheless, there may be no such necessary connection between them as to forbid a far wider extension of the principle, and its application to many other and perhaps widely varient subjects. But, however this may be, it is not necessary to pursue the speculation further, for the sum exacted is an arbitrary one, having no apparent connection with any benefits conferred by the Act itself, or that to which it is supplementary, and the law fails to attempt, in any manner whatever, to provide a method by which any relation between the benefits and burdens that it confers or imposes can be ascertained; but simply provides for the payment of a fixed sum which is to be applied solely to swell the general revenues of the state. None of the features heretofore present, in all Acts of the Legislature which provide for assessments upon property according to the benefits it receives from the operation of law, are discernable in the Act under review, and it cannot be assigned a place in that class of legislation.

The power of the Legislature to levy special exactions to be applied in payment of the expense of governmental supervision over certain lines of business, which the state in the exercise of its police powers may supervise, was maintained by this court in the case of *Cincinnati Gas Light & C. Co.* v. *State*, 18 Ohio St. 237. That case involved the constitutionality of an Act of the General Assembly of this state, passed April 6, 1866, 63 Ohio Laws, 164, (Swan & S. Stat. 158), providing for the inspection of gas-meters The Act provided for the appointment of an inspector, and prescribed his salary; provided also for the purchase of such apparatus as might be required in the performance of the duties of his office, and for the purpose of paying the salary of the inspector and the cost of the necessary apparatus to enable him to perform his duties; provided that a sufficient sum therefor should be assessed against the several gas companies of the state according to their respective appraised valuation. In 18 Ohio St. 237, the power of the Legislature to levy the exaction imposed upon gas companies by the Act abovementioned was assailed, upon the ground that it contravened the constitutional rule of equality in levying taxes, prescribed by section 2, of article 12, of the Constitution. This court, however, sustained the Act. The opinion of the court was delivered by *Judge* Brinkerhoff; and while it may be contended that some illustrations are found in the opinion of that learned judge, not strictly apposite to the case, yet the opinion, taken as a whole, clearly shows that the decision was put upon the ground that the exactions levied upon the several gas companies were not a tax within the constitutional meaning of that term. This view is supported by the following quotation from that opinion: "It is settled by the repeated decisions of this court, in *Hill* v. *Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *Reeves* v. *Wood County Treasurer*, 8 Ohio St. 333, and *Baker* v. *Cincinnati*, 11 Ohio St. 534,—that the section of the Constitution just referred to is only applicable to, and furnishes the governing principle for, all laws levying taxes for general revenue, whether for state, county, township, or municipal corporation purposes.

"Now, although the assessment or charge upon the gas companies of the state imposed by the statute in question may be a tax, in the widest import of the word, it certainly is not a tax for purposes of general revenue. It is the assessment of a charge for a special purpose growing out of the exercise of the supervisory power of the government over the business in which these companies are engaged."

It is true that an examination of the Act above-mentioned, providing for the inspection of the gas meters, will disclose provisions highly beneficial to the gas companies, and it is contended that therein it differs from the Act providing for a commissioner of railroads and telegraphs; the latter Act, it is said, imposes burdens on the railroads of the state instead of conferring benefits. An inspection of this latter Act will disclose provisions, some of which are burdensome while others are beneficial; but whether the one or the other predominate, we do not think it material to inquire in this connection, for we apprehend that the question whether the Act before-mentioned, relating to the inspection of gas-meters, etc., was upon the whole beneficial, rather than burdensome, to the gas companies of the state, did not bear materially upon the decision of the court in 18 Ohio St. 237. The ground upon which that decision was put, we think, was that the business of manufacturing and selling gas was one that fell within the police, or supervisory, powers of the state, and that the expense necessarily attending upon its supervision could lawfully be charged against the gas companies, because the exaction made for that purpose was not a tax within the constitutional meaning of that word.

It cannot, we think, be denied that the business of transporting passengers and freight by the railroads within this state is as clearly within the supervisory, or police powers, of the state as is that of making and vending gas; but while this is so, it does not aid in upholding the statute now under consideration, for that statute does not attempt, as the gas inspecting statute did, to provide a fund to be directly applied to liquidate the expenses attending the supervision.

What is this statute? Its constitutionality must be determined by its operation. It pro-

vides in terms that there be placed upon each mile of railroad track within this state an exaction of $1 per annum; the statute calls it a "fee," but its nature is not affected by the name that may be assigned to it. It is an exaction levied upon railroad tracks, and railroad tracks are property. It does not differ in principle from a fixed sum, levied upon all the farmers of the state, for each acre of land of which they may be seised, or each head of horses or other live-stock that they may own. In both instances the tax is levied upon property, but it is neither levied "according to its true value in money" nor uniformly upon all property; both of which are constitutional requirements (sec. 2, art. 12), if it is a tax within the constitutional meaning of that word. That it is such a tax, we think, there can be little, if any, doubt. A tax is "a pecuniary burden imposed for the support of the government. . . . Burdens or charges imposed by the legislative power of a state upon persons or property to raise money for public purposes." 2 Bouvier, Law Dict. 705. The money raised by this section under consideration is directed to be paid into the state treasury; it becomes a part of the funds of the state applicable to any conceivable public purpose. There is not a word in the section under consideration, or in the Act to which it is supplementary, to indicate a purpose that the fund raised shall be limited, or even in any way specially applied, to the expenses incurred in supervising the railroads of the state. A law like this—the direct and only purpose it can accomplish, being to create a fund by an exaction on property to be paid into the state treasury to be used indiscriminately for any and all public purposes—must be regarded as creating a tax. It bears no resemblance to, and should not be confounded with, that class of laws enacted by the Legislature, the immediate object of which is to call into active operation the police powers of the state, but which, incidentally or indirectly, may cause the production of public revenue.

*Judgment of the circuit court and court of common pleas reversed, and petition dismissed.*

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## WEST VIRGINIA SUPREME COURT OF APPEALS.

C. T. DANIEL, Admr., etc., of Robert Daniel, Deceased,
*v.*
CHESAPEAKE & OHIO R. CO., *Plff. in Err.*

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

***1. When a conductor, in charge of a railroad train, with a right to command and to control its movements, leaves his engine and train standing on the track** of the main line, along which a train, due, and expected by him, has a right at that time to pass, and such conductor fails to use ordinary care to warn or notify in any way the expected train of such obstruction in its way, whereby a collision takes place, and a brakeman on the coming train is injured, and such negligence of the conductor is the direct and proximate cause of such injury, such brakeman being without fault or the means of preventing such negligence, or of avoiding its consequences, such brakeman is not the fellow servant of the conductor, and the company will be held responsible for the injury to the brakeman, caused by the negligence of the conductor in such manner.

**2. A yard master,** in lawful command and control of a train as a conductor for the occasion, is a conductor within the meaning of the rule.

(April 2, 1892.)

ERROR to the Circuit Court for Summers County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

*Head notes by HOLT, J.

The facts are stated in the opinion.

*Messrs.* **Simms & Enslow** and **J. E. Chilton** for plaintiff in error.

*Mr.* **William R. Thompson** for defendant in error.

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

This is a suit in the circuit court of Summers county, brought the 31st of March, 1890, by plaintiff below against the railway company, defendant below, for causing the death of Robert Daniel, plaintiff's intestate, by its negligence, while the decedent was a servant in the railway company's employ, which resulted in a verdict for $3,750 damages, which the court refused to set aside, but gave judgment thereon. To this ruling and various other rulings made on the trial the defendant company excepted, and has obtained this writ of error.

The suit is based on section 5, chap. 103, Code, p. 725, ed. 1891: "Whenever the death of a person shall be caused by wrongful act, neglect, or default," etc.,—the West Virginia form of the Lord Campbell Act. The declaration contains three counts. The first charges that plaintiff's intestate was in the railway company's employ as a brakeman, and while in discharge of his duties, defendant, by its recklessness, carelessness, and negligence, then and there caused the death of plaintiff's intestate. The second count alleges as the defendant's act or neglect and default that it carelessly left standing on its line, one mile from any station or side track, a train of cars, into which the deceased brakeman's train, without warning, was run, without any fault on the part of the running train, which caused the brakeman's death, etc. Third count sets out the facts of the accident in great detail, aver-

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NOTE.—For *notes* on the question who are fellow servants as affected by the superior rank of one of the servants, see Ell v. Northern Pac. R. Co. (N. Dak.) 12 L. R. A. 97; Hunn v. Michigan Cent. R. Co. (Mich.) 7 L. R. A. 500; Murray v. St. Louis Cable & W. R. Co. (Mo.) 5 L. R. A. 735; Hussey v. Coger (N. Y.) 3 L. R. A. 559; Muhlman v. Union Pac. R. Co. (Colo.) 2 L. R. A. 192.



See also 17 L. R. A. 636, 811.

ring that they resulted in the brakeman's death, directly caused by the wrongful act, neglect, and default of defendant; thus giving plaintiff, by reason of the premises, a right of action for $10,000, the damages sustained (the maximum fixed by law). The demurrer was properly overruled, because the court could have given judgment on either count according to the very right of the cause, and according to law; the case as alleged being proved. On the plea of "not guilty" the issue was made up and tried by the jury.

The facts are as follows: Robert Daniel, plaintiff's intestate, was at the time of the accident a brakeman in the employ of defendant on section 2 of No. 78, a freight train on defendant's road. His run was from Sewell to Hinton and back. Freight train No. 78, between these points, was run in two sections. J. W. Spease was assistant yardmaster of the railway company at Hinton. On the 26th day of March, 1890, section 1 of defendant's freight train had reached Hinton. Spease took charge of it, to break up the train, distribute the cars, etc., according to his duty, and for this purpose the cars were at some point uncoupled. On these cars, thus left to stand until Spease had disposed of the others, Sweno, the brakeman, had neglected to set the brakes; so that, when Spease uncoupled and moved off with engine and front cars, the four rear cars ran back by gravity down the tracks to the mouth of Tug creek, a mile and a half west of Hinton towards Sewell. Here they stopped. Spease was engaged in shifting the front part of section 1 about fifteen or twenty minutes, and when he returned with his engine he found that the rear portion of the train, which had been left, had escaped, and run back down to Tug creek, as already described,—a point between one and a half and two miles from Hinton, on the main line. As soon as Spease found the cars had escaped, he started with the engine in pursuit, having with him the engineman of the yard shifter locomotive, and a brakeman, and workman, all under Spease's control. They found the runaway cars at Tug creek. It was proven that J. M. Spease had as full command and charge of section 1 of No. 78, and of the part which escaped and ran back to Tug creek, as a conductor has while in charge of his train and running it on the road, and the like power of control and command over the escaped part while it stood at Tug creek. Spease also knew that section 2, on which Daniel was engaged as brakeman, was following section 1 of No. 78, and was then due at Hinton. When Spease reached the escaped cars at Tug creek, Spease's brakeman immediately began to try to couple up the escaped cars to the cars brought down with the engine from the yard at Hinton; that he had two couplings to make, and attempted to make one of them some 15 times, but the link was bent, and he failed, and was still attempting to couple them when the engineer on the coming section No. 2 of No. 78 blew down brakes just before the collision occurred. The time was 3:30 in the morning. It was dark and foggy. There were two brakemen,—Robert Daniel, the one killed by the collision, and another on said second section of train No. 78,—and, if both had been standing at the brakes and applied them immediately when the signal sounded down brakes, the accident could not have been averted. The train was a freight train, running at the rate of eighteen or twenty miles an hour. Spease had charge of the train, including the escaped cars, and had with him under his control the engineer, brakeman, and a workman from the roundhouse, and no one else was present. Spease, as the rules of the company required, went back in the direction from which section 2—the coming train—was expected, for the purpose of flagging or to signal it to stop, but he went back from the rear of his own train standing on the track at Tug only some 50 or 100 yards, instead of 1,200 yards, as required by the rules of the company. He had ample time to have gone back the distance required to flag, if he had desired to do so, before the expected train came. A red light is used and required by the rules for the purpose of flagging; but Spease on this occasion had a white light. He overtook the escaped cars more than thirty minutes before the accident occurred, and had at least thirty minutes in which to have gone back to flag the expected train, and if it had been flagged 600 yards from the rear of Spease's train, the expected train could have been stopped, and the accident averted. It was also proved that at the time of the collision and wreck it was the duty of the conductor to flag between stations, and the duty of the brakeman to flag at stations, and that, when a train was stopped by accident or obstruction, the flagman must immediately go back with danger signals, to stop any train moving in the same direction. At a point 600 yards he must place one torpedo on the rail. He must then continue to go back at least 1,200 yards from the rear of his train, and place two torpedoes on the rails, ten yards apart; then return to a point 900 yards from the rear of his own train, and there remain until recalled by the whistle of his own engine; but if a passenger train is due within ten minutes he must remain until it arrives, etc. See Rule 99 in Schedule 357. Instead of this, the conductor for the occasion —the yardmaster—went back but 50 or 100 yards, with a white light instead of a red one. The morning (3:30) was dark and foggy. The coming train rushed on at a speed of eighteen or twenty miles an hour. The engineer sounded down brakes, reversed his engine, and sprang off just in time to save himself. All escaped by jumping off except front brakeman Daniel, who was at the time of the collision standing at the rear of the tank attached to the rear of the locomotive, and had no duty to perform in the engine cab except to keep out of the weather, and by the rule he was not permitted to ride on the engine cab, except when called there by some duty, without a written order from the proper authorities, and it does not appear whether he had such permit or not. Daniel was caught in the wreck and killed; the others escaped by jumping off the train. Seven or eight of the front cars of the second section were by reason of the collision shattered, broken up, and derailed. If the expected train had been flagged at a point 700 or 800 yards from the obstructing train standing on the main line, the train could have been stopped in time to avoid the

collision. The deceased was a young man of good habits, sober, frugal, and industrious, 21 years old, and earning from $50 to $65 per month. Thereupon the following instructions were given for the plaintiff:

No. 1 given for plaintiff: "The court instructs the jury that if they believe from the evidence that on the 26th day of March, 1890, one Spease was in the employ of the defendant as assistant yard master at Hinton, and that as such assistant yard master said Spease was in charge of a train of cars, or part of a train of cars, belonging to the defendant, known as the 'First section of No. 78,' at a point on the line of the said railroad of defendant between one and two miles west of Hinton; and that said Spease, as to such train of cars then in his charge, had all the rights and authority, and was charged with all the duties of a conductor in charge of one of the trains of cars of the defendant; and that the plaintiff's decedent, R. Daniels, was in the employ of the defendant on one of the defendant's trains of cars known as 'Second section of No. 78,' and that said Spease knew that at the time he was in charge of said train of cars known as 'First section of No. 78,' standing on the main line of defendant's railroad at Tug creek, that said train of cars known as 'Second section of No. 78' was liable at any moment to come along said railroad on its way to the yards at Hinton on the same track upon which the train of cars of which said Spease was then in charge was standing; and the said Spease also knew that said train of cars, or part of the train of cars, of which he, the said Spease, was then in charge as aforesaid, could not be moved immediately in the direction of the yards at Hinton because of the said train of cars not being coupled together, and that said Spease undertook to flag said second section of train No. 78, upon which plaintiff's decedent, R. Daniels, then was as a brakeman, and failed to go back in the direction from which said second section of No. 78 was approaching, more than 50 or 100 yards, and that said Spease had ample time, and could have gone back a sufficient distance to have warned said section of No. 78 of the obstruction of the railroad track in time for said second section of No. 78 to have been stopped, and to have prevented the accident which did occur; and, if the jury further believes that this conduct on the part of Spease was negligence, and was the immediate and proximate and direct cause of the accident and the death of plaintiff's decedent, R. Daniels,—then the negligence of said Spease is the negligence of defendant, and the jury must find for the plaintiff."

Instruction No. 2 given for the plaintiff: "The court instructs the jury that if they believe from the evidence that plaintiff's decedent, R. Daniels, was in the cab of the engine attached to the second section of train No. 78 on the morning of March 26, 1890, at the time the accident occurred, and that said R. Daniels had no right to be there, but should have been at the brakes on the cars in said train, and that his being in said cab contributed to the accident which occurred and resulted in his death, yet, if the jury further believe that said conduct upon the part of said Daniels was not the direct, immediate, and proximate cause of said accident and his death, and that the defendant could, by the exercise of ordinary care and diligence, have avoided the accident, and prevented the death of said R. Daniels, and that defendant failed to exercise and use such ordinary care and diligence to avoid said accident and prevent said killing of said R. Daniels, then the defendant is liable for said killing, and plaintiff is entitled to recover in this case."

The following instructions were given for defendant: Instruction No. 1 given for defendant: "The court instructs the jury that a servant entering the employment of a master assumes all the ordinary risks of such employment and service, and one of such ordinary risks so assumed by the servant is that of liability to negligence of a fellow servant in a common employment of such master." "No. 4. The court instructs the jury that, if they believe from the evidence that Robert Daniels and Frank Sweno were fellow servants in the defendant's employ, then the defendant is not liable in this suit for any injury done the said Robert Daniels by the negligence of the said Sweno in discharging his duties as such fellow-servant." "No. 10. The court instructs the jury that if they believe from the evidence that Frank Sweno and R. Daniels were brakemen in the employ of the defendant, and had the same duties to perform, and did the same work for the defendant, except they ran on different trains, and neither had any authority over the other, and neither had any duty to perform for the other which should have been performed by the defendant, and that the negligence of the said Sweno in the performance of his duties as such brakeman was the immediate cause of the death of said Daniels while in the discharge of his duties as such brakeman, and that the negligence of D. W. Spease, another employé of the defendant, was the remote cause of said Daniels' death, then the jury will find for the defendant." "No. 12. The court further instructs the jury that before they can find for the plaintiff in this case they must find from the evidence that the plaintiff's decedent, Robert Daniels, came to his death by reason of the negligence of the defendant, or some of its employés, who were not fellow servants of said Daniels in the defendant's employ, and that, if the jury believe that the negligence of the defendant or some of its employés was the remote cause of the death of said Daniels, and contributed to his death, and that the negligence of the said Daniels was the proximate, direct, and immediate cause of his death, then the defendant is not liable, and the jury will find for the defendant." "No. 16. The court instructs the jury that they cannot in this case assess against the defendant vindictive or punitive damages; and by such 'punitive damages' is meant damage to punish the defendant for any wrong; and by 'exemplary damages' is meant damages which may be assessed to make an example of the defendant, and set it on example. Damages for neither of said purposes can be assessed against the defendant in this case. No. 17. The court instructs the jury that in case they find for the plaintiff, they will assess plaintiff's damages at any sum, so as not to exceed $10,000, which, in the judgment of the jury, may be 'just and right,' and that in assessing such damage to the plaintiff they can-

not take into consideration the sorrow of his relatives because of the death of R. Daniels, or the loss of his society and company from the plaintiff and his relatives, and that the true measure of damages in this case is the pecuniary loss to the estate of R. Daniels, by reason of his death. No. 18. The court instructs the jury that, in case they should find for the plaintiff, they will assess his damage at such sum as they may deem just and right, so as not to exceed $10,000, and they may assess said damage at any sum under $10,000 which they may deem just and right, and that in assessing such damages the true measure of the plaintiff's damage is the pecuniary damage to the estate of R. Daniels, by reason of his death, and that such pecuniary damage is what should govern the jury in assessing the plaintiff's damage in this case. No. 19. The court further instructs the jury that in assessing the damage in this case they cannot take into consideration the sorrow of R. Daniels' friends and relatives because of his death, or their sorrow at his loss; nor can the jury in this case assess damages for the purpose of making an example of the defendant, or teaching the defendant a lesson."

Instructions Nos. 2 and 8, as modified by the court, and then given for defendant, are as follows: "No. 2. The court further instructs the jury that all servants of the same master, engaged in a common employment, and who have no authority or superiority over each other, and who are working together, and have equal opportunities to control and influence the conduct of each other, and to none of whom has been delegated the performance of any duty owing by the master to such servant, are all fellow servants in such employment." "No. 8. The court instructs the jury that if the defendant had in its employ one Frank Sweno as a brakeman on one of its trains, and that it was the duty of such brakeman to assist in running said train from Sewell to Hinton, and that the defendant also had plaintiff's decedent, R. Daniels, in its employ as a brakeman on another of its said trains running between said points, and that the duties of said Daniels and said Sweno were the same, and they performed the same work and were in the same service for the defendant, but on different trains, and that the negligence of said Sweno in the performance of his duty as such brakeman on his train caused the death of the said Daniels while engaged in his duties as such brakeman, and that the said Sweno had no authority over the said Daniels, and had no duty to perform, due from the defendant to said Daniels, which the said Daniels did not likewise have to perform for him, the said Sweno, and were so far working together as to be practically co-operating, and to have opportunity to control and influence the conduct of each other, and had no superiority the one over the other, then the jury will find for the defendant."

And the court refused the following instructions, asked for by the defendant. "No. 3. The court instructs the jury that all brakemen in the employment of the defendant company, whether on the same or different trains, are fellow servants, and that one brakeman of the defendant cannot recover damage from the defendant because of any injury sustained by him by reason of the negligence of any other brakeman in discharging his duties as such brakeman." "No. 5. The court instructs the jury that the assistant yard master in the defendant's employ on its yard at Hinton and all brakemen on the defendant's trains are fellow servants. No. 6. The court further instructs the jury that, if they believe from the evidence that one Spease was employed by the defendant company as the assistant yard master on its yards at Hinton, and that his duties as such required him to receive and take charge of all trains run on to such yards, and to overlook and care for such trains, and to have control of them while on such yards, and that plaintiff's decedent, R. Daniels, was a brakeman on one of defendant's trains, which run to and from the said yards, and that said Spease and said Daniels were both engaged in their respective positions in running and caring for defendant's trains, and that the said Spease had no authority over the said Daniels, and that the defendant had not delegated to the said Spease the performance of any duty it owed the said Daniels as its servant, then the said Spease and the said Daniels were fellow servants of the defendant; and, if the said Daniels was killed while in the service of the defendant as such brakeman by reason of the negligence of the said Spease in the performance of his duties as such assistant yard master, the defendant is not liable for the death of said Daniels, and the jury will find for the defendant. No. 7. The court further instructs the jury that if they believe from the evidence that one Frank Sweno was in the employ of the defendant company as a brakeman on the first section of one of its freight trains, and as such brakeman it was a part of his duties to set sufficient brakes on such first section of said train before leaving it on the yards at Hinton to hold it thereon, and that he neglected such duty, and failed to set any brakes on said train, and that by reason of the failure of said Sweno to set the said brakes a part of the cars in said train got loose, and run on the main line of defendant's railway, on which main line there was another train of the defendant, about two miles below where such cars got loose, and thereby caused a collision of such other train, and in such collision the plaintiff's decedent, R. Daniels, was killed, and that at the time said R. Daniels was so killed he was on such other train in the defendant's employ as a brakeman thereon, and that the direct and immediate cause of the said collision and the said killing therein of said Daniels was the negligence of the said Sweno in failing to set the said brakes on said first section, then the jury will find for the defendant." "No. 9. The court instructs the jury that if they believe from the evidence that Frank Sweno and R. Daniels were employed by the defendant as brakemen on its trains, and were employed as such brakemen on different trains of the defendant running between Hinton and Sewell, and that their duties as such brakemen were the same, and one had no authority over the other, and that the defendant had in its employ one D. W. Spease as an assistant yard master on its yards at Hinton, and that the duty of said Spease was to care for and look after all trains while on said yard, and that the

said Spease had no control or authority over either the said Sweno or Daniels, and had no duty to perform which the defendant owed the said Daniels, and all of said parties were engaged by the defendant in handling, caring for, and running its trains on its said road, and that the said Daniels, while so employed as such brakeman, was killed by reason of the joint negligence of the said Sweno and Spease in each failing to perform his duties in his respective position, then the jury will find for the defendant." "No. 11. The court instructs the jury that if plaintiff's decedent, R. Daniels, was killed by the negligence of D. W. Spease, and that at the time said Daniels and Spease were in the defendant's employ, and the duties of the said Daniels were that of brakeman on one of defendant's trains running between Cannelton and Hinton on defendant's railway, and the duties of the said Spease was to take the control, care, and management of defendant's trains while on its yard at Hinton, and that by reason of the carelessness of the said Spease in discharging his duties in taking care of and managing the trains and cars on said yard, certain cars got away from him, and caused the death of said Daniels, and that the death of said Daniels was caused by the negligence of said Spease, then the jury will find for the defendant, unless the jury further find that the defendant owned the said Daniels some duty which it had delegated the said Spease to perform, and which he failed to perform, and that by reason of such failure to perform such duty the said Daniels was killed. And the jury are the judges from all the facts and evidence before them whether or not the defendant had so delegated the said Spease to perform any duty it owed said Daniels as its servant, and, if he did fail to perform such duty, if such failure caused the said Daniels' death." "No. 13. If the jury believes from the evidence that Robert Daniels was in the employ of the defendant as a brakeman on one of its freight trains, and that as such brakeman it was the duty of such Daniels to be on the cars and attending to his duty as such brakeman, and the said Daniels, in violation of the rules of the defendant, left his place as such brakeman, and went into the cab of the locomotive of such train, and by reason of his being in said locomotive received injuries which resulted in his death, then the plaintiff cannot recover in this suit. No. 14. The court instructs the jury that if they believe the plaintiff's decedent, R. Daniels, was a brakeman in the defendant's employ, and as such brakeman there was a rule of the defendant 'that prohibited the said Daniels from going into the cab of the locomotive, excepting when necessary,' and that said Daniels knew of such rule, and that he was engaged on one of defendant's trains as such brakeman, he went into the cab of the locomotive pulling such train when it was not necessary; and, further, that the said Daniels violated the said rule when he so went into said cab, and that the said Daniels was killed while so in said cab, and that the fact that the said Daniels was in said cab contributed to causing his death,—then the jury can take such action of the said Daniels in going in said cab in consideration in assessing the damage against the defendant for the death of said Daniels. No. 15. The court instructs the jury that if they believe from the evidence that the plaintiff's decedent, R. Daniels, was in the employment of the defendant as a brakeman on one of its freight trains, and that the said Daniels' place as such brakeman was at the brakes on the cars in such train, and that said Daniels, in violation of the rules of the said defendant, left his place on said cars, and went into the cab of the locomotive pulling such train, and that the said Daniels at such time knew it was a violation of the rules of the defendant to go in said cab, and that while the said Daniels was in said cab he was injured and killed by reason of the negligence of the defendant or its servants, and that the said Daniels being in said cab contributed to his injuries and death, then the jury may consider the said fact that said Daniels was in said cab in assessing the damage they may give in this case against the defendant, and may consider such fact in mitigation of the damages they may assess herein against the defendant."

It is not necessary to discuss the question whether the injury was the direct result of the negligence of his fellow servant,—the brakeman at the yard by whose neglect to set brakes the cars escaped and ran down to Tug creek, where they were found. That was the occasion of the accident,—the negligence of the yard master in charge and conduct of the train at Tug creek was the cause, direct and proximate; so that the only real question is, Was such yard master, under the circumstances, a vice-principal of the master, or only a fellow servant of the deceased brakeman? Upon this point the main controversy seems to turn, and the arguments on both sides are directed to the question, What are the test or tests to be applied to the breach of duty complained of, to determine whether it is violation of a personal duty of the master to the servant, and done by his vice-principal, in which case he would be liable, or a violation of a nonpersonal duty, in which case he would not be liable? because the yard master as a conductor, would then be a fellow servant with the deceased brakeman, and the risk of injury by him one of the risks assumed by the brakeman as incident to the employment. The counsel have concentrated their arguments around four cases, treated as a group, which have attained much more than a local consideration, especially the "*Madden Case.*" These, taken in the order of time, are *Cooper* v. *Pittsburgh, C. & St. L. R. Co.* 24 W. Va. 37; *Riley* v. *West Virginia Cent. & P. R. Co.* 27 W. Va. 145; *Madden* v. *Chesapeake & O. R. Co.* 28 W. Va. 610; *Criswell* v. *Pittsburgh, St. L. & C. R. Co.* 30 W. Va. 708. We are also referred to *Hoffman* v. *Dickinson*, 31 W. Va. 142; *Humphreys* v. *Newport, N. & M. V. R. Co.* 33 W. Va. 135; and especially the case of *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377, 28 L. ed. 787, called the "*Ross Case.*" See also *Unfried* v. *Baltimore & O. R. Co.* 34 W. Va. 261.

We are referred to two text-books, and two only. I mention them because of the reference to them, and quotations made from them. (1) Bishop, Non-Cont. Law, chap. 32, "Master to Servant, Fellow Servants," where

the author, under the subhead of "Fellow-Servants," has brought together a vast array of cases on this perplexing and tangled subject, and within a narrow compass has treated the doctrine with his usual orderly arrangement, and in his clear and condensed style. I mention him now because I know his books to be reliable, and have drawn largely on his useful labors, even when not citing him or quoting literally. (2) The recent work of McKinney on Fellow Servants, whose former labors in editing and annotating American & English Railway Cases, and in contributing the article on fellow servants in 7 Am. & Eng. Encyclop. Law, p. 821, has well qualified him to give the profession this useful work.

In this day reliable text-books have become an indispensable help to the courts as well as to the bar. The touchstone we apply to the act of the employé to determine whether it is the negligent act of a vice-principal, and, therefore, of the master, or the act of a fellow servant of the injured party, is the nature of his duties. See Bishop, Non-Cont. Law, 665. He who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services, including the perils arising from the carelessness and negligence of those who are in the same employment as fellow servants. But there are certain duties which the master owes to the servant. These he must perform in person, or by his agent, appointed for the purpose, called a "middleman" or "vice-principal." For the breach of these duties by the vice-principal, no matter what his place or grade of service, high or low, the master is responsible to the injured servant who has not directly contributed to and in part caused the injury. Now we have reached the test, What are these personal duties which the master owes the servant as distinguished and set apart from the nonpersonal duties which comprehend the residue, and which Dr. Bishop calls the "assignable duties?" So far these personal duties have no well-defined common earmark of an inherent kind, and so far can only be safely ascertained for practical use by enumeration and analogy; and that has produced discord. All we can say is that the personal duty depends upon its own nature, and not upon the agent or servant who performs it.

In the cases already mentioned we have for us an authoritative enumeration of most, if not all, the well-settled personal (nonassignable) duties which the master owes his servant, no matter by whom performed. In the *Madden Case*, 23 W. Va. 610–617, (1886,) *Judge* Snyder, delivering the opinion, says: "The duties of the master or employer may be summed up as follows: (1) To provide safe and suitable machinery and appliances for the business, (including a safe place to work). This includes the exercise of reasonable care in furnishing such appliances, and the exercise of like care in keeping the same in repair and in making proper inspections and tests. (2) To exercise like care in providing and retaining sufficient and suitable servants for the business, (and instructing those who, from newness or age, evidently need it). (3) To establish proper rules and regulations for the service, and, having adopted such, to conform to them."

In Bishop, Non-Contract Law, § 683, he defines the liabilities of the master by giving connectedly and with certain qualifications the following statement of these personal duties of the master: "The doctrine is that the master is not the insurer of his servants against accident in his service; yet he owes to them the duty of carefulness to a degree reasonable in the particular instance in providing for them, and keeping in safe repair, appliances, and a safe place to work, in selecting suitable fellow servants, and in giving the needed instruction to those who are new to the business, or of immature capacity; and for an injury which, through negligence in this duty, comes to a servant who is not himself contributively negligent he is responsible, but not for injuries from defects in the appliances or place not discoverable on due examination, or for the negligence of carefully selected servants, or for injuries from situations and appliances the risks whereof the servant has assumed." Again, in § 691 the author says: "The leading principle around which the others cluster is that the master shall exercise in the carrying on of his business all the watchfulness over his servants, and employ all the safeguards, which a reasonable and considerate prudence may dictate. For any violation of this duty resulting in an injury to a servant, he (the master) is answerable to him. But for casualties not traceable to any neglect or to any other wrong in the master he is not responsible." So that we see that the doctrine of fellow servant, as far as it has gone, where no statute prevails, has been built up, we are to presume, by the application of the common-law principles of common sense, common justice, common convenience, public policy, and private right, by gathering together the points of law thus adjudged by the application of these principles to particular facts, into rules more or less general, to be applied to new cases as they arise. So that in the formative process of any branch of the law they are not mere glittering generalities, incapable of useful application. One of the best illustrations of the locality of this dividing line, as far as ascertained between the personal and remaining nonpersonal duties of the master, is furnished by the case of *Collins* v. *St. Paul & S.C. R. Co.*, 30 Minn. 31: "If a railroad servant is injured because there is no headlight, the road is responsible; if because the headlight is not lit, it is not responsible." Bishop, Non-Cont. Law, § 672. The personal duties of the master are due in supplying the ways and means and appliances, keeping them safe and in repair by constant watchfulness and supervision. The residue of his duties—the nonpersonal—relate to the execution of the work, and breaches thereof by co-servants are included in the risks incident to the employment.

This brings us to the point involved called the "Ohio and Kentucky Doctrine," to some extent adopted (by a divided court) by the Supreme Court of the United States in the *Ross Case*, found also in the English Employer's Liability Act, and in the Acts of some of our states, and understood to be sanctioned and

adopted in this state, especially in the *Madden Case*. This may be also regarded as cognate with the master's personal duty of superintendence. A superintendent is defined in the English Act as a person whose sole or principal duty is that of superintendence, and who is ordinarily not engaged in manual labor. See McKinney, Fellow Servants, p. 226. It is what we may call the "commanding (superior) servant," personal duty of the master, or limitation of the master's nonpersonal duties. The same English Act enumerates these vice-principals as follows: "Any person in the service of the employer who has the charge or control of any signal points, locomotive engine, or train upon a railroad." See McKinney, Fellow Servants, p. 220. In these particulars the Massachusetts Act of 1887 corresponds with the English Act. It is significant as tending to show that both regard themselves as having gone astray in holding the conductor of the railway train as a mere fellow servant. They put it upon no expressed ground, but impliedly upon the ground that it is the duty of the master to conduct the train in person or by agent, making a vice-principal of the servant or agent who has charge or control of the locomotive engine or train upon a railroad, each making the employé thus injured one not in the service of the master *quoad* his right of recovery against the master.

This brings us to the *Ross Case* and *Madden Case*. In the *Ross Case*, 112 U. S. 377-390, 28 L. ed. 787-792, (1884,), *Justice* Field says: "A conductor having the entire control and management of a railway train occupies a very different position from the brakeman, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative (vice-principal) of the corporation for whose negligence it is responsible to subordinate servants. . . . In no proper sense of the terms is he the fellow servant with the fireman, the brakeman, the porters, and the engineers;" seeming to put it on the ground of control. But he returns to the duty of having a vice-principal present as the only means of having the company (the master) present, regarding his presence in some way on a running train as a thing to be taken for granted. "We agree with them [the Ohio and Kentucky cases] in holding, and the present case requires no further decision, that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it and control over the persons employed upon it, represents the company, and therefore that for injuries resulting from his negligent acts the company is responsible." But, again returning to the idea of the personal duty of the master to be in some way present, he adds: "If such a conductor does not represent the company, then the train is operated without any representative of its owner." The *Cooper Case*, 24 W. Va. 37, (1884,) gives a full enumeration of the personal duties of the master already given; that the master cannot render such duty nonpersonal, no matter to what servant it may delegate this duty by vesting him with controlling or superior authority in regard thereto. The negligence of such servant is the negligence of the company, giving the nature of the duty as the test of its being the personal or nonpersonal duty of the master, and holding that the instructor and master mechanic, charged with the duty of keeping the appliances in repair, is the vice-principal of the master as to such duty, and not the fellow servant of the brakeman. But the importance of the case for the matter in hand is the distinct personal duty of the master to exercise continued supervision over the appliances, and keep them in good and safe repair, which of course implies the presence in some way of the master.

In *Riley's Case*, 27 W. Va. 145, the court still deals with the performance of some personal duty of the master by some superintendent, foreman, or other employé of the company; a duty "which the master has impliedly contracted, or which rests upon him as an absolute duty." Here the personal duty of the master of continued supervision and to keep the same in good and safe repair and condition is this time applied to the railway and track for the use of its employés. The brakeman on a train consisting of one engine and tender was struck by a stump standing by the side of the railway. It was the negligence of a foreman who was intrusted with the personal duty of the master in keeping the road in repair. The *Criswell Case*, found in 30 W. Va. 798, was decided in 1888. Here the plaintiff's intestate who received the injury was at work for defendant in repairing defendant's railroad, and when killed was on a hand-car, going to the place of work. Foutz was his foreman in repairing the track, who stood in the place of the master in controlling and discharging those working under him. It was by his negligence that the deceased was injured. In the opinion the liability is placed on the ground of the *Madden Case:* "That two servants of the same master are not fellow servants when one acts in a superior capacity to the other in regard to some duty of the master." There was collision of a hand-car on the track, moving under the control of the foreman, with an extra train, by the negligence of such foreman, which caused the death of plaintiff's intestate. Here the foreman was in fact clothed by the master with the power to perform its duties to the servant injured, and the power conferred on the foreman was determined by the rules of the company.

We now return to our leading case upon the point here involved,—*Madden* v. *Chesapeake & O. R. Co.*, 28 W. Va. 610, (1886). An engineer upon one train of a railway company was injured by the negligence of a conductor of another train running in an opposite direction. Held, the engineer is not the fellow servant of said conductor. The court put it distinctly on the ground that the conductor, in controlling and running his train, is the vice-principal of the master; and the master is liable for injury to its servants, caused by the negligence of the conductor in running and conducting its train. But Snyder, *J.*, deliyering the opinion of the court, on page 618 says: "The rule deduced from these principles and authorities would seem to be that two servants of the same master are not fellow servants when one acts in a superior capacity to the other in regard to some duty due from the master; and

the master is liable for any injuries to the subordinates caused by the carelessness or negligence of the superior." Reading the head note as given above with this deduction given in the body of the opinion, the conclusion may be drawn that the conductor in control of the railway train is, as to certain duties, the vice-principal of the master, and not the fellow servant of the brakeman and other employés of the common master. The negligence in this case was by negligently obstructing the track with his own train, so as to cause a collision with another train, causing the injury of its engineer.

We have now looked briefly at the *Ross Case* and at the group of which the *Madden Case* may be regarded as the center, severally and separately, with reference to their peculiar bearing on the case in hand. Before I go back and put together the details I have been in search of, and put into juxtaposition this group represented by the *Madden Case* and the *Case of Ross*, I wish to preface it with a matter of common observation. I have seen a few among the very many criticisms on the *Ross Case*. The leading one is based not on a denial of one of the principles impliedly put by the majority at the bottom of the ruling, but upon a misapplication of it, based upon a mistake, it is said, in the matter of common observation. It is a matter of common observation,—the care they take, (the railroad company,) the extreme and continual care and watchfulness, to make and keep the way safe before the coming and going trains. The moving train and the way are by eminence, literally as well as in figure of speech, "the ways and the means" to which their personal, as distinguished from their general, nonpersonal energies and efforts are directed. In the *Cooper Case*, the first of the group, the learned judge in his opinion takes continual supervision and watchfulness as the keynote of the railway company's duty in regard to the appliances. The same thing, in the common law proper, as compared with statute law proper, to some extent justly made the subject of animadversion, may be of advantage during growth; and all living things must grow. The common-law rule is not tied down and hampered by a fixed phraseology, so that time need not be wasted in quibbling over words; but that is within the rule which is within the meaning of the rule, and the meaning is determined by common reason and common justice. In a word, the spirit is not killed by the letter. Hence, in the *Madden Case*, the safe way, as well as the safe appliances, were adjudged to be within the rule requiring continued supervision and watchfulness. Dr. Bishop, as any one familiar with his method may see who will take the time and trouble to examine with some care his chapter on fellow servants, entered the maze of fellow servant cases, and marshaled them over and over again to find the leading string, and a test of a rule which would not offend our common reason and our common sense of right and wrong, which would do right by the company, the master, as well as by the servant. His last word upon the subject is: Watchfulness of ways and appliances is the central duty around which cluster all the personal (nonassignable) duties due the servant from the master.

Returning now to the *Ross Case* and *Madden Case*, and leaving out of view the reason of the rule as resting alone on the fact of superiority and subordination in control, if we take the facts of the case and the reason given impliedly by *Justice* Field and by *Justice* Miller (a venerable name, we may now say) and others who concurred, we find it to be the duty of constant watchfulness of the way and appliances, especially at the moving time and place, at the very moment of its supreme importance, when the great danger to the appliance was the running of it, and the great danger of the serious obstruction of the way was from the trains themselves, monsters of power when moving with the momentum of 500 tons and more, multiplied by more than the speed of the race horse, and a fearful obstruction to encounter when standing still, or when, as in these two cases, they were running together, one or both out of time or out of place by the fault of somebody. *Justice* Field seems to take it as a concession that in these supreme needs of watchfulness and care as they arose from second to second in passing time, and from foot to foot in change of place, the master was surely present; and, if present, why not select the conductor as the one in control as his personal representative, and, in subordination to him, the engineer, too, if need be, both helping for the occasion, together with the operator at the distance, in the constant careful watchfulness in general; the one with his cunning hand on the lever, and his steady eye to the front; the other, passing through the appliances from end to end constantly. And *Judge* Snyder, in the *Madden Case*, and *Judge* Green, quoting it with approval in the *Criswell Case*, held the conductor to be the one in authority, discharging the personal duty of the master, and by that test also, as well as by the test of "superior servant," the doctrine of fellow servant did not come into play. In both cases there was negligence; in the *Ross Case* on both trains. *Justice* Field takes the negligence found on the going train, and restricts the head note to that. *Judge* Snyder applies it in effect to both.

This brings us to the case in hand, the facts of which do not require for the solution of the point of law involved that we shall put the rule of the *Madden Case* upon the one ground or the other,—superiority in isolated commands, or the nature of the duty to be discharged. Both existed in the *Madden Case*, as there held, and both exist here. Whether we call the yardmaster a conductor simply, or a conductor *pro hac vice*, is not important. He was on the ground in command of the train. It was his duty to remove it, as dangerously barring the way of the coming train, which he knew must be close at hand; and to warn and give notice of the dangerous obstruction to the expected train, according to the rules. We have already shown, and it is not necessary to repeat, the railway master cannot, by the requirement of its rules, shift the burden of a personal duty to other shoulders, and thus make the doctrine of fellow servant apply, because it has no power to amend the general law. How far it may be regulated by contract,

express or implied, the facts of this case do not require us to inquire. This, I take it, is the least settled of all. See Bishop, Non-Cont. Law, § 674. "If in words or by implication the servant has undertaken to assume a risk, he cannot have compensation of the master for an injury resulting therefrom."

In the case of *Lake Shore & M. S. R. Co.* v. *Spangler*, 44 Ohio St. 471, 5 West. Rep. 785, Owen, *Ch J.*, says: "The policy of our law (as to the superior servant rule) being well settled, it only remains for us to inquire whether the railroad companies may ignore or contravene that policy by private compact with their employés, stipulating that they (the railroad company) shall not be held to a liability for the negligence of their servants which public policy demands shall attach to them. The answer is obvious. Such liability is not created for the protection of the employés simply, but has its reason and its foundation in public necessity and policy, which should not be asked to yield or surrender to mere private interests and agreements."

This brings us to the instructions respectively given and refused.

Plaintiff's No. 1. This instruction states hypothetically, but correctly, what the evidence certified tended to prove, with the rule of the *Madden Case* correctly applied.

Plaintiff's No. 2. This proceeds upon the supposition, and the facts and nature of the circumstances show the facts supposed to be true,—that is, if plaintiff's intestate had been right at his brake he could not possibly have prevented the collision, and that, if his thus being out of place did not directly contribute to the injury, then plaintiff's right to recover, if any, was not thereby barred. This is the law, as laid down in the *Riley Case*, 27 W. Va. 145, and in many other cases.

Defendant's No. 1. This was properly given for defendant, and there is no one to complain.

Defendant's No. 2. This was properly refused, because it is not in accordance with the law laid down in the *Madden Case*, and, if the court in that case put the master's liability, not upon the single fact that the conductor of the train, as such, was performing a personal duty of the master as the superior in control, but also required that the conductor should be in discharge of some other personal duty, then it at the same time held that, so far as by running his train he obstructed the track to the hurt of another and subordinate servant, he was, as vice-principal *pro hac vice*, in discharge of the master's duty of watchfulness and care in keeping the track clear. Besides, the instruction given by the court in amendment of No. 2 was all that defendant could ask on this head.

Defendant's No. 3. This instruction may or may not be correct, and it was properly rejected, there being no evidence fairly tending to show that the injury directly and proximately resulted from the negligence of the other brakeman; and even if it did, it did not do so without the direct, intervening, proximate help of the negligence of the conductor.

Defendant's No. 4. This is No. 3 in another form.

Defendant's No. 5. This is abstract in one view and incorrect in the other, as already shown.

Defendant's No. 6. In the *Madden Case* the engineer on one train was injured by the negligence of the conductor of another train.

Defendant's No. 7. This, in one part, assumes the fact in dispute,—that the negligence of the other brakeman caused the collision,—while the evidence shows that it was but the occasion, nor is there any evidence tending to show that it was the cause.

Defendant's No. 8. This instruction is based on the theory that the negligence of the brakeman on the other train was the one direct, efficient, proximate cause of the injury. It was properly refused as abstract if for no other reason; and, as amended by the court, and then given, defendant has no ground to complain of it.

Defendant's No. 9. This is based on the theory that, upon the facts such as there was evidence tending to prove, the two brakemen and the conductor were fellow servants. If there had been any evidence tending to support this theory, it would have been enough, whether the transgressors acted jointly or severally.

Defendant's No. 10. This has been already disposed of. There is no evidence tending to show that the negligence of the other brakemen was the immediate cause of the death of plaintiff's intestate, and the negligence of Spease, the conductor, the remote cause. The tendency of all the evidence is to show the reverse.

Defendant's No. 11. The uncontradicted evidence shows that it was the duty of yardmaster Spease to take and conduct a train down to Tug creek, and bring back the runaway cars, and that brings him, for at least the only occasion here material, within the rule in the *Madden Case*. The latter clause of this instruction may have been correct, but it need not be examined, because the court was not asked to consider it separately.

Defendant's No. 12. The ground of the first branch of this instruction was sufficiently covered by instruction No. 1 given for plaintiff, and that of the second branch by plaintiff's instruction No. 2.

Defendant's No. 13. This one, also on contributory negligence, was covered in a practical, concrete way by instruction No. 2 given for plaintiff.

Defendant's No. 14. The evidence shows affirmatively that the death of the brakeman on the coming train was not caused contributorily or otherwise by Daniels' violation of any rule, whether he knew it or not, but by the negligence of the conductor in not observing the rule which required him to give Daniels' expected train warning that the track was obstructed by his, the conductor's, own train.

Defendant's No. 15 This was properly disposed of by instruction No. 2 given for plaintiff, which covered the same point of law, which has been held to be correct in substance. Besides, it is abstract, there being no evidence that the brakeman's own conduct contributed in any degree to his death.

Defendant's Nos. 16, 17, 18, and 19 were given. If either of them should happen to be

wrong in any particular, (they seem to be correct,) plaintiff is not to blame for it.

In conclusion, although counsel should have full liberty to manage their cases in their own way, present all points of law for instruction that may arise, and the same point in different phases out of abundant caution, still they should consider that the time of the circuit court is precious, and that too much caution might tire out the most patient temper.

*Judgment affirmed.*

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## RHODE ISLAND SUPREME COURT.

Paul LAVALLE
*v.*
SOCIÉTÉ ST. JEAN BAPTISTE DE WOONSOCKET.

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

**The unlawful expulsion of a member of a mutual benefit society will not give him a right of action for damages** as such action is based on an acquiescence in the expulsion and a waiver of the illegality which must be counted a waiver of the entire cause of action. Other reasons against the action are found in the lack of any fund from which damages can be paid and in the impossibility of measuring the damages. The proper remedy is mandamus to restore him to membership.

(April 23, 1892.)

EXCEPTIONS by plaintiff to a ruling of the Court of Common Pleas for Providence County sustaining a demurrer to his declaration in an action brought to recover damages for his alleged illegal expulsion from membership in defendant society. *Overruled.*

The facts are stated in the opinion.

*Mr.* **Livingston Scott,** for plaintiff:

The fact that mandamus lies does not preclude the existence of a remedy by action.

The existence simply of another remedy will not defeat mandamus unless it is such a remedy as will place the party demanding it in the same situation as he was in before the act complained of, or will give him relief substantially equivalent to the specific relief that mandamus affords.

*Etheridge* v. *Hall,* 7 Port. (Ala.) 47; *McCullough* v. *Brooklyn,* 23 Wend. 461; *Re Trustees of Williamsburgh,* 1 Barb. 34, *Fremont* v. *Crippen,* 10 Cal. 211, 70 Am. Dec. 711; Ang. & A. Corp. 712.

If these interests in the insurance funds were the only interests of the plaintiff in the corporation, the case could not then be distinguished from the ordinary case of interference by a corporation with the rights of a shareholder in a moneyed stock company.

In the case of a stock company, when the corporation refuses to transfer stock to a purchaser, the courts refuse to restore by mandamus on the ground that a remedy by action will give him relief substantially adequate and equivalent to the specific remedy of mandamus.

*Wilkinson* v. *Providence Bank,* 3 R. I. 22; *Hart* v. *Frontino & B. S. A. G. Min. Co.* L. R. 5 Exch. 111; *Smith* v. *Maine Boys Tunnel Co.* 18 Cal. 111; *Bond* v. *Mount Hope Iron Co.* 99 Mass. 505, 97 Am Dec. 49

In this case the court can give relief in damages in this action for the loss of interest in the two insurance funds, entirely adequate and equivalent to specific relief by mandamus, and it ought not to refuse to do it simply because the right of the plaintiff in the general property of the corporation cannot be exactly estimated in the same action.

The nature of the plaintiff's right in the general property is the same as that of a stockholder.

As respects the membership rights, irrespective of the rights in the insurance funds, the plaintiff has suffered legal damage by the interference with his rights as a member by the act of expulsion.

*Ashby* v. *White,* 2 Ld. Raym. 955; *Washington Ben. Soc.* v. *Bacher,* 20 Pa. 425.

And he may waive his right as a member to reinstatement, and elect to consider these rights as lost, and sue for damages for such loss and injury.

*State* v. *Lipa,* 28 Ohio St. 665; *Ludowiski* v. *Polish R. C. St. S. K. Ben. Soc.* 29 Mo. App. 337; *Grosvenor* v. *United Society of Believers,* 118 Mass. 78; *Hardin* v. *Second Baptist Church,* 51 Mich. 137, 47 Am. Rep. 555.

The existence of this remedy by action has been often recognized and alluded to by courts in other cases as an existing remedy concurrent with mandamus.

*Sperry's App.* 8 Cent. Rep. 215, 116 Pa. 391; *Com.* v. *Pike Ben. Soc.* 8 Watts & S. 247; *Black & W. S. Soc.* v. *VanDyke,* 2 Whart. 309.

It does not lie in the mouth of the defendant to say that the plaintiff has suffered no damage because the action of the society was illegal.

*Delacy* v. *Neuse River Nav. Co.* 8 N. C. 274, 9 Am. Dec. 636; *Medical & S. Soc. of Montgomery* v *Weatherly,* 75 Ala. 248; *McLafferty* v *Sweeney* (Pa.) 7 Cent. Rep. 895; *Harman* v. *Tappenden,* 1 East. 562; *Washington Ben. Soc.* v. *Bacher,* 20 Pa. 425; *Webb* v. *Portland Mfg. Co.* 3 Sumn. 197; *Paul* v. *Sloan,* 22 Vt. 238, 54 Am. Dec. 75; *Embrey* v. *Owen,* 6 Exch. 368; *Wadsworth* v *Western U. Teleg. Co* 86 Tenn. 695.

If the plaintiff cannot maintain the action for damages for the loss of his membership rights for the reason that, the act of the society being illegal, he is to be considered still a member, *nolens volens,* and therefore has not lost his right of membership, yet he certainly may as a member maintain the action for dam-

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NOTE.—The opinion and briefs seem to exhaust the authorities on the exact question involved in the above case.

For *notes* on power of court to review suspension of member of mutual benefit association, see Connelly v. Masonic Mut. Ben. Asso. (Conn.) 9 L. R. A. 423: Canfield v. Knights of Maccabees (Mich.) 13 L. R. A. 625.



See also 40 L. R. A. 488.

ages for the interference with his rights and his exclusion from the enjoyment of them, and for the injury to his reputation which his expulsion has caused, and for the public disgrace and mental and bodily distress which the unlawful act of the society has inflicted upon him.

*Washington Ben. Soc.* v. *Bacher, supra; People* v. *German U. E. St. S. Church*, 53 N. Y. 103; *Ludowiski* v. *Polish R. C. St. S. K. Ben. Soc.* and *McLafferty* v. *Sweeney, supra.*

*Mr.* **Edwin Aldrich,** for defendant:

The vote of expulsion is invalid and altogether void.

Ang. & A. Corp. § 420, and *note*, § 422, and cases cited; *Rex* v. *Faversham Fishermen*, 8 T. R. 356; *Harman* v. *Tappenden*, 1 East, 562; *Fuller* v. *Plainfield Academic School*, 6 Conn. 532; *Western U. Teleg Co.* v. *Davenport*, 97 U. S. 369, 24 L. ed. 1047; *Pratt* v. *Taunton Copper Co.* 123 Mass. 112, 25 Am. Rep. 37; *Com.* v. *Pennsylvania Ben. Inst.* 2 Serg. & R. 141; *Loubat* v. *LeRoy*, 40 Hun, 546.

Such a vote is a mere nullity, and does not expel the plaintiff. He is therefore upon his own showing still a member of defendant society, and has been deprived of no rights or privileges therein.

See *People* v. *German U. E. St. S. Church*, 53 N. Y. 103; *Innes* v. *Wylie*, 1 Car. & K. 257; *State* v. *Milwaukee Chamber of Commerce*, 47 Wis. 670.

If the plaintiff still remains a member of the defendant society, and has been deprived of no rights or privileges of membership, he cannot maintain this action, because he has suffered no damage.

See *Wood* v. *Woad*, L. R. 9 Exch. 190.

No action of the case can be maintained for any act however tortious which does not occasion "temporal damage."

Oliver, Precedents, 347, and cases cited; *Fuller* v. *Plainfield Academic School, supra.*

Where a member has been wrongfully expelled from a society or corporation, mandamus is the proper remedy to compel the society or corporation to restore him to membership.

See Am. L. Rev. July-August, 1890, p. 551, § 13, and cases cited; 1 Morawetz, Priv. Corp. § 277, and cases cited; *Fuller* v. *Plainfield Academic School, supra*; *Sibley* v. *Carteret Club*, 40 N. J. L. 295; *People* v. *Fire Department of Detroit*, 31 Mich. 458, *Savannah Cotton Exchange* v. *State*, 54 Ga. 668; *People* v. *Medical Soc. of Erie County*, 32 N. Y. 192; *Com.* v. *Pike Ben. Soc.* 8 Watts & S. 247; *Sleeper* v. *Franklin Lyceum*, 7 R. I. 527, *People* v. *New York Ben. Soc.* 3 Hun, 361.

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

The plaintiff seeks in this action to recover damages for an illegal expulsion from membership in the defendant corporation. The declaration sets out that the corporation is a benevolent organization, of the kind now generally known as a "mutual benefit society," having a relief fund for the benefit of its sick members; that the plaintiff was a member in good standing, and had performed all his duties and obligations as such member, yet the defendant, at a regular meeting, in the absence of the plaintiff, without lawful cause, without notice of any charges against him, without any trial or examination of any charges, and without affording him any opportunity to be heard, expelled the plaintiff from membership, whereby he lost his privileges as a member and his right and interest in and to the property of the corporation, and was also greatly injured in reputation. To this declaration the defendant demurred in the court of common pleas, where the demurrer was sustained, and the case comes before us on exception to the ruling of the court below in sustaining the demurrer. It is obvious, if the defendant is liable to suit at all on such a cause of action, that the declaration sets out the cause of action with sufficient fullness. The elements of an illegal and highhanded violation of the plaintiff's rights are fully stated. Indeed, the defendant takes the ground that the declaration sets forth an act so clearly illegal that it is void *ab initio*, and so there has been no expulsion, and consequently there is no damage and no right of action. No society should be admitted to shield itself in such a way. If the position is taken in good faith, a proper acknowledgment of the error will be evidenced by a restoration of the injured member to the privileges of the society; otherwise, continuing to hold out a member who has been wrongfully expelled is as bad as the original wrong itself. It amounts to saying to the member: "We have illegally expelled you; but so long as you do nothing about it we will let the expulsion stand and keep you out, but if you call us to account for it we will say we have not done it at all, because we did not do it right." Such a defense cannot commend itself to a court of justice. Cases which lay down such a doctrine cannot be followed by this court. The demurrer cannot be sustained on this ground. As the case stands upon the demurrer, a corporation for benevolent purposes has expelled a member without a trial, who thereupon sues for damages for the illegal expulsion, and the issue raised is, Can such an action be maintained? There is no question that a member who has been illegally expelled has the right to apply to the court to be restored to membership by a writ of mandamus.

There is also no question that while a corporation like this is not one which gives a member an indefeasible interest or property right, like shares of stock, still the benefits are a sort of money interest, in regard to which the member is entitled to protection. If he is lawfully expelled he loses these benefits altogether. If he is not lawfully expelled he is entitled to be restored to them; but is he also entitled to maintain an action for damages for the pretended expulsion? It is manifest that the most exact and complete remedy is by restoration, for in this way one is not only vindicated in his character and standing, but also re-established in the very rights which belong to him, without being obliged to take something else as a substitute for them. And evidently he cannot have both remedies at the same time, for restoration implies a correction of the error, and damages, compensation for it. They are incompatible; they cannot stand together.

Thus, in *State* v. *Lipa*, 28 Ohio St. 665, it was held that bringing an action for damages

was a waiver of the right to a mandamus for restoration to membership. It is now well settled in cases of this kind, involving, as they do, a sort of right in property, that mandamus will lie; and we have only to consider whether an action may lie in lieu of mandamus. Decisions of this question have not been numerous, owing to the fact that the multiplication of these societies is of recent date, and the decisions that have been given are diverse. We have been referred to one case only, and we have found no other, which squarely sustains the right of action. *Ludowiski* v. *Polish R. C. St. S. K. Ben. Soc.* 29 Mo. App. 337. It is to be regretted that the court in that case simply declares that the right of action exists, without stating the ground upon which it rests. In other cases there are *dicta* that an action may be maintained for illegal expulsion, but these, too, lack a discussion of the right of action. It is assumed to be in compensation for an injury caused by a violation of right. *Washington Ben. Soc.* v. *Bacher*, 20 Pa. 425; *People* v. *German U. E. St. S. Church*, 53 N. Y. 103.

*State* v. *Lipa*, *supra*, was a petition for mandamus, which was refused on account of a pending action in error, on which a judgment had been recovered. On the other hand is the recent case of *Peyre* v. *Mutual Ben. Relief Soc.*, 90 Cal. 240, which denied the right of action upon the ground that it would punish those who voted against the expulsion as well as the majority who voted in favor of it. The question cannot yet be regarded as settled upon authority. Upon principle we do not think the action should be sustained. It assumes an illegal expulsion, for which, the wrong being waived, compensation is demanded. If the illegality is waived and the expulsion acquiesced in by the member, we see no reason why it should not be taken for what it implies. The waiving of illegality implies and recognizes a legal expulsion. There is no escape from this. But if the member has been legally expelled there is no ground of action. The waiver of the illegality, therefore, is a waiver of the entire cause of action; for, if the action be not illegal and in violation of the plaintiff's rights, there is nothing to complain of. There are cases in which a tort can be waived and an action of assumpsit for damages sustained, but those cases are radically different from the case at bar. They rest upon the principle that an act done, which is in itself a tort, may be treated by the injured party as having created a contract upon which he may recover; this remedy being of a milder character, and so no disadvantage to the defendant. But no case can be found where a plaintiff is allowed to waive a tort for the purpose of putting the defendant in a worse position than he would be in for the tort itself. Much less should one be allowed to waive a tort for the purpose of maintaining an action which, without the tort, would have no foundation. For example, suppose one wrongfully takes the goods of another. He may be sued in trover; or the tort being waived, and the taking considered as lawful and so carrying the title, a promise to pay may be implied. Here, outside of the tort, there is something upon which the implication of a contract may act, namely, the payment for the plaintiff's goods which the defendant has in possession. But in the case at bar there is no chance for the implication of a contract. There is no right to the fund except in a member; and a member may be lawfully expelled, and thereby lose that right altogether. In the ordinary case of waiving a tort one simply foregoes an advantage which he might press by reason of the wrongful act; but, in the matter of expulsion, if he foregoes the wrong he foregoes everything. Suppose, in an action for assault and battery, one could waive the tort, what would be left to sue for? Yet such a case would be analogous to the case at bar. The reasonable view is that if one waives the illegality of an act, and acquiesces in it as a legal and accomplished fact, he must take it with its consequences; and the consequences of an expulsion, with the element of illegality dropped out of it, would be a valid deprivation of membership, for which no action could lie. See Cooley, Torts, 2d ed. 108-111.

There is another reason why an action like this should not be maintained. Ordinarily these societies have no fund except that which is contributed for the benefit of the members, according to the regulations agreed upon. Each society is a sort of trustee of such a fund, and has no right to apply it to any other purposes. If one can take it on a judgment for damages he diverts it from the benevolent objects for which it was contributed, and that, too, possibly, to the injury of members who have not been in fault. Irrespective of the question of jurisdiction over such a fund as trust fund or a charity, a court ought not to make such a diversion possible if it can be reasonably avoided. If resort cannot be had to such a fund, a judgment against a corporation which accumulates only such a fund, and acquires no other property of account, would be a barren remedy to offer. The more difficult question of the measure of damages shows the impropriety of allowing the action.

In *Ludowiski* v. *Polish R. C. St. S. K. Ben. Soc. supra*, only nominal damages were given. To establish a right of action for the mere purpose of allowing one to recover nominal damages is a course not to be commended. But what rule can be laid down by which to gauge a larger measure of damages? The members of these benefit societies have no severable interest in the fund. They can receive no benefit from it except as members who continue to pay their assessments, and then only in case of sickness. How can it be determined whether any member would continue to pay dues in the future; whether he would be sick during his membership, so as to derive benefit from the fund; whether the amount which he would be required to pay in may not exceed the amount he might receive as a benefit, and thus prove to be no loss at all? All of these questions enter into the determination of the amount of damage sustained by expulsion. They are incapable of proof. They are matters of pure speculation and guess, and too uncertain to form the basis of a judgment. If a member wrongfully expelled desires to enforce his rights, exact justice can be done by reinstating him. Great injustice may be done by an award of damages based upon conjecture or possible prejudice.

But the plaintiff urges that, if the action

cannot be maintained for the loss of membership rights, yet he may recover for the exclusion from the right to enjoy the use of the common property and the privileges of membership. While such a recovery would not be objectionable for inconsistency, and would be less objectionable for uncertainty in the elements of damage, we nevertheless think that an action is not maintainable on this ground. The plaintiff had the right to an immediate restoration to participation in the affairs of the society. What he has suffered by exclusion therefrom is due to his own neglect to seek his remedy. Upon no principle of justice can he allow the exclusion to run on for the purpose of accumulating damages. There might be a brief interval of exclusion between the vote of the society and the enforcement of the remedy, but that would be too small a matter for a court to allow as a ground of action. Mistakes and illegalities are liable to occur in all sorts of societies, and the remedy which a court can give cannot always be absolutely adequate. Courts must deal with these matters sensibly, and to recognize every error which may to some extent infringe the rights of a member, as a cause of action, when that error can be speedily corrected, would be a manifest stretch of the administration of the law. The grievance may be regarded as an incident to membership in a society, and, at any rate of too trivial a character to require compensation in damages when the substantial remedy of restoration is at hand. In our opinion the plaintiff is not entitled to maintain this action, and the demurrer to the declaration is sustained.

*Exceptions overruled.*

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## MASSACHUSETTS SUPREME JUDICIAL COURT.

Thomas A. SCANLON, by Next Friend,
*v.*
Benjamin M. WEDGER.

Willis E. BURNHAM, by Next Friend,
*v.*
SAME.

George MASON, Admr., etc.,
*v.*
SAME.

Henry AR FOON, by Next Friend,
*v.*
SAME.

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

**A voluntary spectator of a display of fireworks** in a highway must be held to assume the risk of injury from accident without negligence although the show is unauthorized.

*(Morton and Knowlton, JJ., dissent.)*

(June 21, 1892.)

REPORT from the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court, after verdict in favor of defendant, of actions brought to recover damages for injuries inflicted by the bursting of a mortar which was being used in displaying fireworks, and which was alleged to have been caused by defendant's negligence. *Judgments for defendant.*

The facts are stated in the opinions.

*Mr.* **C. W. Turner,** for plaintiffs:

As defendant was not protected in firing said bombs by any license, his acts in so firing them were unjustifiable and wrongful and a public nuisance, and independent of any question of care on his part, he was liable for the trespass so committed by him to such persons as, being lawfully near and in the exercise of due care, suffered from the consequences of such acts.

*Vosburgh* v. *Moak*, 1 Cush. 453, 48 Am. Dec. 613; *Cole* v. *Fisher*, 11 Mass. 137; *Moody* v. *Ward*, 13 Mass. 299; *Barker* v. *Com.* 19 Pa. 413.

The act of exploding fire-crackers in a public highway is held to be wrongful and unlawful, independently of any statute, in *Conklin* v. *Thompson*, 29 Barb. 218; Thompson, Highways, 4th ed. 287.

In *Jenne* v. *Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578, which is in its facts very similar to the case at bar, it was held that the use of a

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NOTE.—*Liability for injuries caused by the discharge of fireworks.*

Contrary to the doctrine of the main case it was held in a Missouri case not to be contributory negligence for a person to be present to witness a display of fireworks in a public square. Dowell v. Guthrie, 99 Mo. 653.

So in Bradley v. Andrews, 51 Vt. 530, the presence of a person on a public street in a crowd which had been invited there by an exhibition of fireworks was held, in direct conflict with the main case, not to be contributory negligence.

The decisions of the subject of liability for injuries by fireworks present quite a variety. The above Missouri decision holds that the discharge of fireworks at suitable places when not prohibited by statute or municipal regulation is not unlawful, but that the circumstances may be such as to make the act of discharging fireworks culpable negligence. Dowell v. Guthrie, *supra.*

It was there held that it was not unlawful or wrongful to shoot off sky-rockets from a courthouse in the center of a public square where the troughs were so arranged that the rockets would pass over the people assembled. *Ibid.*

There was evidence, however, in that case of negligence in the way the fireworks were scattered about so that they caught fire and were shot off accidentally. *Ibid.*

But in a New Jersey case the court declared that the explosion of fireworks in a public street constituted a public nuisance *per se.* In that case the president of a political club who ordered a display of fireworks in a public street in front of a building where a meeting of the club was being held, and who paid for the fireworks from money raised by individual subscriptions, was held liable for injuries occasioned by the discharge of fireworks by a person whom he hired to explode them. Jenne v. Sutton, 43 N. J. L. 257, 39 Am. Rep. 578.

The same principle has been decided in several other cases. Thus in New York the explosion of



See also 17 L. R. A. 726; 18 L. R. A. 759; 19 L. R. A. 285; 21 L. R. A. 641; 24 L. R. A. 430; 28 L. R. A. 192; 40 L. R. A. 733; 43 L. R. A. 295.

public highway as a place in which to fire a bomb was illegal and *per se* constituted a public nuisance, and that all persons concerned in such an act were responsible for the injuries done to an innocent person.

Every person who indulges himself, even on the Fourth of July, in the discharge of fireworks in a highway or in any place to which he has not a private right, is liable for an injury caused to another.

Shearm. & Redf. Neg. 3d ed. p. 670.

Bombs belong to the class of articles denominated in the text-books "dangerous things," the use of which even when in a lawful place subjects the actor to strict responsibility.

Pollock, Torts, 407.

*Mr.* **A. D. Bosson** for plaintiff Ar Foon.

*Mr.* **S. Z. Bowman** for plaintiff Mason.

*Messrs.* **Charles S. Lincoln** and **Charles P. Lincoln,** for defendant:

The defendant, in firing off the mortar, was in the prosecution of a lawful act. The license of the board of aldermen under which he acted gave the right to display the fireworks, and a place was designated for the purpose by the police.

Mass. Pub. Stat. chap. 102, § 55.

In *Cushing* v. *Boston*, 122 Mass. 173, it was held that a special Statute of 1884, chap. 16, § 3, which provided that no door-steps shall project into any street more than one twelfth of the width thereof, and in no case more than three feet, though negative in form, implied authority to occupy the street to the extent indicated, and that steps so constructed did not constitute a defect or nuisance. This defendant, therefore, was lawfully engaged and cannot be liable prima facie without some proof of negligence or fault on his part.

*Brown* v. *Collins*, 53 N. H. 442, 16 Am. Rep 372; *Searles* v. *Manhattan R. Co.* 2 Cent. Rep. 442, 101 N. Y. 661; *Brown* v. *Kendall*, 6 Cush. 292; *Willett* v. *Rich*, 2 New Eng. Rep. 672, 142 Mass. 356, 56 Am. Rep. 684; *Tourtellot* v. *Rosebrook*, 11 Met. 462; *Rockwood* v. *Wilson*, 11 Cush. 226; *Nitro Glycerine Case*, 82 U. S. 15 Wall. 537, 21 L. ed. 206.

The liability of the defendant does not depend on the illegality of his act, but upon his want of due care.

*Steele* v. *Burkhardt*, 104 Mass. 61; Shearm. & Redf. Neg. 27.

In order to hold this defendant liable for the alleged injuries, there must be some evidence of want of reasonable care on his part.

Pollock, Torts, *120, 121; *Stanley* v. *Powell*, 39 Week. Rep. 76.

It is true that the courts have held persons using dangerous things to a greater degree of care than in the use of ordinary things. Yet it is still a question of reasonable care (a relative phrase) for a jury, who, having all the facts before them and the instructions of the court to guide them, will determine their ver-

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fire-crackers by a boy on a public street of a city on the 4th of July, which so frightened a horse that he died, was held to be wrongful and to make the boy, although a minor, liable for the damages. Conklin v. Thompson, 29 Barb. 218.

So in Vermont a boy thirteen years old who shot off a roman candle on a Saturday evening for the purpose of amusement and the celebration of the 4th of July, which came the next day, was held liable for injuries thereby resulting to another person. Bradley v. Andrews, 51 Vt. 530.

And in Louisiana a father was held liable for an injury caused by the negligent discharge of a roman candle by his 6-year-old boy who discharged it downward from the gallery of his house in the direction of children in the street during a Christmas celebration. Mullins v. Blaise, 37 La. Ann. 92.

In a Massachusetts case the fact that plaintiff, who was injured by the negligent discharge of a sky-rocket, belonged to the same political club with the defendant, and that both had contributed to defray the expenses of the display, was immaterial. Fisk v. Wait, 104 Mass. 71.

But one on whose grounds an exhibition of fireworks is given for a 4th of July celebration was held not liable for an injury to a spectator by a ball from a roman candle in the hands of his son which was supposed to have been exhausted, where it is not shown that he procured the fireworks or invited any spectators, although he did prevent the firing of them from one place on his grounds and pointed out another from which the display could be made and was present at the display. Waixel v. Harrison, 37 Ill. App. 323.

In the old and well-known Squib Case (Scott v. Shepherd, 2 W. Bl. 892), a person who threw a lighted squib into a covered market place where a large concourse of people were assembled was held liable for the loss of an eye by a person whom it finally struck after being thrown about by several other persons in self-defense. The only question on which the court had any difficulty was as to the form and not the substance of the action.

In King v. Ford, 1 Starkie, 421, it was said by *Lord* Ellenborough that a school-master would be liable for injury to a scholar by the use of fireworks if he was negligent in not preventing their use when he knew they were to be used. But in that case it was decided that under the pleadings there could be no recovery on the facts shown.

On the principle that a municipal corporation is not liable for lack of diligence in enforcing police regulations it has been held that a town is not liable for an injury by the discharge of fireworks in violation of an ordinance, although the council and officers and a majority of the citizens actively participated therein and no attempt was made by the officers to prevent it. Ball v. Woodbine, 61 Iowa, 83, 47 Am. Rep 805.

A city is not liable for injury such as the destruction of property by fire caused by an explosion of fireworks, although it had expressly suspended a general ordinance prohibiting such explosions within the city Hill v. Charlotte, 72 N. C. 55.

In a Massachusetts case, without determining the question whether a city could be held liable if it authorized a display of fireworks, the city was held not responsible to a person wounded by a sky-rocket which was bought by a committee of the city council appointed to celebrate the 4th of July, and which was negligently fired under their direction during the celebration. Morrison v. Lawrence, 98 Mass. 219.

In a later Massachusetts case it was held that a city, in celebrating the 4th of July exclusively for the gratuitous amusement of the public, is not liable for personal injuries sustained by a person from the discharge of fireworks during the celebration. Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289.

In this case the fact that a statute authorized appropriations of money for such purposes to a limited amount was regarded as implying an intention not to impose a further liability growing out of the celebration.

But, on the contrary, the city court of Brooklyn has just held that a city is liable for damages from fireworks for which it has given a permit. Speir v. Brooklyn, 46 N. Y. S. R. 561. R. A. R.

dict upon all the circumstances and exigencies of the case.

*Sullivan* v. *Scripture*, 3 Allen, 566; *Brown* v. *Kendall*, and *Stanley* v. *Powell*, *supra*; *Cunningham* v. *Hall*, 4 Allen, 276; *Holly* v. *Boston Gas Light Co.* 8 Gray, 131, 69 Am. Dec. 233.

The plaintiffs, in attending the exhibition, voluntarily exposed themselves to its risks, and in the absence of negligence on the part of the defendant he cannot be liable.

Pollock, Torts, *143, 144; Cooley, Torts, pp. 589, 594; Smith, Neg. 158, Appendix, B.

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

The several plaintiffs were injured by the explosion of a bomb or shell during a display of fireworks in Broadway square, which was a public highway in Chelsea. This display was made by the defendant Wedger, who acted under a license from the mayor and aldermen of Chelsea for a display of fireworks in Broadway square on that evening, under Pub. Stat., chap. 102, § 55. A verdict was returned for the defendant, and the jury made a special finding that the defendant, in firing the bomb, exercised reasonable care. The case comes to us on a report, which states that if, on the facts contained therein, and on said finding, the plaintiffs are entitled to recover, the case is to be remitted to the superior court for the assessment of damages; otherwise judgments are to be entered for the defendant. It is therefore to be considered whether it appears affirmatively that the plaintiffs were entitled to recover.

The plaintiffs apparently were present at the display of fireworks as voluntary spectators, and were of ordinary intelligence. No fact is stated in the report to show the contrary, nor has any suggestion to that effect been made in the argument. The plaintiffs have not rested their claims at all upon the ground that they were merely travelers upon the high way, or that they were unaware of the nature and risk of the display. The report says: "A considerable number of persons were attracted to said square by said meeting, and said bombs and other fireworks which were being exploded there. A portion of the center of the square about 40×60 feet was roped off by the police of said Chelsea, and said bombs or shells were fired off within the space so inclosed, and no spectators were allowed to be within said inclosure. . . . The plaintiffs were lawfully in said highway at the time of the explosion of said mortar, and near said ropes, and were in the exercise of due care." The bombs or shells are described in the report, and they were to be thrown from mortars into the air, it being intended that they should explode in the air, and display colored lights. They were apparently a common form of fireworks, such as has long been in use. The ground on which the plaintiffs place their several cases is that Pub. Stat., chap. 102, § 55, did not authorize the mayor and aldermen of Chelsea to license the firing of anything but rockets, crackers, squibs, or serpents, and that, therefore, the act of the defendant in firing bombs or shells was unauthorized and unlawful. It is not contended that it was at the time supposed either by the defendant or by anybody else that the license was insufficient to warrant the display which was actually made. The licensee was the chairman of a committee which had a political meeting in charge, and the defendant acted at the request of the committee, and was directed by them as to when and where to fire off the fireworks. Under this state of things, it must be considered that the plaintiffs were content to abide the chance of personal injury not caused by negligence, and that it is immaterial whether there was or was not a valid license for the display. If an ordinary traveler upon the highway had been injured, different reasons would be applicable. *Vosburgh* v. *Moak*, 1 Cush. 453, 48 Am. Dec. 613; *Jenne* v. *Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578; *Conradt* v. *Clauve*, 93 Ind. 476, 47 Am. Rep. 388. But a voluntary spectator, who is present merely for the purpose of witnessing the display, must be held to consent to it, and he suffers no legal wrong if accidentally injured without negligence on the part of any one, although the show was unauthorized. He takes the risk. See Pollock, Torts, 138–144. In the opinion of a majority of the court, the entry must be, *judgments for the defendant.*

**Morton, J.**, dissenting:

I dissent fom the opinion of the majority of the court. The majority regard as immaterial the question whether the license was valid or not. It may be treated, therefore, as void, as I think it was. If it is void, then the defendant, Wedger, was using the highway for a purpose that was dangerous, unlawful, wrongful, and unjustifiable as against anybody lawfully in the highway and in the exercise of due care, as it is expressly found that the plaintiffs were, and is liable for any injury caused to them by the explosion, whether they were travelers or not, unless they participated or aided in the display, or contributed by their own conduct to their injuries, or assumed the risk of injury. It is not claimed that there is any evidence that they participated or aided in the display. There is no evidence that they were guilty of contributory negligence. It is said, however, that they assumed the risk. What are the facts? Merely that a political meeting was being held in the square, to which a considerable number of persons had been attracted, and that bombs and other fireworks were being discharged there; and that at the time of the explosion the plaintiffs were near the rope that inclosed the space that had been roped off for discharging the fireworks, but were lawfully there, and in the exercise of due care. There is no evidence that they knew or had any reason to suppose that such mortars were liable to explode and injure bystanders, or that they were familiar with their construction, or the manner in which they were fired, or were aware that the bombs were charged with an explosive more powerful than ordinary gunpowder. There is nothing to show that they had any knowledge or suspicion that they were incurring any risk by being where they were. An inference or a conclusion that they were not unaware of the risk rests, it seems to me, entirely on assumption. The most that can be said of them is that they were voluntary spectators of the display. But be-

fore they can be held to have assumed the risk it must appear that they knew all the facts material to the risk, and appreciated and understood it. *Fitzgerald* v. *Connecticut River P. Co.* (Mass.) 29 N. E. Rep. 464; *Anderson* v. *Clark* (Mass.) 29 N. E. Rep. 589; *Mahoney* v. *Dore* (Mass.) 30 N. E. Rep. 366. It is carrying the doctrine of assumption of the risk further than I think it has ever been carried to say that one who, being lawfully on the highway, and in the exercise of due care, observes as a spectator an unlawful and dangerous exhibition in it, assumes the risk. The exhibitor is bound at his peril to see that he has a valid license. If he selects the highway for an unlawful and dangerous display designed or calculated to attract the public, he, and not the spectators, assumes the risk of injury. It is of no consequence that the defendant exercised reasonable care in firing the bomb. It is a contradiction of terms to say of one engaged in an unlawful, dangerous, wrongful, and unjustifiable business that he used due care in it. Due care is predicated of something which a person may lawfully do, but which by his negligent manner of doing it may become injurious to others; not of something which he has no right whatever to do. Further, the question of assumption of the risk is ordinarily one of fact for the jury. Cases *supra*. The plaintiffs are not bound to show that they did not assume the risk. Unless it appears that they did, they are entitled to recover. This court cannot say as matter of law upon the facts stated that the plaintiffs assumed the risk. Nothing is disclosed as to the circumstances under which the plaintiffs were present. For aught that appears, they might have been travelers stopping for a moment on their way through the square, or detained by the crowd. It is difficult to see what the plaintiffs' supposition (if they did suppose it) that the exhibition was a lawful one had to do with their assumption of the risk; and still more difficult to see it if the exhibition was, as it proved to be, unlawful. I understand the question submitted to this court by the report to be whether, upon the facts therein stated, and upon the finding of the jury as to reasonable care on the part of Wedger, the plaintiffs were entitled to recover. I think they were, and that no other conclusion is warranted on principle or by authority. *Vosburgh* v. *Moak*, 1 Cush. 453, 48 Am. Dec. 613; *Cole* v. *Fisher*, 11 Mass. 137; *Moody* v. *Ward*, 13 Mass. 299; *Congreve* v. *Smith*, 18 N. Y. 79; *Congreve* v. *Morgan*, Id. 84, 72 Am. Dec. 495; *Cohen* v. *New York*, 113 N. Y. 532, 4 L. R. A. 406; *Jenne* v. *Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578; *Fletcher* v. *Rylands*, L. R. 1 Exch. 265, 279 *et seq.*

As the opinion of the majority does not consider the matter of the release set up by the defendant Wedger, I have not done so, but have assumed that nothing which occurred operated to release him. I think, therefore, that, in accordance with the terms of the report, the entry should be, cases remitted to the superior court for the assessment of damages.

**Knowlton**, *J.*, concurs in this opinion.

16 L. R. A.

ATTORNEY-GENERAL, *ex rel.* BOARD OF GAS & ELECTRIC LIGHT COMMISSIONERS,

*v.*

WALWORTH LIGHT & POWER CO.

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

**A statute forbidding any other electric company to "lay or erect wires"** for the purpose of carrying on its business over or under any street without consent of the authorities in any city or town in which a company is already engaged in furnishing electric light impliedly forbids the maintenance or use as well as the laying or erection of such wires in streets, and the prohibition extends to wires in a street which were lawfully laid by a predecessor of the company, to those laid by a company and sold to its customers as well as to those which were laid and owned by the customers themselves, where these are mere devices to evade the statute and the wires outside of the street lines are owned by the company.

(June 24, 1892.)

REPORT by the Supreme Judicial Court for Suffolk County (Morton, *J.*,) for the opinion of the full bench of information filed by the attorney-general to enjoin defendant from maintaining certain electric wires. *Injunction granted.*

This was an information in equity filed by the attorney-general at the relation of the board of gas and electric light commissioners, against the defendant corporation, to compel it to desist and refrain from maintaining or using certain wires for electric lighting over and under the streets of the city of Boston, and from laying or erecting any wires over such streets, and to compel it to take down and remove all wires heretofore laid or erected by it over or under the streets of Boston.

The defendant was organized for the purpose of furnishing electric light and steam heating and power to customers in Boston, and it was so organized after the passage of chapter 382 of the Statutes of 1887, which provides that "in any city or town in which a company is engaged in or organized for the purpose of the manufacture and sale of electric light, no other company shall lay or erect wires over or under the streets, lanes, and highways of such city or town for the purpose of carrying on its business, without the consent of the mayor and aldermen of such city or selectmen of a town, after a public hearing and notice to all parties interested."

The defendant had never obtained any consent or authority of the mayor and aldermen of Boston pursuant to the provisions of this statute. At the time of the organization of the defendant, as well as at the time of the hearing, two other electric light companies were engaged in business in Boston. At the time of the hearing, the defendant was furnishing

NOTE.—This case is interesting as a novel construction of a statute which is likely to be enacted in other jurisdictions as time goes on and the demand for electricity for domestic use increases, and which would be of little value if it could be evaded in the manner shown in this case.

electric light or electricity for lighting over a considerable number of wires crossing the streets of Boston.

The defendant succeeded, by purchase, to a business that had already been established. Two wires lying under Hawley street were placed in a tunnel which the predecessors of the defendant had been authorized by the mayor and aldermen to construct for the purpose of carrying a shaft and steam through, and were placed in the tunnel by such predecessors, who sold them to the defendant. No permission had ever been given by the mayor and aldermen to the defendant, or its predecessors, to lay wires for electric lighting in the tunnel or to lay them under or erect them over Hawley street. Of the wires over which, at the date of the hearing, the defendant was furnishing electricity for lighting, it appeared that only two, through their entire length,—those in the tunnel under Hawley street,—belonged to it. Of the others, several lines belonged, through their entire length, where they crossed the streets and where not, from the station to the lamps, to customers who had put them up at their own expense. All the other wires except where they crossed the streets, belonged to the defendant. When these last-named wires crossed the streets they belonged to customers from the fixture on one side of the street to that on the other, or from eave to eave of the buildings on the opposite sides of the street. In some cases, the treasurer of the defendant corporation, acting for and on behalf of the corporation, at the request of the customers, procured the wires to be erected across the street and the customers paid the defendant therefor; and in other cases, the customer himself procured the wire to be erected across the street.

In the case of arc lights, the defendant owned the lamps used by its customers and took care of them and replaced the carbons as they burned out. In the case of the incandescent lamps, the practice varied. In some instances the defendant owned and furnished everything, except so much of the wires as crossed the streets; and in others, where the customers owned the entire line, the defendant only furnished the globe-bulbs, the customer buying them of the defendant as he would of any other party having them to sell.

The defendant had erected no poles in the streets, and the wires in question crossed the streets at heights varying from 80 to 90 or 100 feet. There were many other wires also crossing the streets in the same localities not belonging to or used by the defendant or its customers.

The information was filed by the attorney-general after a written notice to him and the defendant from the Board of Gas & Electric Light Commissioners, pursuant to the provisions of the Statutes of 1885, chap. 314, § 12, and the Statutes of 1887, chap. 382, § 2.

*Messrs.* **Everett W. Burdett** and **Charles A. Snow**, for petitioner:

The wires as maintained by defendant are within the prohibition of the statute.

An information is the appropriate remedy in this case.

*Atty-Gen.* v. *Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264; *Atty-Gen.* v. *Woods*, 108 Mass. 436, 11 Am. Rep. 380; *Eastern District Atty.* v. *Lynn & B. R. Co.* 16 Gray, 242; *Atty-Gen.* v. *Cambridge*, 16 Gray, 247; *Atty-Gen.* v. *Boston Wharf Co.* 12 Gray, 553; *Rowe* v. *Granite Bridge Corp.* 21 Pick. 347; *Atty-Gen.* v. *Tudor Ice Co.* 104 Mass. 239, 6 Am. Rep. 227; *Haskell* v. *New Bedford*, 108 Mass. 208, 215; *Atty-Gen.* v. *Jamaica Pond Aqueduct Corp.* 133 Mass. 361; *Atty-Gen.* v. *Tarr*, 2 L. R. A. 87, 148 Mass. 309; *Atty-Gen.* v. *Bay State Brick Co.* 115 Mass. 431; *Atty-Gen.* v. *Consumers Gas Co.* 2 New Eng. Rep. 816, 142 Mass. 417; *Atty-Gen.* v. *Algonquin Club*, 11 L. R. A. 500, 153 Mass. 447, and cases cited.

Injury to the public from a nuisance may be redressed by information in equity as well as by indictment at law. "The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance." *Carlton* v. *Rugg*, 5 L. R. A. 193, 149 Mass. 550; *Haskell* v. *New Bedford*, 108 Mass. 208, 215; *Atty-Gen.* v. *Tarr*, 2 L. R. A. 87, 148 Mass. 309; *Atty-Gen.* v. *Jamaica Pond Aqueduct Corp.* 133 Mass. 361; *Atty-Gen.* v. *Woods*, 108 Mass. 436, 11 Am. Rep. 380; *Com.* v. *King*, 13 Met. 115; Dillon, Mun. Corp. § 660, *note 4*.

It cannot be objected that the Statute of 1887 is unconstitutional upon the ground that, in effect, it tends to create a monopoly or monopolies in the use of the streets for electric-lighting purposes.

That the creation of such a monopoly is within the constitutional powers of the Legislature is well established.

*New Orleans Gas Light Co.* v. *Louisiana L. & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516.

Such a statute is a valid exercise of the police powers of the state.

*Western U. Teleg. Co.* v. *New York*, 38 Fed. Rep. 552; *Cushing* v. *Boston*, 128 Mass. 330, 35 Am. Rep. 383; *Budd* v. *New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, and cases cited; *People* v. *Squire*, 10 Cent. Rep. 437, 107 N. Y. 593; *Sawyer* v. *Davis*, 136 Mass. 239, 49 Am. Rep. 27.

No valid objection to the constitutionality of the statute can be urged upon the ground that it delegates the regulation of the use of the streets to the mayor and aldermen, or to a state board.

*Com.* v. *Plaisted*, 2 L. R. A. 142, 148 Mass. 375.

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

This is an information by the attorney-general, under Stat. 1887, chap. 382, and Stat. 1885, chap. 314, § 13, to restrain the defendant from maintaining or using certain wires over which the defendant furnishes electricity for lighting. The defendant was incorporated since the passage of Stat. 1887, chap. 382. By section 3 of that Act, "in any city or town in which a company is engaged in . . . the manufacture and sale of electric light, no other company shall lay or erect wires over or under the streets, lanes, and highways of such city or town, for the purpose of carrying on its business, without the consent of the mayor and aldermen," etc. There were companies in