where due care has been used in selection of such correspondent." The foregoing statement of the rule by Mr. Freeman is quoted with approval in *First Nat. Bank* v. *Sprague*, 34 Neb. 318, 15 L. R. A. 498, and the rule itself is adopted.

In *Guelich* v. *National State Bank*, 56 Iowa, 434, 41 Am. Rep. 110, the reasons of the rule are stated as follows: "The course of business of defendant, and all other banks, is, in such cases, to make collections through correspondents. They do not undertake themselves to collect the bills, but to intrust them to other banks at the place payment is to be made. The holder of the paper, having full notice of the course of business, must be held to assent thereto. He therefore authorizes the bank with whom he deals to do the work of collection through another bank. . . . The bank receiving the paper becomes an agent of the depositor with authority to employ another bank to collect it. The second bank becomes the subagent of the customer of the first, for the reason that the customer authorizes the employment of such an agent to make the collection. The paper remains the property of the customer, and is collected for him; the party employed, with his assent, to make the collection, must therefore be regarded as his agent."

In *Daly* v. *Butchers' & D. Bank*, 56 Mo. 94, 7 Am. Rep. 663, the plaintiff was a depositor in the defendant's bank, and deposited therein certain drafts in controversy in that case. The drafts were sent by the defendant to the National Bank of Vicksburg, which the defendant believed trustworthy, with directions to collect and remit. The Vicksburg bank collected the money and kept it, and became insolvent, and it was held that the defendant was not liable for the loss.

The foregoing cases are entirely in harmony with the decision of this court in *Ætna Ins. Co.* v. *Alton City Bank*, 25 Ill. 243, 79 Am. Dec. 328, in which it was held that, where a bill or note is received by a bank for collection which renders its transmission to another place necessary, the bank discharges its duty by sending it in due season to a competent, reliable agent, with proper instructions for its collection. There the legal holder of the bill indorsed and delivered it to the defendant bank for collection in the usual and regular course of banking business, and the defendant bank on the same day indorsed and transmitted it for collection to certain bankers in St. Louis, Missouri, the proceeds of the bill, when collected, to be placed to the credit of the Alton bank. By the negligence of the correspondent bankers in failing to have the bill protested for nonacceptance and to give notice of nonacceptance, the amount of the bill was lost, and it was held that the defendant bank was not liable. In discussing the case the court said (p. 324): "This presents the question whether the bank receiving such paper for collection is bound for the acts of its correspondents and is responsible for their negligence, or whether its undertaking requires anything more than that it should use reasonable care and prudence in the selection of a responsible correspondent to whom it shall be intrusted. That a bank receiving such paper for that purpose in the usual course of business is bound to use ordinary and reasonable care in selecting an agent competent and responsible, there is no doubt, and a want of such precaution would clearly render them liable for consequent loss. It does not appear that there was any agreement on the part of the bank to become liable, at all events, for any loss that might occur from the acts of its correspondents, and the law has imposed no such liability." See also *Drovers' Nat. Bank* v. *Anglo-American Pkg. & P. Co.* 117 Ill. 100, 57 Am. Rep. 855; *Fabens* v. *Mercantile Bank*, 23 Pick. 332, 34 Am. Dec. 59; *Stacy* v. *Dane County Bank*, 12 Wis. 629; *Citizens' Bank* v. *Howell*, 8 Md. 530, 63 Am. Dec. 714; *Lawrence* v. *Stonington Bank*, 6 Conn. 521; *Third Nat. Bank* v. *Vicksburg Bank*, 61 Miss. 112, 48 Am. Rep. 78; *Bank of Louisville* v. *First Nat. Bank*, 8 Baxt. 101, 35 Am. Rep. 691; *Merchants' Nat. Bank* v. *Goodman*, 109 Pa. 422, 58 Am. Rep. 728; *Hyde* v. *Planters' Bank*, 17 La. Ann. 560, 36 Am. Dec. 621; *German Nat. Bank* v. *Burns*, 12 Colo. 539; *Bank of Lindsborg* v. *Ober*, 31 Kan. 599; Mechem, Agency, § 514.

In the light of these authorities it must be held that the First National Bank and the Bank of New Hanover, of Wilmington, North Carolina, were the agents of the plaintiff, and not of the defendants, and that the losses resulting from their default must be borne by the plaintiff, and not by the defendants.

It appears, however, that on the 24th day of November, 1891, the First National Bank of Wilmington, after collecting the drafts forwarded to it, remitted to the defendants two drafts on the United States National Bank of the City of New York, aggregating $940.25, and failed and became insolvent the day following; that the defendants, on receipt of the drafts, not having received intelligence of the failure of the drawer, placed the amount of the drafts to the credit of the plaintiff and paid the same over to it, and that the money so paid has been retained by it; that the drafts themselves were immediately forwarded to New York for collection, and were there dishonored and protested, and that nothing was realized from them; that the defendants subsequently proved up their claim for the amount of the two drafts before the receiver of the First National Bank of Wilmington, and afterwards obtained from the receiver, by way of dividends on their claim, the sum of $625.92. They now claim, and have been permitted to recover by way of set-off, the difference between the amount of the dividends so received and the face of the drafts. This we think was proper. If the plaintiff had itself deposited these drafts with the defendants and received payment of their amount, the drafts being at the time worthless by reason of the insolvency of the drawer, there can be no doubt that the defendants would have had the right to charge back and recover the amount of the loss from the plaintiff. They were in fact received by the defendants from the First National Bank of Wilmington, which, for all the purposes of the transactions under consideration, is to

be regarded as the plaintiff's agent. The rights of the defendants would therefore seem to be the same as though the plaintiff had itself deposited the drafts with the defendants.

Nor are we able to see that the case is at all affected by the circumstance that the defendants retained the drafts and proved up a claim for their amount before the receiver in their own name. They had paid the amount of the drafts to the plaintiff and until the money so paid was refunded to them they were entitled to hold the drafts, and collect in their own name and for their own benefit whatever could be collected from the estate of the insolvent drawer, of course crediting whatever they might be able to collect upon their claim against the plaintiff.

We are of the opinion that the judgment is fully warranted by the facts appearing by the stipulation of the parties, and *the judgment of the Appellate Court will therefore be affirmed.*

WASHINGTONIAN HOME OF CHICAGO, *Appt.*, *v.* City of CHICAGO *et al.*

(157 Ill. 414.)

1. **A corporation composed of private individuals,** not restrained by law from conducting its business for private benefit, which does not report to and is not inspected by any state official, elects its own managers without the state's approval, and by law owes the state no duty, is a private corporation within the provisions of the Illinois constitution prohibiting municipalities from making donations to private corporations.

2. **A statute requiring a county and city to pay a percentage of liquor license fees** to a certain home is repealed, but not retrospectively repealed, by a constitutional provision prohibiting municipalities from making donations to a private corporation.

3. **The provision of the constitution prohibiting municipalities from making donations** to private corporations is self-executing, and operated as paramount law from the adoption of the constitution.

4. **A city does not, by an appropriation and payment of its revenue for many years** in violation of the constitution, estop itself to assert that it is prohibited in future from making such payment.

(October 11, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Cook County dismissing a petition for a writ of mandamus to compel defendant to turn over to petitioner certain money derived from liquor licenses. *Affirmed.*

The facts are stated in the opinion.

Messrs. **M. B. Loomis** and **F. S. Loomis,** for appellant:

The charter of the Washingtonian Home was a valid exercise of legislative power and discretion at the time it was granted, and was not repealed or annulled by separate section No. 2 of the Constitution of 1870.

Schall v. *Bowman*, 62 Ill. 321; *Covington* v. *East St. Louis*, 78 Ill. 548; *Chicago & I. R. Co.* v. *Pinckney*, 74 Ill. 277; *Middleport* v. *Ætna L. Ins. Co.* 82 Ill. 562; *Wright* v. *Bishop*, 88 Ill. 302; *Lippincott* v. *Pana*, 92 Ill. 24; Cooley, Const. Lim. 6th ed. 77; *Allbyer* v. *State*, 10 Ohio St. 588; *State* v. *Barbee*, 3 Ind. 258; *Evans* v. *Phillipi*, 117 Pa. 226; *Perkins* v. *Board of Police*, 41 La. Ann. 701; *State* v. *Thompson*, 2 Kan. 432; *Slack* v. *Maysville & L. R. Co.* 13 B. Mon. 1; *State* v. *Macon County Ct.* 41 Mo. 453; *New Central Coal Co.* v. *George's Creek Coal & I. Co.* 37 Md. 557; *Cass* v. *Dillon*, 2 Ohio St. 607; *Indiana County* v. *Agricultural Soc. of Indiana County*, 85 Pa. 357; *Allegheny County* v. *Gibson*, 90 Pa. 397.

The Washingtonian Home is not a private corporation within the meaning of the constitutional clause referred to.

Chicago, D. & V. R. Co. v. *Smith*, 62 Ill. 268, 14 Am. Rep. 99; *Prettyman* v. *Tazewell County Supvrs.* 19 Ill. 406, 71 Am. Dec. 230; *Firemen's Benev. Asso.* v. *Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115; *Johnson* v. *Stark County*, 24 Ill. 75; *Perkins* v. *Lewis*, 24 Ill. 208; *Butler* v. *Dunham*, 27 Ill. 474; *Keithsburg* v. *Frick*, 34 Ill. 405; *Taylor* v. *Thompson*, 42 Ill. 9; *McLean County* v. *Humphreys*, 104 Ill. 378; *Mather* v. *Ottawa*, 114 Ill. 659; *Wetherell* v. *Devine*, 116 Ill. 631; *Cook County* v. *Chicago Industrial School for Girls*, 125 Ill. 540, 1 L. R. A. 437; *Wagner* v. *Rock Island*, 146 Ill. 139, 21 L. R. A. 519; *Burd Orphan Asylum* v. *Upper Darby School Dist.* 90 Pa. 35; *Episcopal Academy* v. *Philadelphia*, 150 Pa. 565; *Philadelphia* v. *Masonic Home of Pennsylvania*, 160 Pa. 572, 23 L. R. A. 545; *Donohugh* v. *Library Co. of Philadelphia*, 86 Pa. 306; *McDonald* v. *Massachusetts Gen. Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Gooch* v. *Association for Relief of Aged Indigent Females*, 109 Mass. 558; 2 Pom. Eq. Jur. §§ 1019–1025; *Shepherd's Fold* v. *New York*, 96 N. Y. 137; *Speer* v. *Blairsville School Directors*, 50 Pa. 150; *Brodhead* v. *Milwaukee*, 19 Wis. 625, 88 Am. Dec. 711; Cooley, Const. Lim. 6th ed. pp. 559 *et seq.*

The legislature, having incorporated the Washingtonian Home as a public charity, had the right to endow it from the public treasury.

Sawyer v. *Alton*, 4 Ill. 127; *Mason* v. *Wait*, 5 Ill. 134; *Munn* v. *People*, 69 Ill. 80; *Hawthorn* v. *People*, 109 Ill. 302, 50 Am. Rep. 610; *Coles* v. *Madison County*, 1 Ill. 120; *People* v. *Wren*, 5 Ill. 269; *Richland County* v. *Lawrence County*, 12 Ill. 1; *People* v. *Power*, 25 Ill. 187; 1 Dill. Mun. Corp. § 35; *People* v. *Moon*, 4 Ill. 125; *Shaw* v. *Dennis*, 10 Ill. 405; *Gutzweller* v. *People*, 14 Ill. 142; *Dennis* v. *Maynard*, 15 Ill. 477; *Pike County Comrs.* v. *State*, 11 Ill. 202; *Sangamon County Supvrs.* v. *Springfield*, 63 Ill. 66; *Logan County Supvrs.* v. *Lincoln*, 81 Ill. 156; *Harris* v. *Whiteside County Supvrs.* 105 Ill. 445, 44 Am. Rep. 808; *Marion County* v. *Lear*, 108 Ill. 343; *Firemen's Benev. Asso.* v.

NOTE.—For *note* on the question when constitutional provisions are self-executing, see *note* to Willis v. St. Paul Sanitation Co. (Minn.) 16 L. R. A. 281.

For state institutions as distinguished from private corporations, see *note* to State v. Board of Regents (Kan.) *ante*, 378.

See also 33 L. R. A. 137, 554; 34 L. R. A. 393; 38 L. R. A. 591.

Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; *McLean County* v. *Humphreys*, 104 Ill. 378.

The legislation in question was a valid exercise of the police power of the state.

4 Chitty's Bl. Com. 162; Cooley, Const. Lim. 203, 704; *Hawthorn* v. *People*, *supra*; *Dennehy* v. *Chicago*, 120 Ill. 627; *Wilson* v. *Chicago Sanitary Dist. Trustees*, 133 Ill. 443; *Marion County* v. *Lear*, *supra*; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Thorpe* v. *Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Donoghue* v. *Philadelphia County*, 2 Pa. 230; *Kensington Comrs.* v. *Philadelphia County*, 13 Pa. 76; *Allegheny County* v. *Gibson*, 90 Pa. 397, 35 Am. Rep. 670; *Darlington* v. *New York*, 31 N. Y. 164, 88 Am. Dec. 248; *Ely* v. *Niagara County Supvrs.* 36 N. Y. 297; *Folsom Bros.* v. *New Orleans*, 28 La. Ann. 936; *Street* v. *New Orleans*, 32 La. Ann. 577; *Underhill* v. *Manchester*, 45 N. H. 215; *Chadbourne* v. *Newcastle*, 48 N. H. 196.

A license is not a tax; therefore the decisions holding that a corporate tax cannot be perverted from corporate purposes have no application.

People v. *Thurber*, 13 Ill. 554; *East St. Louis* v. *Wehrung*, 46 Ill. 392; *Lovingston* v. *Board of Trustees*, 99 Ill. 564; *East St. Louis* v. *Trustees of Schools*, 102 Ill. 489, 40 Am. Rep. 606; *Craw* v. *Tolono*, 96 Ill. 261, 36 Am. Rep. 143; *Illinois Mut. F. Ins. Co.* v. *Peoria*, 29 Ill. 180; *Ducat* v. *Chicago*, 48 Ill. 172, 95 Am. Dec. 529; *Walker* v. *Springfield*, 94 Ill. 372; *Gutzweller* v. *People*, 14 Ill. 142; *Pike County Comrs.* v. *State*, 11 Ill. 202; *Richland County* v. *Lawrence County*, 12 Ill. 1; *Firemen's Benev. Asso.* v. *Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115; *People* v. *Power*, 25 Ill. 187; *Sangamon County Supvrs.* v. *Springfield*, 63 Ill. 66; *Benevolent Asso. of Paid Fire Dept.* v. *Farwell*, 100 Ill. 197; *Dennehy* v. *Chicago*, 120 Ill. 627.

The city consented to the appropriation of the fund in question to the Washingtonian Home.

Chicago, R. I. & P. R. Co. v. *Joliet*, 79 Ill. 39; *Chicago, B. & Q. R. Co.* v. *Quincy*, 136 Ill. 498; *People* v. *Salomon*, 54 Ill. 41; *People* v. *Farnham*, 35 Ill. 562; *Roby* v. *Chicago*, 64 Ill. 447; *Martel* v. *East St. Louis*, 94 Ill. 69; *Chicago & N. W. R. Co.* v. *West Chicago Park Comrs.* 151 Ill. 204, 25 L. R. A. 300; *Booth* v. *Wiley*, 102 Ill. 106; *Searing* v. *Butler*, 69 Ill. 578; *Choisser* v. *People*, 140 Ill. 21; *Connett* v. *Chicago*, 114 Ill. 239; *Cairo & St. L. R. Co.* v. *Sparta*, 77 Ill. 505; *Richland County* v. *Lawrence County*, 12 Ill. 1; *People* v. *Logan County Supvrs.* 63 Ill. 374; *Gaddis* v. *Richland County*, 92 Ill. 119; *Owners of Lands* v. *People*, 113 Ill. 296; *Strosser* v. *Ft. Wayne*, 100 Ind. 451; *Valparaiso* v. *Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *People* v. *Maynard*, 15 Mich. 470; *People* v. *Lothrop*, 24 Mich. 235; *Rumsey* v. *People*, 19 N. Y. 41; *Lanning* v. *Carpenter*, 20 N. Y. 447.

Mr. **S. P. Shope**, with *Messrs.* **Harry Rubens** and **Sigmund Zeisler**, for appellee:

The Washingtonian Home is a private corporation.

Morawetz, Priv. Corp. 2d ed. § 3; *Dartmouth College Trustees* v. *Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *Rundle* v. *Delaware & R. Canal*, 1 Wall. Jr. 290; *Sweatt* v. *Boston, H. & E. R. Co.* 3 Cliff. 339; Waterman, Corp. § 17; *Louisville* v. *Louisville University Trustees*, 15 B. Mon. 642; *People* v. *McAdams*, 82 Ill. 356; *Cleaveland* v. *Stewart*, 3 Ga. 291; Walker, American Law, 7th ed. 226, 227; *Harward* v. *St. Clair & M. Levee & D. Co.* 51 Ill. 130; *Harward* v. *People*, 51 Ill. 138; *Hessler* v. *Drainage Comrs.* 53 Ill. 105.

The Constitution of 1870 repealed section 7 of the Washingtonian Home Act.

Phillips v. *Quick*, 63 Ill. 445; *People* v. *Maynard*, 14 Ill. 419; *Hills* v. *Chicago*, 60 Ill. 86; *Chance* v. *Marion County*, 64 Ill. 66; *Concord* v. *Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. ed. 628; *Cook County* v. *Chicago Industrial School for Girls*, 125 Ill. 540, 1 L. R. A. 437.

The legislature is powerless to impose a tax upon a city without its consent. A law creating a corporate debt without the consent of the municipality is unconstitutional.

Marshall v. *Silliman*, 61 Ill. 218; *Choisser* v. *People*, 140 Ill. 21; *Chicago, B. & Q. R. Co.* v. *Aurora*, 99 Ill. 205.

The elements of an estoppel against the city are entirely wanting.

Logan County Supvrs. v. *Lincoln*, 81 Ill. 156; Bigelow, Estoppel, 4th ed. p. 445; 7 Am. & Eng. Encyclop. Law, pp. 17, 18; *Chicago, R. I. & P. R. Co.* v. *Joliet*, 79 Ill. 40; *Chicago & N. W. R. Co.* v. *People*, 91 Ill. 251.

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

This was a petition for mandamus brought by the Washingtonian Home of Chicago against the city of Chicago to compel the city to pay to the petitioner $25,000,—10 per cent of moneys received for licenses granted by the city for the right or privilege to sell spirituous liquors from January 1, 1893, to April 1, 1894. To the petition the city of Chicago interposed a general demurrer, which the court sutained, and the petition was dismissed. To reverse the judgment of the circuit court the petitioner appealed.

The petitioner is a corporation organized under an act of the legislature approved February 16, 1867. That act was set out in the petition, sections 1 and 2 of which are as follows:

"Sec. 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that the Washingtonian Home Association of Chicago is hereby created, and declared to be a body corporate and politic, under the name of 'The Washingtonian Home of Chicago,' with power to sue and be sued, plead and be impleaded, contract and be contracted with; to take, by gift, grant, devise or otherwise, property, real, personal and mixed, and the same to hold, use, lease, convey, mortgage and otherwise dispose of, for the purposes hereinafter mentioned; to adopt and use a corporate seal, and alter the same at pleasure; also to erect and maintain such buildings and other fixtures and conveniences as may be deemed requisite or necessary for the purposes of this corporation.

"Sec. 2. The object of this incorporation shall be the founding and maintenance of an institution for the care, cure, and reclamation of inebriates."

Section 3 authorized the corporation to adopt such by-laws for the management of the institution as it thought proper.

Sections 4 and 5 are as follows:

"Sec. 4. Fifteen of the directors of said home, to be selected by lot, shall hold their office until the third Monday of January, A. D. 1869, and the remaining fifteen until the third Monday of January, A. D. 1871; and on the second Monday of January, A. D. 1869, and biennially thereafter, said corporation shall elect successors in place of those whose term of office shall expire the Monday thereafter, who shall, respectively, hold their offices for two years, and until their successors shall have been elected; and in case of removal, death, or resignation of any one or more of said directors or their successors before the expiration of their term of office, their place may be filled by said remaining directors; and such person or persons shall hold their office until the next biennial election. Seven of said directors shall constitute a quorum for the transaction of business.

"Sec. 5. Any person sentenced by the authorities of the city of Chicago to the Bridewell or house of correction for intemperance, drunkenness, or for any misdemeanor caused thereby, may, with the consent of the proper officers of said home, be received and detained as an inmate of said home in lieu of the Bridewell or house of correction, until the expiration of such sentence; and when any such person has been committed to the city Bridewell or house of correction for any such misdemeanor caused by intoxication or for drunkenness, either justice of the police court may, with the consent aforesaid, cause him to be transferred to said home for the unexpired term of sentence."

Section 7 provides:

"Sec. 7. It shall be the duty of the treasurer of the county of Cook and the treasurer of the city of Chicago, or of the officers of either into whose hands the same may come or be paid, to pay over to said corporation in quarterly installments, for the support and maintenance of said institution, 10 per cent of all moneys received for all licenses granted by authority of said county or city for the right or privilege to vend or sell spirituous, vinous, or fermented liquors within the said county of Cook and city of Chicago."

Section 7 was amended by an act in force July 1, 1883, providing that in no case shall the sum so paid for or during any one year exceed $20,000.

It is alleged in the petition that, immediately after the act went into effect, petitioner perfected its organization, and at once proceeded to carry out the objects of its incorporation, and has continued its organization and continued to carry out the objects of its organization; that, since its organization up to the present time, petitioner has cared for and treated in its said institution not less than 18,000 inebriates, large numbers of whom have, by reason of such care and treatment, been cured and reclaimed from their unfortunate habits of drunkenness and inebriety.

That, of the above number of inebriates so cared for and treated by petitioner as aforesaid, a large number, to wit, about 3,865 thereof, were persons sentenced by the authorities of said city of Chicago to the Bridewell or house of correction of said city, for intemperance, drunkenness, or for misdemeanors caused thereby, who, with the consent of the proper authorities of said home, were received and maintained as inmates of the home in lieu of the Bridewell until the expiration of such sentence. It is also alleged in the petition that from the time of petitioner's organization until July 1, 1883, the treasurer of the city of Chicago paid to it, in quarterly installments, for its support and maintenance, 10 per cent of all moneys received for licenses to sell spirituous liquors within the city. That after the said amendatory act went into force, to wit, after July 1, 1883, the treasurer of the said city of Chicago continued to pay over to petitioner, in the manner hereinbefore stated, in quarterly installments, for the support and maintenance of its aforesaid institution, 10 per cent of all moneys received by him as such treasurer as aforesaid for all licenses granted by authority of said city of Chicago, not exceeding $20,000 in any one year, up to and including the quarterly installment due on the 1st day of January, 1893. That since January 1, 1893, the city treasurer has refused to make any payments.

It is claimed on behalf of the city of Chicago that section 7 of the Act of 1867, which requires the city to pay to the home 10 per cent of all moneys received for licenses to sell spirituous liquors, and the amendatory Act of 1883, whereby the amount was limited to $20,000 per annum, are unconstitutional and void; that the section and amendment violate that clause of the Constitution of 1870 which reads as follows: "No county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation: Provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same had been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." It will be observed that this provision of the constitution prohibits cities and other municipal corporations from making donations or loaning their credit in aid of any private corporation; and the first question to be considered is whether the Washingtonian Home is a private corporation, within the meaning of the constitution. As has been seen, the 2d section of the Act creating the home declares the object of the corporation to be the founding and maintenance of an institution for the care, cure, and reclamation of inebriates. The charter contains nothing prohibiting the corporation from making such charges for the care or cure of patients as it may think best; but, on the other hand, section 3 confers the power to adopt such by-laws as it may think proper for the management of its business. The charter does not specify who the incorporators shall be, but

the 1st section of the charter declares the Washingtonian Home Association of Chicago to be a body corporate and politic. Who constituted the association or what was the qualification of members when it was created a corporation is not disclosed by this record. Section 4 provides that fifteen directors, to be selected by lot, shall hold office until the third Monday of January, 1869, and the remaining fifteen until the third Monday of January, 1871; but the act is silent as to who shall elect the first board of directors. The act nowhere prescribes how any person can become a member of the corporation, nor is there any provision in regard to the salary of officers or directors. So far as appears, the persons who composed the Washingtonian Home Association of Chicago when the act was passed were clothed with corporate power, under which they might transact the business mentioned in the act for their own private benefit. At all events, no state control over the institution is provided for, nor has Chicago or Cook county any voice in its control or management. The corporation has the right to acquire and hold property, both real and personal, but the state has no voice in the management or control of the property thus acquired, or in the mode or manner in which the institution shall be managed or conducted. The act makes no provision for any report to be made by the institution to the state or any of its officials. Indeed, no provision whatever is made for an inspection or visitation of the institution in behalf of the state or by any state officer, but the entire supervision and control seem, under the charter, to be intrusted to private individuals. No officer or manager of the corporation is elected by the people or appointed by the state. The institution owes no duty to the public or the state.

Is such a corporation a public one, or is it a private corporation, within the meaning of the constitution? A brief reference to a few authorities will demonstrate, as we think, that the corporation is a private one. Morawetz, Priv. Corp. 2d ed. § 3, says: "By another classification corporations have been divided into public corporations and private corporations. The difference between these two classes of corporations is radical, and hence they are in many instances governed by widely different principles of law. Private corporations are associations formed by the voluntary agreement of their members, such as banking, railroad, and manufacturing companies. Public corporations are not voluntary associations at all, and there is no contractual relation between the corporators who compose them; they are merely government institutions, created by law for the administration of the public affairs of the community. States, counties, and municipalities are examples of public corporations." In *Dartmouth College Trustees* v. *Woodward*, 17 U. S. 4 Wheat. 668, 4 L. ed. 667, *Justice* Story, in pointing out the distinction between private and public corporations, said: "Public corporations are generally esteemed such as exist for public purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government, for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is in the strictest sense, a public corporation. So an hospital created and endowed by the government for general charity. But a bank whose stock is owned by private persons is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases the uses may, in a certain sense, be called public, but the corporations are private,—as much so, indeed, as if the franchises were vested in a single person. This reasoning applies in its full force to eleemosynary corporations. An hospital founded by a private benefactor is, in point of law, a private corporation, although dedicated by its charter to general charity. So a college founded and endowed in the same manner, although, being for the promotion of learning and piety, it may extend its charity to scholars from every class in the community, and thus acquire the character of a public institution. This is the unequivocal doctrine of the authorities; and cannot be shaken but by undermining the most solid foundations of the common law. . . . When the corporation is said, at the bar, to be public, it is not merely meant that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control, and direct the corporation, and its funds and its franchises, at its own good will and pleasure." Waterman, Corp. § 17, says: "A corporation is private when the whole interest does not belong to the government, or the corporation is not created for the administration of political or municipal power. A chartered religious society is a private corporation. A corporation may be private and yet the charter contain provisions of a purely public character introduced solely for the public good, and as a general police regulation of the state." See also *Louisville* v. *Louisville University Trustees*, 15 B. Mon. 642; *People* v. *McAdams*, 82 Ill. 356; *Cleaveland* v. *Stewart*, 3 Ga. 283. Under the rule declared in the authorities cited, it is plain that the Washingtonian Home is nothing more than a private corporation.

The Constitution of 1848 contained no provision prohibiting cities from making donations to private corporations, and, if the legislature conferred the power upon cities, no reason is perceived why that power might not be exercised. But conceding that section 7 of the Act of 1867, under which the Washingtonian Home was incorporated, was constitutional when enacted, the question

then arises how that act was affected by the constitutional provision of 1870, which prohibits cities from making donations to private corporations. It will be observed that the act does not authorize the city to make a contract with the home under which persons sentenced to the Bridewell for intemperance, drunkenness, or for any misdemeanor caused thereby, may be taken into the home, and retained for such time as they may have been sentenced for treatment or for any other purpose; but the act, by its terms, is mandatory on the city, and compels it to pay over $20,000 per annum in quarterly installments to the home for its support and maintenance. The petition for mandamus is not predicated on any contract existing between the city and the home, but the right to require the payment of the fund is predicated on the provisions of the Act of 1867, and upon those provisions alone. It is set out in the petition that during the years 1892 and 1893, and up to the time the petition was filed, in 1894, the amount received by the city from licenses has not been less than $2,000,000 per annum, so that 10 per cent received for licenses each year is far in excess of $20,000, so that the amount the home seeks to compel the city to pay over has become a fixed and definite sum; and it is a matter of no moment whether the money demanded by the home comes from liquor licenses received by the city into its treasury, or from funds in the treasury raised by taxation. Under the Act of 1867, the city was required to pay over to the home each year, from its revenues derived from liquor licenses, 10 per cent of the amount received, not exceeding $20,000, for the support and maintenance of that institution. This was required as a donation. By the terms of the section of the constitution, *supra*, such donation was prohibited; and, whatever may have been the obligation imposed upon the city by the Act of 1867 before the Constitution of 1870 was adopted, after the adoption of the constitution the city had no power or authority to donate any of its revenues derived from liquor licenses or from any other source to a private corporation. It declares: "No county, city, town, etc., shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation." This provision of the constitution required no legislation to place it in full force and effect. It was, like some other provisions of the constitution, self-executing, and operated as a paramount law from the time the constitution was adopted by the people. *Phillips* v. *Quick*, 63 Ill. 445; *Hills* v. *Chicago*, 60 Ill. 86; *Chance* v. *Marion County*, 64 Ill. 66. In the case first cited, it is said: "But it may be said that constitutional provisions require legislation to carry them into effect. This is true in many cases, but not in all, as will occur to every person on a moment's reflection. In cases where its provisions are negative or prohibitory in their character, they execute themselves. Where that instrument limits the power of either of the departments of the government, or where it prohibits the performance of any act by an officer or person, no one would contend that the power might be exercised or the act performed until prohibited by the general assembly. The constitution undeniably has as much vigor in prohibiting the exercise of power or the performance of an act as the general assembly. That body could add to the prohibition penalties and forfeitures if the constitutional prohibition should be disregarded, but the prohibited act would, nevertheless, be void. Where the constitution requires the performance of an act, but provides neither officers, the means, or the mode in which the act shall be performed, in such a case there is no other means of carrying such a provision into effect but by appropriate legislation. In such cases the constitution does not execute such provisions. That instrument, all will concede, may repeal, and does repeal, laws which are repugnant to its provisions. The very first section of the schedule declares that all laws in force at the adoption of the constitution, and not inconsistent with its provisions, shall continue to be as valid as if the constitution had not been adopted. This, by implication, says that all that conflict therewith shall be invalid and of no force. In fact, this provision preserves rights of the state and of individuals that would have otherwise been lost. The understanding with all persons is that a law passed either before or after the adoption of the constitution which is repugnant to its provisions must be held to be of no valid force, and precisely as if it had been repealed before the performance of the act." This question is discussed in *Cook County* v. *Chicago Industrial School*, 125 Ill. 540, 1 L. R. A. 437, and, among other things, it is there said (566): "If, on the one side, a statute directs the county board to pay money to a school which appears, not on the face of the statute, but from outside proof, to be controlled by a church, and if, on the other side, the constitution, in a self-executing provision, directs the county board not to pay money to such a school, which direction is to be followed? We answer, unhesitatingly, the latter. When the constitution says, 'You must not pay,' it must be obeyed in preference to a statute which says, 'You must pay.' And this is true, not only where the statute on its face is in conflict with the constitutional provision, but also in a case where an attempt to apply the statute to a given state of facts gives rise to a violation of such provision. We are therefore of the opinion that, upon the facts of this case, the Act of May 28, 1879, imposes no obligation upon the county of Cook which is superior to its obligation to obey section 3 of article 8 of the Constitution." We do not think the constitution operated retrospectively. Under section 7 of the Act of 1867, the city was authorized to make an annual donation to the home; but, upon the adoption of the Constitution in 1870, all cities were thereafter prohibited from making donations to a private corporation. The donations made prior to the adoption of the constitution remained unaffected, but donations after that time were prohibited.

But it is insisted in the argument that as the city paid over this fund quarterly for a

period of over twenty years, as required by section 7 of the Act, and as the payment was recognized each year in the annual appropriation ordinances of the city, and as the city has received a substantial benefit each year in return, the city is bound by its ratification of the act, and is now estopped from denying its constitutionality. By the adoption of the Constitution in 1870, the 7th section of the Act of 1867 was repealed, and from that time it was nugatory; and the fact that the officers of the city for twenty-two years paid over to the home annually a portion of the revenue of the city, in violation of law, could not work an estoppel on the city; nor did the fact that the city council annually, in its appropriation ordinances, recognized and made provision for the payment of the fund to the home, estop the city from refusing payment at any time it might elect to do so. The revenues of the city of Chicago arising from licenses, from taxation, and from all other sources are owned by the city, and held by it in trust to be used for corporate purposes which are lawful, and the revenues of a city cannot be diverted to any other purpose. The revenues of a city cannot be donated by the officers of the city or by the city council to any person they may think entitled to the same; but, on the other hand, such revenues can only be paid out or appropriated by the city council or its officers in the manner and for the purposes authorized by law. Where the lawful power does not exist, the payment is unauthorized and void, and the city will lose no rights where the money has been unlawfully paid out by its officers. The city having no power to pay over its revenues to the home, the fact of payment for a series of years will not estop it. In *Logan County Supvrs.* v. *Lincoln*, 81 Ill. 156, in speaking in regard to estoppel *in pais*, it is said (159): "Before the doctrine of estoppel can be invoked, there must have been some positive acts by the municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done." An estoppel by matter *in pais* may be defined as an indisputable admission, arising from the circumstance that the party claiming the benefit of it has, while acting in good faith, been induced, by the voluntary, intelligent action of the party against whom it is alleged, to change his position. Bigelow, Estoppel, 2d ed. p. 345. "The other party must have been induced to act upon the representation or concealment. His action must have been of a character to result in substantial prejudice, were he not permitted to rely on the estoppel." 7 Am. & Eng. Encyclop. Law, pp. 17, 18. Here, so far as appears, the home was not induced to change its position, nor was it induced to do or not do anything on account of the payments which were annually made by the city of Chicago different from what it would have done if the city had never made any payments.

The judgment will be affirmed.

29 L. R. A.

See also 44 L. R. A. 561.

Ira BARCHARD *et al.*, *Appts.*,
v.
Josephine KOHN.

(157 Ill. 579.)

The lien of a chattel mortgage upon property exempt from execution is not waived by obtaining judgment upon the notes secured by the mortgage and levying upon the mortgaged property under execution thereon, although the exempt property is set off to the debtor as such; but such lien may be enforced by seizure and sale under the terms of the mortgage, in a jurisdiction where the mortgage creates only a lien and does not transfer the legal title, since there is no such inconsistency between remedies as there would be where the levy asserted title in the mortgagor while the enforcement of the mortgage claimed title in the mortgagee.

(October 11, 1895.)

APPEAL by defendants from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to recover damages for an alleged trespass in taking property claimed under a chattel mortgage. *Reversed.*

Statement by **Magruder, J.:**

This is an action of trespass, begun on April 14, 1891, by appellee against appellant Borrmann, a dry-goods merchant, and appellant Barchard, a constable, for the alleged unlawful taking and carrying away of a stock of goods claimed to be the property of appellee, and entering for that purpose into the store No. 931 West Eighteenth street in Chicago, on April 13, 1891, where the goods were then located. Three pleas were filed: The first, not guilty. The second, averring that plaintiff, Josephine Kohn, was the wife of William Kohn; that William Kohn was the owner of the goods and chattels on June 16, 1890, and on that day executed a chattel mortgage upon the same to the defendant Borrmann to secure $3,000, of which $2,000 remained unpaid at the time of the alleged trespass; that Borrmann, by his agent, Barchard, took possession of the property under said mortgage, and, in pursuance of its terms, the property was sold at public auction on May 2, 1891, for $421.40, an amount insufficient to pay what was due upon the mortgage. The third plea sets up that the entry into the premises was made in a quiet and peaceable manner, and without unnecessary damage, in order to take the goods under the mortgage. The trial in the circuit court was before the court and a jury, and resulted in verdict and judgment for $800 in favor of plaintiff. The judgment has been affirmed by the appellate court, and an order has been

NOTE.—On the general subject of election of remedies, see *notes* to Mills v. Parkhurst (N. Y.) 13 L. R. A. 472; Crossman v. Universal Rubber Co. (N. Y.) 13 L. R. A. 91; Terry v. Munger (N. Y.) 8 L. R. A. 216; Conrow v. Little (N. Y.) 5 L. R. A. 693; Fowler v. Bowery Sav. Bank (N. Y.) 4 L. R. A. 145.

made by that court certifying that the cause involves questions of law of such importance on account of collateral interests involved that it should be passed upon by the supreme court. The case is brought here by appeal from the judgment of the appellate court.

The material facts necessary to present the question involved are as follows: The chattel mortgage was given to secure twenty-nine notes executed by William Kohn to Borrmann, dated June 16, 1890, twenty-eight of which were each for $100, payable weekly thereafter, and the twenty-ninth was for $200, payable on March 1, 1891; so that all the notes had been due for some two weeks before the levy of the executions hereinafter named. The mortgage was not recorded until July 26, 1891, long after the present trespass suit was begun. On March 18, 1891, the mortgagor, William Kohn, executed two judgment notes,—one for $98.52, to D. Liebman, and one for $231.27, to A. Lewin & Sons. On the next day, March 19, 1891, judgments were entered up upon these notes, and executions issued and placed in the sheriff's hands, the sheriff receiving the Lewin execution at 10:55 A. M. and the Liebman execution at 11 A. M. of that day. On the same day the appellant Borrmann, learning of these judgments, caused judgment for $2,000 to be entered up upon eighteen of the notes secured by his chattel mortgage then remaining unpaid, and execution to be issued thereon, the sheriff receiving said execution at 4 o'clock in the afternoon of March 19, 1891. On the same day, and in the order in which they came to the hands of the sheriff, the three executions were levied upon the property included in the chattel mortgage. The next day, Kohn, the judgment debtor, presented a schedule, and asked to have his legal exemptions set off to him out of the property levied upon under the provisions of the exemption law of this state. 1 Starr & C. Anno. Stat. p. 1112, chap. 52, § 14. Appraisers were appointed, and on March 26, 1891, Kohn selected, and there was set off to him as exempt, property to the amount of $400, being a part of the property covered by the chattel mortgage. Subsequently the balance of the property levied upon, after taking out the exemptions, was sold under the executions, and out of the proceeds of the sale the Lewin and Liebman executions were paid in full, and the remainder of the proceeds was, on March 30, 1891, applied upon the execution of the appellant Borrmann, leaving still due to him upon his judgment about $950. It is claimed by appellee that her husband, William Kohn, owed her $250 when the executions were levied; that he paid $100 of this amount to her on March 19, 1891, and in payment of the remaining $150 turned over the exempt property, amounting to about $400, to her by first transferring it to one Adolph Cohen, who, on or about March 26, 1891, transferred it back to appellee. All instructions asked by the defendants submitting to the jury the question whether the property really belonged to the plaintiff were refused. It was this exempt property which the appellants took under the mortgage on April 13, 1891, for the purpose of satisfying *pro tanto* the $950 remaining due thereon, and which was sold, after the giving and posting of notice as required by the mortgage, at public auction, on May 2, 1891, as alleged in the pleas.

Mr. **Jesse Holdom** for appellants.

Messrs. **Moran, Kraus & Mayer,** for appellee:

Under the law of this state, a chattel mortgage is but a conditional sale, and when the mortgagor fails to perform the condition, the title to the mortgaged property, so far as it is held by the mortgagor, vests in the mortgagee.

Rhines v. *Phelps*, 8 Ill. 455; *Pike* v. *Colvin*, 67 Ill. 227; *Durfee* v. *Grinnell*, 69 Ill. 371.

The levy of the execution upon the mortgaged property on April 19, 1891, seven weeks after default had been made in the payment of the last note secured under the mortgage, was pursuing a course which was neither concurrent nor consistent with the assertion of any right under the mortgage.

Evans v. *Warren*, 122 Mass. 303; *Buck* v. *Ingersoll*, 11 Met. 226; *Swett* v. *Brown*, 5 Pick. 178; *Legg* v. *Willard*, 17 Pick. 140, 28 Am. Dec. 282; *Libby* v. *Cushman*, 29 Me. 429; *Whitney* v. *Farrar*, 51 Me. 418; *Kimball* v. *Marshall*, 8 N. H. 291; *Haynes* v. *Sanborn*, 45 N. H. 429; *Dyckman* v. *Sevatson*, 39 Minn. 132.

If one holding goods in pledge in the hands of an agent attach them for the same debt secured by the pledge, he thereby relinquishes the lien of his pledge.

Jones, Pledges, § 600; Jones, Chat. Mortg. § 565; *Butler* v. *Miller*, 1 N. Y. 496; *Hanchett* v. *Riverdale Distillery Co.* 15 Ill. App. 57.

Where a mortgagee permits the mortgagor to remain in possession until long after the maturity of the mortgage debt, a purchaser who buys the property from the mortgagor will hold it as against the mortgagee, even though said purchaser had actual notice of the mortgage.

Lemen v. *Robinson*, 59 Ill. 115; *McDowell* v. *Stewart*, 83 Ill. 538; *Sage* v. *Browning*, 51 Ill. 217; *Frank* v. *Miner*, 50 Ill. 444.

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

The question in the case is whether the appellant Borrmann, mortgagee in the chattel mortgage, had a right to take possession under his mortgage of the goods set off as exempt to William Kohn, the judgment debtor and mortgagor, or whether, by taking judgment upon the notes secured by the mortgage, and levying the execution issued thereon upon the mortgaged property, and allowing a part of the proceeds of the sale made under the executions to be applied upon the judgment, he thereby waived his right to proceed under his mortgage against the portion of the mortgaged property not sold under the executions, and set off as exempt to the judgment debtor. The question arises out of the ruling of the trial court excluding the chattel mortgage when offered by the defendants as a justification of the alleged trespass, and admitting it only in mitigation of damages, and also out of the action of the court in instructing the jury that as a matter of law the

chattel mortgage did not justify the defendants in seizing the goods in question. As the mortgage was not recorded, and provided for the sale of the goods mortgaged in the ordinary course of business, it was void as to creditors, but it was good as between the parties to it. *Gregg* v. *Sanford*, 24 Ill. 17, 76 Am. Dec. 719; *Forest* v. *Tinkham*, 29 Ill. 141; *McDowell* v. *Stewart*, 83 Ill. 538; Jones, Mortg. 4th ed. § 138; *Greenebaum* v. *Wheeler*, 90 Ill. 296; *William Deering & Co.* v. *Washburn*, 141 Ill. 153.

The main case which holds that an attachment of the mortgaged property by the mortgagee for the mortgage debt is a waiver of his lien under the mortgage is *Evans* v. *Warren*, 122 Mass. 303. The decision in that case was placed upon the ground substantially that the liens created by mortgage and by attachment upon the same property are essentially different, and cannot coexist, for the reason that under the Massachusetts statutes the equity of redemption of personal property is not subject to attachment, and hence, if the mortgagee causes an attachment to issue against the mortgaged property, it is a waiver of the mortgage lien. The cases which hold that the attachment operated as a waiver of the plaintiff's rights under the mortgage do so upon the general grounds that a person cannot avail himself of inconsistent remedies in relation to the same matter, and, having chosen and carried into effect one remedy, he cannot resort to a different one, involving a repudiation of the grounds upon which the first one was based; that the suit on the mortgage and the attachment suit were inconsistent, because the one proceeds upon the ground that the mortgagee is the owner of the property, and the other upon the ground that the mortgagor thereof is owner; that when the debt matured the mortgagee had the right to take the property under the mortgage, he having the legal title, subject only to a right of redemption; and that by bringing the attachment suit he elected to treat the property as the property of the debtor, and cannot, by seeking to enforce his mortgage, assert an ownership and right of possession in himself antedating the attachment. The reasoning in *Evans* v. *Warren*, *supra*, was held to be unsatisfactory, and its doctrine was repudiated in *Byram* v. *Stout*, 127 Ind. 195. In the latter case the mortgagee in a chattel mortgage brought an action to foreclose it; and a junior mortgagee set up as a defense that the complainant had previously brought suit upon the evidences of debt secured by his mortgage, and had therein issued a writ of attachment, and levied it upon the mortgaged property, and had thereby released his mortgage lien; but the court held that the attachment was not a waiver of the mortgage lien, and did not estop the mortgagee from claiming under his mortgage, basing its decision mainly upon the ground that in Indiana the mortgagee in a chattel mortgage is a mere lien holder. Jones, Mortg. § 565. In support of the conclusion that the mortgagee of personal property is a mere lien holder, Indiana decisions are there referred to, holding that personal property under mortgage may be levied upon and sold by execution subject to the mortgage lien. The case of *Howard* v. *Parks*, 1 Tex. Civ. App. 603, follows the case of *Byram* v. *Stout*, *supra*, holding that a mortgage lien upon personal property is not waived by suing out an attachment upon the debt secured by the mortgage, and that in Texas a chattel mortgage has the effect of a lien on the property.

There can be no doubt that the chattel mortgage act of Illinois recognizes a lien as existing under the mortgage upon the property mortgaged. Section 1 thereof speaks of a mortgage, trust deed, or other conveyance of personal property "having the effect of a mortgage or lien upon such property." 2 Starr & C. Anno. Stat. p. 1630. We have held that a court of equity has jurisdiction to foreclose a chattel mortgage. *McCauley* v. *Rogers*, 104 Ill. 578; *Dupuy* v. *Gibson*, 36 Ill. 197; *Gaar* v. *Hurd*, 92 Ill. 315. A bill in equity could not be filed to foreclose such a mortgage, unless a lien was thereby conferred which could be enforced against the property. If, therefore, an attachment of the mortgaged property in a suit upon the debt secured by the chattel mortgage is not a waiver of the right to proceed under the mortgage where the mortgage is a lien upon the property, such an attachment will not be a waiver in this state when the subsequent proceeding, begun to enforce the mortgage, is a bill in equity to foreclose. In such case there is no inconsistency between the two remedies, as both certainly recognize the mortgagor as owner. Where a chattel mortgage is properly acknowledged and recorded, a third person, who is a creditor of the mortgagor, may levy an attachment or an execution upon the property in the possession of the mortgagor subject to the mortgage. *Beach* v. *Derby*, 19 Ill. 617; *Pike* v. *Colvin*, 67 Ill. 227; *Durfee* v. *Grinnell*, 69 Ill. 371. We have also held that a chattel mortgage is a conditional sale; that when there is default in the performance of the condition the title of the mortgagor vests in the mortgagee; and that the mortgagee, upon default or condition broken, being invested with the legal title, may bring replevin or trover, or reduce the property to possession, and proceed to sell under the power in the mortgage. *Pike* v. *Colvin* and *Durfee* v. *Grinnell*, *supra*; *Cleaves* v. *Herbert*, 61 Ill. 126; *Simmons* v. *Jenkins*, 76 Ill. 479; *Arnold* v. *Stock*, 81 Ill. 407; *Greenebaum* v. *Wheeler*, 90 Ill. 296; *Rhines* v. *Phelps*, 8 Ill. 455.

But even in this class of remedies the inconsistency relied upon as the basis of the theory of waiver is more seeming than real. In *Howard* v. *Parks*, *supra*, which was a statutory action for the trial of the right of property, in which it was sought to foreclose and enforce a contract lien upon personalty, the court says: "We are of opinion that . . . this lien was not waived by suing out an attachment upon the debt secured by such lien. We see no such inconsistency in the two suits as that the suing out of the attachment should have this effect." In the case at bar there was no attachment of the property covered by the chattel mortgage in the proceeding upon the note secured thereby. The property was levied upon under

an execution issued upon a judgment entered upon the note so secured. There can be no substantial difference, however, between taking the property under execution after judgment and taking it under an attachment before judgment. If there is no inconsistency between the enforcement of the mortgage lien and an attachment of the property, there can be none between the enforcement of such lien and the levy of an execution upon the property. The chattel mortgage here provides that, in case of default in payment, or in any of the other conditions of the mortgage, the mortgagee shall have the right to take immediate possession of the property, and may sell the same, and out of the proceeds of sale, after paying the costs and debt secured, shall render the surplus, if any, to the mortgagor. Although the naked legal title, after condition broken, vests in the mortgagee for the purpose of obtaining possession and applying the proceeds of the sale of the property to the payment of the debt, yet the requirement that the surplus proceeds be paid to the mortgagor shows that the absolute and exclusive ownership is not in the mortgagee. On the contrary, this requirement indicates that even the enforcement of the mortgage by seizure and sale under the power therein contained proceeds upon the idea that the rights of an owner still remain with the mortgagor to a certain extent.

It has long been the doctrine of this court in regard to real-estate mortgages, that the mortgagee may sue upon the note secured by the mortgage, or bring ejectment on condition broken, or file a bill in chancery to foreclose, and that he may pursue these remedies either concurrently or successively. *Fish* v. *Glover*, 154 Ill. 86, and cases there cited. In such cases, reducing the debt to judgment does not release the mortgage. It merely changes the form of the debt, so that the mortgage then becomes a security for the payment of the judgment. The judgment on the note without satisfaction is no bar to a proceeding in equity to foreclose, and the two suits may be pending at the same time. The lien of the debt secured by the mortgage attaches to the mortgaged property, and, as between the parties, can only be defeated by the payment or discharge of the debt, or by the release of the mortgage. *Ibid.* It has never been regarded as an objection to the prosecution of ejectment at law and of foreclosure in equity at the same time against the mortgagor of realty that the one proceeds upon the theory of title in the mortgagee and the other upon the theory of title in the mortgagor. Notwithstanding their apparent inconsistency, they may proceed concurrently until the debt secured is satisfied, it being always understood that there can be but one satisfaction. The rule that a mortgagee may proceed concurrently with an action on his note and with lawful proceedings to foreclose his mortgage applies to mortgages of personal property as well as to mortgages of real estate. *Burtis* v. *Bradford*, 122 Mass. 129.

The holder of a chattel mortgage, after default, has three remedies, any one or two or all of which he may pursue concurrently,—an action at law to recover the debt, an appropriate action to recover the mortgaged property, and a foreclosure of the mortgage. Herman, Chat. Mortg. § 206; 2 Cobbey, Chat. Mortg. § 947. In the case of chattels, as well as of realty, a personal judgment on the note secured by the mortgage is no bar to a subsequent suit to foreclose the mortgage, and the mortgagee does not lose his right to the mortgaged property if he seizes it on execution under the judgment. 2 Cobbey, Chat. Mortg. §§ 944, 1018. The mortgage, being a specific lien, and the judgment a general lien, may be pursued consistently until the debt is satisfied. The doctrine of election does not apply in such cases. Pingrey, Chat. Mortg. § 1027; *Tyson* v. *Weber*, 81 Ala. 470. The authorities which sustain the doctrine of waiver as above stated "depend upon a mere legal technicality, and not upon any principle in equity." *Byram* v. *Stout*, *supra*. In *Stier* v. *Harms*, 154 Ill. 476, where the main point decided was that replevin and trespass for the wrongful taking of goods under a distress warrant were analogous, consistent, and concurrent remedies the case of *Dyckman* v. *Sevatson*, 39 Minn. 132, was cited as illustrating the general doctrine that, where there are two inconsistent remedies, the selection of one will preclude the right to pursue the other; yet it was not intended to hold that the remedies here under discussion of attachment and foreclosure are inconsistent. Moreover, it is difficult to reconcile them with the decision of this court in *Atkins* v. *Byrnes*, 71 Ill. 326. In that case the action was replevin, brought by the holder of a junior chattel mortgage, who had suffered the mortgaged property to remain in the hands of the mortgagor long after the mortgage debt had matured, against the bailiff, who had taken possession of the property under a distress warrant issued by the holder of a prior chattel mortgage, after the debt thereby secured had been overdue an unreasonable length of time. It was held that, although both mortgagees had been guilty of laches, yet, as against each other, under the circumstances, the one first acquiring possession was entitled to priority; that, although the defendant took the property as bailiff under the distress warrant, yet his possession was legally that of the prior mortgagee, for whom he was acting; that the prior mortgagee did not thereby release any lien which he had upon the property by virtue of his chattel mortgage; that, consequently, he could subject the property, except as against third persons whose interests had attached before the property was taken, to the payment of either or both liens; and that the execution of a note for rent due and a chattel mortgage to secure its payment does not operate as a waiver of the right to enforce payment by distress. If the holder of a chattel mortgage, given to secure a note for rent due does not waive his mortgage lien by causing the property to be seized under a distress warrant issued for the rent, then it would seem to follow that the mortgage lien is not waived when the mortgagee causes the property to be taken under an execution upon the judgment obtained in a suit upon the note secured by the mortgage. The lien of the

execution is no different from the lien of the distress warrant in its effect upon the right to enforce the mortgage lien.

In the case at bar the mortgaged goods were *in custodia legis*, when Borrmann's execution came into the sheriff's hands, because they had theretofore been levied upon under the executions issued upon the judgments in favor of Liebman and Lewin & Sons. Borrmann's execution lien was subject to the prior liens of the two other executions. The property set off to Kohn as exempt was set off as exempt from the levy of the three executions. So far as the proceeds of the sale of the mortgaged property levied upon were applied upon Borrmann's execution, his chattel mortgage was to that extent satisfied. But the execution did not take effect against the property set off as exempt. That property was released from the lien of the execution. It was not sold and applied upon the execution, and did not operate as a satisfaction *pro tanto* of the judgment into which the mortgage note had been merged. In *Conway* v. *Wilson*, 44 N. J. Eq. 457, which was a bill to foreclose a chattel mortgage, the answer set up that the complainant had sued at law on the claim secured by his mortgage, recovered judgment, issued execution, levied on the mortgaged property and other property, and then had directed the sheriff to surrender the goods levied upon to the defendant, and the sheriff did so; and it was claimed from these facts that the complainant, having once had a levy on goods enough to satisfy his demand, his demand would be presumed to be satisfied; but it was held that, although such was the general rule, it could not apply when the defendant himself had received the goods, and retained them. Where property is not taken from the possession of the defendant, or is restored to him at his request, the levy does not operate as a satisfaction, so far as his rights are concerned. Freeman, Judgm. 4th ed. § 475; *Hanness* v. *Bonnell*, 23 N. J. L. 159. Hence, if the mortgaged property levied upon by Borrmann had been surrendered to and retained by Kohn, it would not have affected the right of Borrmann to proceed against it under his mortgage. We cannot see why that right was in any way affected by the fact that the property was, upon the application of the debtor, set off as exempt. In *Tuesley* v. *Robinson*, 103 Mass. 558, 4 Am. Rep. 575, a chattel mortgage covering property exempt by law was held to be fraudulent as against creditors, but good as between the parties; and upon the bankruptcy of the mortgagor the property was set apart by the assignee as excepted from the operation of the bankruptcy act. It was held that the right of the mortgagee to hold the property as security under his mortgage was not waived or affected by the debtor's discharge in bankruptcy, and that he was entitled to replevy from the mortgagor the property so set off to him. In *Sumner* v. *McKee*, 89 Ill. 127, where the mortgagor in a chattel mortgage died before the note secured thereby had matured, and the mortgagee failed to take possession at its maturity, and the widow relinquished her claim to the articles mentioned in the appraisement of her specific allowance, and in lieu thereof elected to take all the articles of personalty inventoried and appraised, including the goods mortgaged, as a creditor of the estate, it was held that she took them subject to the lien of the mortgage. In case of a chattel mortgage the owner waives the benefit of the exemption so far as the encumbrance is operative. Thompson, Homesteads & Exemptions, § 741. It is questionable whether, as between Borrmann and Kohn, the latter was entitled to have the property set off as exempt from the levy of Borrmann's execution. Borrmann had the right, under his mortgage, to take possession of the property and sell it. There could be no material difference in selling it under the mortgage and directing the sheriff to sell it under the execution and apply the proceeds *pro tanto* towards the payment of the execution. "Where personal property otherwise exempt from execution has been pledged as collateral security for the payment of a debt, and judgment has been rendered on the debt, an execution may be issued, and the property seized and sold thereon as in other cases." *Jones* v. *Scott*, 10 Kan. 33. "Where, by the terms of a chattel mortgage, the mortgagee, at the maturity of his debt, has the right to take possession of the property, he may, if he choose, reduce his debt to judgment, take out execution, and levy upon and sell the mortgaged property as in other cases; in which case the debtor sustains no such injury as will support an action of trespass, even though the chattels thus mortgaged be the articles enumerated by law as exempt from execution." *Frost* v. *Shaw*, 3 Ohio St. 270; Thompson, Homesteads & Exemptions, § 742; Herman, Chat. Mortg. § 207. We are inclined to think that the lien of the mortgage upon the property not sold under the execution was not waived by the proceedings under the execution, and that the court below erred in refusing to admit the mortgage in evidence as a justification of the act of taking possession of the property, and in instructing the jury as follows: "The court instructs you as a matter of law that the defendant Borrmann lost the benefit of any lien which he may have had upon any of the property in question under the chattel mortgage in evidence by the entry of the judgment by him against William Kohn, and by the levy of the execution issued thereon, as shown by the evidence; and that, as a matter of law, the chattel mortgage did not justify the defendants in seizing the goods in question, and it is your duty to find the defendants guilty."

The judgments of the Appellate and Circuit Courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

PENNSYLVANIA SUPREME COURT.

Thomas DURKIN
v.
KINGSTON COAL CO. *et al.*, *Appts.*

(171 Pa. 193.)

1. **The constitutional right to acquire, possess, and protect property** prevents making a man liable for the acts and engagements of strangers over whom he has no control.
2. **The imposition of liability on a mine owner** by the Act of 1891, art. 17, for the failure of a certified foreman, whom he is compelled to employ, and with whose acts he cannot interfere, and whose duties are prescribed by the act, to comply with those duties, is unconstitutional and void.
3. **A mine foreman is personally liable** for his negligence causing injury to a workman in the mine, either under the Act of 1891, permitting only certified foremen to be employed and regulating their duties, or without regard to such statute.

(October 7, 1895.)

APPEAL by defendants from a judgment of the Court of Common Pleas for Luzerne County in favor of plaintiff in an action brought to recover damages for personal injuries received by plaintiff while working in the mine of the defendant corporation of which the defendant Jones was the superintendent. *Reversed as to the corporation. Affirmed as to Jones.*

The facts are stated in the opinion.

Messrs. **William C. Price** and **H. W. Palmer** for appellants:

A mine boss, under the Act of March 3, 1870, is a fellow servant with a driver boy employed to haul coal from the chambers of the mine.

The operator of a coal mine fulfils the measure of his duty to his employés if he commits his work to careful and skilful bosses and superintendents, who conduct the same to the best of their skill and ability.

Waddell v. *Simoson*, 112 Pa. 567.

In the absence of constitutional prohibition, legislation of this character cannot be sustained.

Millett v. *People*, 117 Ill. 294, 57 Am. Rep. 869; Cooley, Const. Lim. 1st ed. p. 391; *Budd* v. *State*, 3 Humph. 483, 39 Am. Dec. 189; *Wally* v. *Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *People* v. *Marx*, 99 N. Y. 377, 52 Am. Rep. 34.

This action is brought under the statute which gives the action against the operator for negligence of the boss. Such an action cannot be sustained without the aid of the statute. But the bosses are joined in the suit. The statute gives no action against them. If they are liable to fellow servants for injuries arising from their negligence, it would be in a common-law action joined with one for statutory negligence.

Kendrick v. *Chicago & A. R. Co.* 81 Mo. 521; *Smith* v. *Meanor*, 16 Serg. & R. 377.

Messrs. **Edward A. Lynch** and **John T. Lenahan**, for appellee:

Anthracite mining being a separate and distinct class of mining from any other kind, and as the Act of 1891 includes all anthracite coal mines in the commonwealth, and does not make special provisions for the regulation of some and the exclusion of others, it is clearly constitutional under the principle that the fundamental law permits legislation for classes but not for persons or things of a class.

Wheeler v. *Philadelphia*, 77 Pa. 351; *Kilgore* v. *Magee*, 85 Pa. 401; *Lackawanna Twp., Harris' App.* 160 Pa. 494.

If a law is general and uniform throughout the state, operating alike upon all persons and localities of a class or who are brought within the rules and circumstances provided for it, it is not objectionable as wanting a uniformity of operation.

Reading v. *Savage*, 124 Pa. 328; *State* v. *Berka*, 20 Neb. 375; *State* v. *Hawkins*, 44 Ohio St. 98; *Allen* v. *Pioneer Press Co.* 40 Minn. 117, 3 L. R. A. 532; *State* v. *Hudson*, 44 Ohio St. 137; *McAunich* v. *Mississippi & M. R. R. Co.* 20 Iowa, 388.

To make such general regulations for the good government of the state and the protection of the rights of individuals as may be deemed important, all contracts and rights are subject to the power.

Cooley, Const. Lim. 3d ed. p. 574; *State* v. *Noyes*, 47 Me. 211; *Powell* v. *Com.* 114 Pa. 294, 60 Am. Rep. 350; *Com.* v. *Vrooman*, 164 Pa. 306, 25 L. R. A. 250; *Wright* v. *Com.* 77 Pa. 470; *New York* v. *Williams*, 15 N. Y. 502.

In a long line of adjudicated cases this police power of the state stands unchallenged, so that now it has become the accepted law of all the states of our Union.

Thorpe v. *Rutland & B. R. Co.* 27 Vt. 148, 62 Am. Dec. 625; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527; *State* v. *Noyes*, 47 Me. 211; *State* v. *Yopp*, 97 N. C. 477; *Dabbs* v. *State*, 39 Ark. 353, 43 Am. Rep. 275.

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

The first article of the constitution of this state, known as the "Bill of Rights," declares that all men are possessed of certain inherent and inalienable rights. One of these is the right to acquire, possess, and protect property. The preservation of this right requires, both that every man should be answerable for his own acts and engagements, and that no man should be required to answer for the acts and engagements of strangers over whom he has no control. A statute that should impose such a liability, or that should take the property of one person and give it to another or

NOTE.—The above case is believed to be the first of the kind, as the statute condemned differs from others which have made employers liable to employés for acts of fellow servants in the particular that it attempts also to create the relation of master and servant between the mine owner and a person whom he does not voluntarily employ.

For other statutory regulations for protection of workers in mines, see *note* to Consolidated Coal & M. Co. v. Floyd (Ohio) 25 L. R. A. 848.

See also 40 L. R. A. 812; 45 L. R. A. 616.

to the public, without making just compensation therefor, would violate the bill of rights, and would be, for that reason, unconstitutional and void. *Harvey* v. *Thomas*, 10 Watts, 66, 36 Am. Dec. 141; *Ervine's App.* 16 Pa. 265, 55 Am. Dec. 499; *Kneass' App.* 31 Pa. 87; *Wolford* v. *Morgenthal*, 91 Pa. 30; *Godcharles* v. *Wigeman*, 113 Pa. 431. It is in furtherance of the right to acquire, possess, and protect property that section 18 of the Bill of Rights prohibits the enactment of laws that shall interfere with or impair the obligation of contracts. The tendency toward class legislation for the protection of particular sorts of labor has been so strong, however, that several statutes have recently been passed that could not be sustained under the provisions of the bill of rights. Such was the case in *Godcharles* v. *Wigeman, supra;* such was the case with some recent provisions relating to mechanics' liens; and such is alleged by the appellants to be the case with some of the provisions of the Act of 1891 (Pub. Laws, p. 176), under which this action was brought. The title of the Act of 1891 is, "An Act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania and for the protection and preservation of property connected therewith." It divides the anthracite region into eight districts, and provides for the appointment by the governor of a competent mine inspector in each district, who shall have a general oversight of mining operations within his district. It creates an examining board for each district, with power to examine candidates, and recommend such as they shall deem qualified for the position of mine foreman to the secretary of internal affairs. It is made the duty of this officer to issue certificates to those who apply therefor and have been recommended by the board of examiners. Article 8, § 1, declares that no person "shall be permitted to act as mine foreman or assistant mine foreman of any coal mines or colliery" who has not been examined by the board of examiners, recommended to the secretary of internal affairs, and provided by that officer with a certificate. The employment of a certified mine foreman is made obligatory upon all mine owners and operators, and a failure to do so is punished by a fine of $20 per day, which may be collected from the owner, the operator, or the superintendent in charge of the mine. The duties of the mine foreman are prescribed by the act, and the owner or operator of the mine cannot interfere with them. He is especially to "visit and examine every working place in the mine at least once every alternate day while the men of such place are or should be at work, and direct that each and every working place is properly secured by props or timber, and that safety in all respects is assured by directing that all loose coal or rock shall be pulled down or secured and that no person shall be permitted to work in an unsafe place unless it be for the purpose of making it secure." The mine foreman is also required to examine, at least once every day, "all slopes, shafts, main roads, ways, signal apparatus, pulleys, and timbering, and see that they are in safe and efficient working condition." After having thus most effectually taken the management of his mining operations out of his hands and committed it to officers of its own creation, whose employment is made compulsory upon him, the statute, in section 8 of article 17, imposes upon the mine owner a liability for the neglect or incompetency of the men whom he is compelled to employ, in these words: "That for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any . . . mine foreman, a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby; and in case of loss of life by reason of such neglect or failure aforesaid a right of action shall accrue to the widow and lineal heirs of the person whose life shall be lost for like recovery of damages for the injury they shall have sustained." This statute, regarded as a whole, is an extraordinary piece of legislation. Through it the lawmakers say to the mine owner: "You cannot be trusted to manage your own business. Left to yourself, you will not properly care for your own employés. We will determine what you shall do. In order to make it certain that our directions are obeyed, we will set a mine foreman over your mines, with authority to direct the manner in which your operations shall be conducted, and what precautions shall be taken for the safety of your employés. You shall take for this position a man whom we certify to as competent. You shall pay him his salary. What he orders done in your mines you shall pay for. If, notwithstanding our certificate, he turns out to be incompetent or untrustworthy, you shall be responsible for his ignorance or negligence." Under the operation of this statute the mine foreman represents the commonwealth. The state insists on his employment by the mine owner, and, in the name of the police power, turns over to him the determination of all questions relating to the comfort and the security of the miners, and invests him with the power to compel compliance with his directions. Incredible as it may seem, obedience on the part of the mine owner does not protect him; but, if the mine foreman fails to do properly what the statute directs him to do, the mine owner is declared to be responsible for all the consequences of the incompetency of the representative of the state. This is a strong case of binding the consequences of the fault or folly of one man upon the shoulders of another. This is worse than taxation without representation. It is civil responsibility without blame, and for the fault of another. The same conclusion may be reached by another road.

It has been long settled that a mining boss or foreman is a fellow servant with the other employés of the same master, engaged in a common business, and that the master is not liable for an injury caused by the negligence of such mining boss. *Lehigh Valley Coal Co.* v. *Jones*, 86 Pa. 432; *Delaware & H. Canal Co.* v. *Carroll*, 89 Pa. 374; *Waddell* v. *Simoson*, 112 Pa. 567. The duty of the mine owner is to employ competent bosses or fore-

men to direct his operations. When he does this he discharges the full measure of his duty to his employés, and he is not liable for an injury arising from the negligence of the foreman. *Waddell* v. *Simoson, supra.* A vice principal is one to whom an employer delegates the performance of duties which the law imposes on him, and the employer is responsible because the duty is his own. As to the acts of the workmen, and the manner in which they do their work, the duty of the employer is to employ persons who are reasonably competent to do the work assigned them, and, if he finds himself mistaken in regard to their competency, to discharge them when the mistake is discovered. But he is not responsible for the consequences of their negligence as these may affect each other. *Ross* v. *Walker*, 139 Pa. 42. Now, the Act of 1891 undertakes to reverse the settled law upon this subject and declare that the employer shall be responsible for an injury to an employé resulting from the negligence of a fellow workman. Prior to the Act of 1891, the man whose negligence caused the injury was alone liable to respond in damages. He might not always have property out of which a judgment could be collected, but the plaintiff must, in any case, take his chances of the solvency of the defendant against whom his cause of action lies. The Act of 1891 undertakes to furnish a responsible defendant for the injured person to pursue. Passing over the head of the fellow servant at whose hands the injury was received, it fastens on the owner of the property on which the accident happened, and declares him to be the guilty person on whose head the consequences of the accident shall fall. To see the true character of this legislation we must keep both lines of objection in mind. We must remember that the injury complained of is due to the negligence of a fellow workman, for which the master is responsible neither in law nor morals. We must also remember that this fellow workman has been designated by the state, his duties defined and his powers conferred by statute, and his employment made compulsory, under heavy penalties, by the same statute. Finally, we must remember that it is the negligence of this fellow servant, whose competency the state has certified, and whose employment the state has compelled, for which the employer is made liable. The state says: "He is competent. You must employ him. You shall surrender to his control the arrangements for the security of your employés." It then says, in effect: "If we impose upon you by certifying to the competency of an incompetent man, or if the man to whom we commit the conduct of your mines neglects his duty, you shall pay for our mistake and for his negligence." We have no doubt that so much, at least, of section 8 of article 17 of the Act of 1891 as imposes liability on the mine owner for the failure of the foreman to comply with the provisions of the act which compels his employment and defines his duties, is unconstitutional and void. This disposes of this appeal so far as the Kingston Coal Company is concerned.

But why should the certified mine foreman be relieved from the consequences of his negligence? The jury have found that the injury was due to his want of attention to his proper duties, and his liability is clear, without regard to our mining laws. But the statute required him to examine the roads and ways in use in the mine each day. He knew the film of rock separating the upper from the lower working was but 8 feet thick, at best. He knew that the supports for this film were not in line with each other in the upper and lower workings. He knew that layers of the rock were falling off, that the thickness of the floor was reduced under the way on which the accident occurred to about 5 feet, and that, not far away, it had fallen down into the lower working; yet, with all this knowledge, he did nothing, so far as we can learn, to increase the security of the way. Whether his conduct be considered with reference to the statute, or regardless of it, his failure to do what he must have known to be necessary was a neglect of duty such as should render him liable to his fellow servant who has suffered from it. Some difficulty has been suggested, growing out of the pleadings, but the declaration is not before us. We cannot determine, therefore, whether an amendment is necessary in order to sustain the judgment against him.

We are not prepared to hold the Act of 1891 to be unconstitutional as a whole. It relates to all anthracite coal mines, and defines what shall be regarded as such mines. Coal may be taken out of the ground by farm owners for their own use, or it may be taken in such small quantities and for such local purposes as to make the application of the mining laws to the operations so conducted, not only unnecessary, but burdensome to the extent of absolute prohibition. Such limited or incipient operations are not within the mischief to remedy which the mining laws were devised. They are ordinarily conducted for purposes of exploration, or for family supply, and ought not to be classed with operations conducted for the supply of the public. The business of coal mining, like that of insurance or banking, may be defined by the legislature. The definition found in the Act of 1891 seems to us reasonable, to be within the fair limits of a legislative definition, and to exclude only such operations as are too small to make the general regulations provided by the act applicable to them. The ground on which we place our judgment is not, therefore, that the act is local, but that the provisions of it which we have considered are in violation of the bill of rights.

The judgment against the Kingston Coal Company is reversed for reasons that are fatal to a recovery against it.

The judgment against William Jones is affirmed.

CALIFORNIA SUPREME COURT.

H. M. LEVY
v.
SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO *et al.*

(105 Cal. 600.)

Compelling a person to disclose his possession of any property of a decedent's estate, or his knowledge concerning such estate, on penalty of imprisonment for refusal, in proceedings on behalf of the estate, being a remedial, and not a penal, proceeding, is not within the constitutional provisions against making any person a witness against himself in a criminal action, and against unreasonable searches and seizures.

(*McFarland and De Haven, JJ., dissent.*)

(January 6, 1895.)

APPLICATION for a writ of prohibition to stop further proceedings for the examination of petitioner on oath concerning property alleged to have belonged to the estate of Morris Hoeflich, deceased, and which petitioner was alleged to have concealed and disposed of. *Writ denied.*

The facts are stated in the opinion.

Messrs. **Byron Waters, I. B. L. Brandt,** and **Reddy, Campbell & Metson,** for petitioner:

Sections 1459 and 1460 of the Code of Civil Procedure, under which these proceedings were had, are unconstitutional.

Const. art. 1, §§ 13, 19; U. S. Const. 4th and 5th Amendments.

These sections provide for a penalty.

Andrews v. *Jones*, 3 Blackf. 444; *Tayloe* v. *Sandiford*, 20 U. S. 7 Wheat. 13, 5 L. ed. 384; *Astley* v. *Weldon*, 2 Bos. & P. 346; *United*

NOTE.—*Constitutional protection against being forced to furnish evidence to be used against one's self in a civil case.*

I. *Provisions against self-accusation.*
  a. *Limitation to criminal proceedings.*
  b. *Application to proceedings for penalties and forfeitures.*
  c. *General doctrine as to evidence against one's self.*
  d. *The contrary doctrine.*
  e. *Parties in interest.*
II. *Unreasonable searches and seizures.*
III. *Right of trial by jury.*
IV. *Due process of law.*
V. *Distinction between civil and criminal or penal proceedings.*

I. *Provisions against self-accusation.*

a. *Limitation to criminal proceedings.*

Constitutional provisions protecting a witness against being compelled to give evidence against himself extend, as will be seen from the cases set forth below in the latter part of this subdivision, to all evidence which could be used against him whether brought out in a civil or criminal proceeding, and are designed for his protection against such use, and refer, therefore, to the case in which the evidence is thus sought to be used as distinguished from that in which it is sought to be deduced. The term "civil case" as used in the heading of this note applies, therefore, to the case in which the evidence with reference to which constitutional protection is claimed, is sought to be or might be used, and this note does not include those cases which are very numerous, in which the constitutional protection was claimed in a civil action against furnishing evidence which tended to criminate one or render him liable to a criminal prosecution only; but the object of this note is to show what constitutional protection one has against being compelled to give evidence in any case which can be used against him in a civil case.

The provision of the Federal Constitution (Fifth Amendment), that no one shall be compelled in a criminal case to be a witness against himself, expressly limits the privilege to criminal cases, and the constitutions of a number of the states, notably New York, California, and Georgia, contain substantially the same provision, and those of a large number of the other states contain the same limitation though expressed in different language. Some of the constitutions, however, as, for example, those of Massachusetts, Mississippi, New Hampshire, and Virginia, provide that no person shall be compelled to give evidence against himself or to testify against himself. But, even under such provisions, the right to protection against giving evidence against one's self has been limited to criminal cases by a decided preponderance of authority.

This rule was expressly laid down in Judge of Probate v. Green, 1 How. (Miss.) 146 (1834).

And in Bull v. Loveland, 10 Pick. 9 (1830), it was held that a witness is not exempted from being compelled to produce a document in his possession under a *subpœna duces tecum* in a case in which the party calling him has a right to use it, or from examination, in a matter pertinent to the issue, by the provision of the Massachusetts bill of rights that no subject shall be compelled to accuse or furnish evidence against himself, when his answers will not expose him to criminal prosecution or tend to subject him to a penalty or forfeiture, although they may otherwise adversely affect his pecuniary interests.

And the seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself within the spirit and meaning of the constitutional provision. Boyd v. United States, 116 U. S. 616, 29 L. ed. 746 (1885).

So, in Devoll v. Brownell, 5 Pick. 448 (1827), it was held that one against whom an action was brought as trustee of another, in which a bill of sale from the latter to the former was disclosed, was bound to answer questions put to him in order to prove that the bill of sale was fraudulent as against creditors and that he had secreted the property, though he might thereby charge himself, the court saying that the constitutional provision that no subject shall be compelled to furnish evidence against himself does not relate to questions of property.

And in Keith v. Woombell, 8 Pick. 211 (1829), the court granted a motion for an order directing the defendant to leave the bond, for the possession of which the action was brought, with the clerk of the court for the inspection of the plaintiff, which was opposed upon the ground that by the constitution a subject could not be compelled to furnish evidence against himself, saying that had reference to criminal cases, and that the plaintiff, claiming an interest in the bond, was entitled to see it.

And in Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816 (1891), it was said that the constitutional provision that no person shall be compelled to accuse or furnish evidence against himself, should not have a different inter-

29 L. R. A.

See also 33 L. R. A. 227; 39 L. R. A. 269.

States v. *Chouteau*, 102 U. S. 611, 26 L. ed. 249; Century Dict. 4368; 2 Burrill, Law Dict. 286; 2 Stephen, Com. 159-162; 2 Story, Eq. Jur. §§ 1313-1326; Black, Law Dict. 884; *San Luis Obispo County* v. *Hendricks*, 71 Cal. 245; *United States* v. *Mathews*, 23 Fed. Rep. 74; *United States* v. *Utrici*, 3 Dill. 532; *People* v. *Nedrow*, 122 Ill. 363; *Grover* v. *Huckins*, 26 Mich. 482; Rapalje & Lawrence, Law Dict. 945; *Sidebottom* v. *Adkins*, 5 Week. Rep. 743; *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746; *Ex parte Gould*, 99 Cal. 360, 21 L. R. A. 751.

In no case or proceeding, the object of which is to procure evidence against a person, to enforce a penalty or secure a forfeiture of his goods or chattels, can the defendant or respondent be compelled to be a witness against himself.

2 Story, Eq. Jur. §§ 1319, 1434, 1509; 1 Pom. Eq. § 202; *Poindexter* v. *Davis*, 6 Gratt. 491; *Currier* v. *Concord R. Corp.* 48 N. H. 321; *Livingston* v. *Harris*, 3 Paige, 534.

Mr. **Henry E. Highton**, for respondents:

Sections 1458-1461, are analogous in extent and object to the power exercised by courts of chancery upon bills of discovery.

Mesmer v. *Jenkins*, 61 Cal. 151; *Selectmen of Boston* v. *Boylston*, 4 Mass. 318; *Fletcher* v. *Holmes*, 40 Me. 364.

The question of title to property is not involved.

Ex parte Casey, 71 Cal. 269; *Re Curry*, 25 Hun, 321; *Re Knittel*, 5 Dem. 371.

The sections are not penal, but remedial in nature.

Jahns v. *Nolting*, 29 Cal. 507.

The sections are not in conflict with any constitutional provision.

Re Strouse, 1 Sawy. 605; *Re Meador*, 1 Abb. (U. S.) 317.

As to the power of the legislature to make such order prima facie evidence of the right of the administrator to the property, or even to provide that the mere bringing of an action by the administrator to recover the possession thereof, shall be prima facie evidence of his right thereto, there can be no doubt.

Cooley, Const. Lim. 6th ed. 451, 452; *How-*

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pretation from that declaring that no person shall be compelled in a criminal case to be a witness against himself, the manifest purpose of all of the provisions being to prohibit the compelling of testimony of a self-criminating kind, and that the privilege is limited to criminal matters.

So, in Thurston v. Clark (Cal.) 40 Pac. Rep. 435 (1895), it was said that the constitutional provision that no one shall be compelled in a criminal case to be a witness against himself applies to all cases in which the action prosecuted is, not to establish, recover, or redress private and civil rights, but to try to punish persons charged with the commission of public offenses.

And in People v. Kelly, 12 Abb. Pr. 150 (1861), it was said that the constitutional exemption applies only when the trial or matter under investigation is criminal, and the statement was repeated in the decision on appeal in the same case, 24 N. Y. 74 (1861).

And in People v. Sharp, 107 N. Y. 427 (1887), and People v. Kelly, 24 N. Y. 74 (1861), it was said that if a witness objects to a question on the ground that an answer would criminate himself, he must allege in substance that his answer, if repeated as his admission on his own trial, would tend to prove him guilty of a criminal offense.

People v. Kelly, *supra*, and People v. Sharp, *supra*, together with Higdon v. Heard, and Wilkins v. Malone, set forth in *infra*, I. b, *Application to proceedings for penalties and forfeitures*, are said, in United States v. James, 60 Fed. Rep. 257, 26 L. R. A. 418 (1894), to have been expressly overruled by Counselman v. Hitchcock, *supra*, so far as they hold that the privilege is confined to evidence given in a criminal prosecution. See also, as to that question, cases set forth is a subsequent portion of this subdivision.

In *Re* Nickell, 47 Kan. 734 (1892), however, it was said that the language of section 10 of the Kansas Bill of Rights, that no person shall be a witness against himself, is, if anything, stronger than that of the Federal Constitution, and does not limit the right to criminal cases.

But the privilege is not confined to evidence given or required in criminal cases, but extends to all evidence called for in any trial, whether civil or criminal, which could be subsequently used against the witness.

This was directly held in Cullen v. Com., 24 Gratt. 624 (1873), of the Virginia constitutional provision that no one shall be compelled to give evidence against himself.

And in Wilkins v. Malone, 14 Ind. 153 (1860), it was held that Ind. Const., art. 4, § 14, providing that no person in any criminal prosecution shall be compelled to testify against himself, extends literally to criminal prosecutions only, and not to civil actions, but its spirit and intent protect a person from a compulsory disclosure in a civil suit of facts tending to criminate him whenever his answer could be given in evidence against him in a subsequent criminal prosecution.

And in Drake v. State, 75 Ga. 413 (1885), Ga. Const., art. 1, § 1, par. 6, providing that no person shall be compelled to give testimony tending in any manner to criminate himself, was held to mean that when a person is sworn as a witness in a case he shall not be compelled to testify to facts that may tend to criminate him.

So in Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816 (1891), it was said that the object of the provision of the Fifth Amendment to the Federal Constitution, that no person shall be compelled in a criminal case to be a witness against himself, was to insure that a person should not be compelled when acting as a witness in any investigation to give testimony which might tend to show that he had committed a crime. The privilege is as broad as the mischief against which it seeks to guard.

And in United States v. James, 60 Fed. Rep. 257, 26 L. R. A. 418 (1894), it is said that "since the Counselman Case, *supra*, it is admitted law that every person is protected by the Fifth Amendment against self-disclosure in any proceeding, civil or criminal, of such of his own acts as would subject either the act or any connected act to the dangers of incrimination."

And in Emery's Case, 107 Mass. 172, 9 Am. Rep. 22 (1871), it was said that the provision of the Massachusetts declaration of rights that no subject shall be compelled to accuse or furnish evidence against himself extends to all investigations of an inquisitorial nature instituted for the purpose of discovering crime or the perpetrators of crime by putting suspected parties upon their examination in respect thereto in any manner, although not in the course of any pending prosecution; and that any disclosure which would be capable of being used against the person making it as a confession of crime, or an admission of facts tending to prove the commission of an offense by him, in any prosecution then pending, or that might be brought against him therefor, is an accusation of himself within the meaning thereof.

ard v. *Moot*, 64 N. Y. 262; *State* v. *Cunningham*, 25 Conn. 195.

Van Fleet, *J.*, delivered the opinion of the court:

Morris Hoeflich died at the city and county of San Francisco in May, 1891, and Solomon Hoeflich was by the superior court of said city and county appointed administrator of his estate. Thereafter, on the ——— day of June, 1893, the administrator filed in said superior court a petition in the matter of said estate, averring, in substance, that it had come to his knowledge that said deceased was at and prior to his death a partner with one H. M. Levy, or engaged with said Levy jointly in a large number of transactions in stocks and mines in California and Nevada, and in other property, "the exact nature and extent of which transactions, and of the real and personal estate resulting therefrom, can be ascertained by an examination of the said H. M. Levy and other witnesses under oath, and by the production and examination of books of account, correspondence, checks, deeds, conveyances, bonds, contracts, and other writings and documents now in the exclusive possession of said H. M. Levy;" and also by the examination of other named persons, and documents, etc., in their possession. The petition further averred that said Levy has concealed, conveyed away, and disposed of moneys and property of said deceased, and has in his possession and within his knowledge deeds and other documents and writings "which contain evidences of and tend to disclose the right, title, interest, and claim of said deceased to real and personal property,"—portions of such property being particularly described The prayer was that said Levy be cited to appear before said court and undergo an examination under oath, together with such witnesses as might be then produced, touching all the matters set forth in the petition, "and especially touching his possession and knowledge of any and

So, in Poindexter v. Davis, 6 Gratt. 481 (1850), it was held that the rule that a party is not bound to answer interrogatories which may subject him to a penalty or forfeiture is not confined to cases brought for the purpose of enforcing a penalty or forfeiture, but extends also to cases in which the discovery would expose the party to some subsequent action or suit tending to the like result.

And in *Ex parte* Clarke, 103 Cal. 352 (1894), an insolvent debtor was held to be entitled to the immunity of Cal. Const., art. 1, § 13, providing that no person can be compelled in any criminal case to be a witness against himself, in a civil proceeding to examine him with reference to property which should have been turned over to the assignee and alleged to have been disposed of by him, when the facts alleged, if true, would render him guilty of a crime.

So Pennsylvania Act of January 11, 1879, authorizing the plaintiff in an execution, upon filing an affidavit that he believes the defendant owns property which he fraudulently conceals, and refuses to apply to the payment of his debts, to examine him on oath as to his property, conflicts with the Pennsylvania constitutional provision that no one shall be obliged to give evidence which may criminate him, as its design is to compel the debtor to reveal that which is made a misdemeanor by the Criminal Act of 1860. Horstman v. Kaufman, 97 Pa. 147, 39 Am. Rep. 802 (1881).

And champerty is an indictable offense and therefore a party to a champertous agreement, whether a party to the suit or not, cannot be compelled as a witness to make disclosures concerning the agreement which would tend to expose him to punishment or which might be used against him on a prosecution therefor. Douglass v. Wood, 1 Swan, 393 (1852).

So in Emery's Case, *supra*, the provision of the Massachusetts declaration of rights that no subject shall be compelled to accuse or furnish evidence against himself was held to apply to investigations ordered and conducted by the legislature or either of its branches.

b. *Applications to proceedings for penalties and forfeitures.*

At common law no person could be compelled to testify against himself, or compelled to answer any question which would have a tendency to expose him to a penalty or forfeiture, or form a link in a chain of evidence for that purpose as well as to criminate him. Higdon v. Heard, 14 Ga. 255 (1853); Benjamin v. Hathaway, 3 Conn. 528 (1821).

And a court of chancery will not compel a person to discover what may subject him to a penalty or forfeiture or to a loss in the nature of a forfeiture. Northrop v. Hatch, 6 Conn. 361 (1827); Vanderveer v. Holcomb, 17 N. J. Eq. 91 (1864); Higdon v. Heard, *supra*.

Or form a link in a chain of evidence for that purpose. Higdon v. Heard, *supra*.

So the common-law doctrine of protection against compulsory disclosures which will tend to subject the witness to a penalty or forfeiture is also asserted without placing it upon constitutional grounds, in State v. Talbott, 73 Mo. 347 (1881); Lister v. Boker, 6 Blackf. 439 (1843); Poindexter v. Davis, 6 Gratt. 481 (1850).

And in Johnson v. Donaldson, 18 Blatchf. 287 (1880), it was held that the defendant in an action to recover penalties and for the forfeiture of plates for the violation of a copyright under U. S. Rev. Stat. § 4965, cannot be compelled by *subpœna duces tecum* to produce his books of account and plates to be used in evidence against him, though the statute provides that no discovery or evidence obtained from a party or witness by means of a judicial proceeding shall be used against him in any criminal proceeding for the enforcement of a penalty or forfeiture, the proceeding in which it was sought being itself one for a penalty or forfeiture.

And in *Re* Dickinson, 58 How. Pr. 260 (1879), it was held that a county treasurer subpœnaed before a committee of the board of supervisors to answer interrogatories concerning moneys in his hands, pursuant to New York Laws of 1858, chap. 190, § 3, cannot be compelled to answer incriminating questions, though it is provided by section 9 thereof that such testimony shall not be used against him in the trial of any indictment or criminal prosecution, as it might be used in a proceeding for his removal for delinquency under the Act of 1877, which is not a criminal proceeding but a proceeding for the forfeiture of the office.

And when a note is transferred by the payee, and an action is brought upon it by the holder against the maker, and the payee is called as a witness by the maker for the pupose of showing that the note was usurious, he is privileged from answering questions designed to show the consideration for the note or any payment thereon to him, as under the statutes making the taking of usury a misdemeanor and imposing a penalty therefor the tendency of his answers might be to subject him to the penalty or an indictment therefor. Burns v. Kempshall, 24 Wend. 360 (1840), affirmed, Kempshall v. Burns, 4 Hill, 468 (1842).

all deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, and interest or claim of the decedent, Morris Hoeflich, to any real or personal estate, or any claim or demand whatsoever;" and that said Levy be required to produce all said deeds, conveyances, and other writings, books of account, etc., for inspection and examination. In response to a citation issued upon said petition, said Levy appeared and demurred, which demurrer being overruled, he filed a verified answer specifically denying all the material averments of the petition; denied that he had any property in which the deceased was interested, as a partner or otherwise, or that he had any documents or writings relating to any such property. He also filed written objections to any further proceedings in the matter of said examination; but the demurrer and the objections were overruled, and a day was set by the court for the examination. Thereupon said Levy filed his petition here, setting up these facts, upon which he makes this application for a writ of prohibition directed to said court, and the Honorable J. V. Coffey, judge thereof, commanding said respondents to refrain and desist from further proceeding with said contemplated examination. An alternative writ was issued, in response to which respondents have demurred and answered, and the matter has since been argued and submitted.

The proceedings in the superior court which are called into question by this application for prohibition were admittedly taken under and in pursuance of sections 1459 and 1460 of the Code of Civil Procedure, and these sections are as follows:

"Section 1459. If an executor, administrator, or other person interested in the estate of a decedent complains to the superior court, or a judge thereof, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of

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So the Minnesota statutory provision that a witness shall not be required to answer questions which will have a tendency to accuse himself of any crime or misdemeanor or expose him to any penalty or forfeiture is but a declaration of the law as it previously existed. State v. Bilansky, 3 Minn. 246 (1859).

And the same doctrine has been declared upon constitutional grounds and the constitutional provision held to apply to penalties and forfeitures.

Thus, in Livingston v. Harris, 3 Paige, 534 (1832), it was held to be inconsistent with the spirit of the constitution to compel a party to be a witness against himself in a case when the effect of the disclosure which he is required to make will tend to subject him to a penalty or forfeiture, and he may, in his answer in a proceeding for discovery, object to such matters.

And in Boyd v. United States, 116 U. S. 616, 29 L. ed. 746 (1885), and Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816 (1891), proceedings for penalties and forfeitures were spoken of as of a quasi criminal nature within the meaning of the provision of the Federal Constitution.

And that a witness is privileged from testifying, under the provision of the New York constitution that no one shall be compelled in a criminal case to be a witness against himself, to matters which may subject him to a penalty as well as to matters which may tend to criminate him, was held in Cloyes v. Thayer, 3 Hill, 564 (1842).

And the payee in a promissory note which has been transferred is privileged thereunder from testifying when called upon in an action brought upon the note by the holder against the maker to prove that it was given upon a usurious consideration, though the note was made prior to the enactment of the New York Act of May 15, 1837, making the taking of usury a misdemeanor and imposing a penalty therefor. *Ibid.*

So a witness or party called as a witness may not only object to testifying to the main fact which would subject him to a penalty or forfeiture, but may also refuse to disclose any one of a series of facts which together would expose him to such penalty or forfeiture. Henry v. Bank of Salina, 1 N. Y. 83 (1847), 3 Denio, 593, affirming Bank of Salina v. Henry, 2 Denio, 155.

Thus, a witness who is the debtor of a bank is privileged, under the provision of the New York constitution, against being compelled in a criminal case to be a witness against himself, from answering questions propounded to him, any of which would have formed a link in a chain of evidence tending to show that he had discounted the note upon which the action was brought, in violation of 1 N. Y. Rev. Stat., 595, § 28, concerning the discounting of notes by officers of corporations, imposing as a penalty therefor the forfeiture of the debt and twice its amount. *Ibid.*

And the New York Act of 1887, authorizing the calling an officer of a corporation to prove usury in the discount of a note, and excusing him from criminal prosecution therefor, does not deprive such witness of his constitutional exemption from being compelled in a criminal case to be a witness against himself, when under the law he might be subjected to a penalty or forfeiture therefor distinct and separate from the question of usury. *Ibid.*

But the offense created by the provisions of that act making the taking of usury a misdemeanor is not consummated until the usury is actually received and a mere agreement to receive it does not render the party indictable and does not bring him within the protection of the constitutional provision. Henry v. Bank of Salina, 5 Hill, 523 (1843).

So the defendants in a bill in equity for a discovery are not bound to disclose any matters in their answer which will expose them to penalties, and the provisions of New Hampshire Act of July 5, 1867, requiring such discovery, is in conflict with the provision of the constitution of that state that no person shall be compelled to accuse himself of crime or furnish evidence against himself. Currier v. Concord R. Corp. 48 N. H. 321 (1869).

And when a charge of misconduct is made against an officer, whether amounting to an indictable offense, or only to his discredit as such officer, which might furnish grounds for his removal or impeachment, he is protected by the 5th Amendment of the Federal Constitution against being compelled to be a witness against himself. United States v. Collins, 1 Woods, C. C. 439 (1873).

See also, as to disclosures which might be used in proceedings for removal of an officer. *Re* Dickinson, 58 How. Pr. 260 (1879), set forth, *supra*.

And in Trammell v. Thomas, 1 Harr. & McH. 261 (1767), it was held neither the sheriff nor his deputies can be compelled to give evidence tending to show that they had not given notice of an execution served by them in accordance with the return thereof made by them. But the decision was not placed on constitutional grounds.

the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where the decedent dies, or where letters have been granted, he may be cited and examined either before the superior court of the county where he is found, or before the superior court of the county where the decedent dies, or where letters have been granted. But if, in the latter case, he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

"Section 1460. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidences of or tending to disclose the right, title, interest, or claim of the decedent to any real or personal estate, claim, or demand, or any lost will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writ-

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And in Williams v. Lowndes, 1 Hall, 579 (1829), the question whether a deputy who makes a levy can be compelled to testify as to the identity of the execution in an action against the sheriff for a false return was raised but not decided.

The Indiana constitutional provision that no person in any criminal prosecution shall be compelled to testify against himself, however, has been held to apply to criminal prosecutions only, and not to extend to mere penalties and forfeitures. Wilkins v. Malone, 14 Ind. 153 (1860).

c. General doctrine as to evidence against one's self.

This subdivision is made up principally, if not entirely, from cases decided upon general principles of evidence without reference to constitutional provisions against self-accusation and which might therefore be regarded as not strictly within the scope of the note. But in view of the universal holding that the constitutional provisions apply only when the evidence sought would tend to subject the witness to a criminal prosecution or a penalty or forfeiture, they have been included with the design of showing the limits of the constitutional rule and what rules govern in civil cases.

By these cases the general doctrine is established by a preponderance of authority that the privilege of a witness to refuse to answer pertinent questions extends only to those the answers to which might criminate him or expose him to punishment. *Ex parte* Boscowitz, 84 Ala. 463 (1887); Calboun v. Thompson, 56 Ala. 166, 28 Am. Rep. 754 (1876); Hall v. State, 40 Ala. 698 (1867); Jones v. Lanier, 2 Dev. L. 480 (1830); Baird v. Cochran, 4 Serg. & R. 397 (1818); *Re* Doran, 2 Pars. Sel. Eq. Cas. 467 (1846); Robinson v. Neal, 5 T. B. Mon. 213 (1827); Miller v. Creyon, 2 Brev. 108 (1806); Zollicoffer v. Turney, 6 Yerg. 297 (1834); Lowney v. Perham, 20 Me. 235 (1841); Stewart v. Turner, 3 Edw. Ch. 458 (1841); Byass v. Sullivan, 21 How. Pr. 50 (1860); Byass v. Smith, 4 Bosw. 679 (1860).

Or subject him to a penalty or forfeiture. Baird v. Cochran and *Re* Doran, *supra;* Henry v. Bank of Salina, 1 N. Y. 83 (1847); *Re* Kip, 1 Paige, 601 (1829); Jones v. Lanier and Lowney v. Perham, *supra.*

Or something in the nature of a forfeiture of his estate or interest. Henry v. Bank of Salina and *Re* Kip, *supra.*

And that a witness may be compelled to give testimony pertinent to the issue which may tend to subject him to a pecuniary loss. Alexander v. Knox, 7 Ala. 503 (1845); Lowney v. Perham, 20 Me. 235 (1841); Hays v. Richardson, 1 Gill & J. 366 (1829); Ward v. Sharp, 15 Vt. 115 (1843).

Or a civil liability. *Re* Strouse, 1 Sawy. 605 (1871); *Re* Danforth, 1 Pa. L. J. 31 (1870); Naylor v. Semmes, 4 Gill & J. 273 (1832); Judge of Probate v. Green, 1 How. (Miss.) 146 (1834); Hemphill v. McBride, 12 Smedes & M. 620 (1849).

Or which will establish or tend to establish that he owes a debt recoverable in a civil action. Zollicoffer v. Turney, 6 Yerg. 297 (1834); Henry v. Bank of Salina, 1 N. Y. 83 (1847); Burnett v. Phalon, 11 Abb. Pr. 157, 19 How. Pr. 530 (1860); Stewart v. Turner, 3 Edw. Ch. 458 (1841); Hays v. Richardson, *supra;* Copp v. Upham, 3 N. H. 159 (1825).

Or is otherwise subject to a civil suit. Henry v. Bank of Salina, Stewart v. Turner, Burnett v. Phalon, and Jones v. Lanier, *supra;* Taney v. Kemp, 4 Harr. & J. 348, 7 Am. Dec. 673 (1818); Alexander v. Knox, 7 Ala. 503 (1845); Gorham v. Carroll, 3 Litt. (Ky.) 221 (1823); Com. v. Thurston, 7 J. J. Marsh. 62 (1831); Planters' Bank v. George, 6 Mart. (La.) 670, 12 Am. Dec. 487 (1819); Copp v. Upham, *supra.*

Or which may be used against him in a civil suit. *Re* Kip, 1 Paige. 601 (1829).

And he cannot be excused on the ground that the verdict may be used as evidence against him in some other civil proceeding then pending or which might thereafter be instituted. Hays v. Richardson, 1 Gill & J. 366 (1829).

Or because his testimony might injuriously affect his own interests. Miller v. Creyon, 2 Brev. 108 (1806); Robinson v. Neal, 5 T. B. Mon. 213 (1827); Baird v. Cochran, 4 Serg. & R. 397 (1818); Stevens v. Whitcomb, 16 Vt. 121 (1844); Stoddert v. Manning, 2 Harr. & G. 147 (1828); French v. Price, 24 Pick. 13 (1833); Com. v. Willard, 22 Pick. 476 (1838); Harper v. Burrow, 6 Ired. L. 30 (1845).

A witness who is not a party is not privileged, and cannot be excused from testifying upon the ground that he has an interest in the matter in controversy which he may be in danger of prejudicing by his testimony. Robinson v. Neal, *supra;* Black v. Crouch, 3 Litt. (Ky.) 226 (1823); Conover v. Bell, 6 T. B. Mon. 157 (1827).

No interest short of being the real party will excuse him from giving testimony. Stevens v. Whitcomb, 16 Vt. 121 (1844).

Thus, the plaintiff in an action for seduction may be compelled to testify as to alleged previous acts of unchastity with others, where fornication is not punishable except civilly. Love v. Masoner, 6 Baxt. 24, 32 Am. Rep. 522 (1873).

And the plaintiff, in an action for debauching and enticing away his wife, may be compelled to testify on examination as a witness before trial with reference to allegations in the answer that the wife was

ing signed by the party examined, and filed in the court. The order for such disclosure made upon such examination shall be prima facie evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side."

Petitioner contends that these provisions of the code are unconstitutional and void, and that the proceeding in the superior court is, therefore, without warrant of law. His position is that they are obnoxious to several features of the constitution of the state, and more particularly to section 3 of article 1, which provides that "no person shall . . . be compelled in any criminal case to be a witness against himself;" and to section 19 of the same article, which provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated." These two provisions of the constitution are of well-understood significance; they involve like principles, and, in considering the objection made, may be regarded as one. The argument of petitioner is that the sections of the code referred to are distinctly penal in character, and contemplate a proceeding which is in its essential nature criminal, within the meaning of the above provisions of the constitution; that, being a criminal proceeding, petitioner is protected by the constitution from being compelled to testify against himself, or submit his books and papers in evidence.

There is no question that, if petitioner's premises are correct, his conclusion follows

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compelled to leave him by reason of his cruel and inhuman treatment and immoral conduct in bringing a lewd woman into his home for immoral purposes. Taylor v. Jennings, 7 Robt. 581 (1867).

And a railway conductor, charged with receiving money for fares of passengers for which he has not accounted, may be required to state the condition of his property at the commencement and close of his service, to be weighed with the other evidence in the case, unless the court can see that it would furnish a link in a chain of circumstances tending to accuse him of crime. State v. Farmer, 46 N. H. 200 (1865).

And one who purchased intoxicating liquor may be required to testify thereto on an indictment for the illegal sale thereof when the buying is not made a criminal act. Com. v. Kimball, 24 Pick. 366 (1837); Com. v. Willard, 22 Pick. 477 (1838); State v. Rand, 51 N. H. 361, 12 Am. Rep. 127 (1871).

Nor can a witness refuse to give testimony against the defendant in an action because the defendant is his debtor, and his testimony by establishing the plaintiff's claim would diminish the funds out of which his claim might be satisfied. United States v. Grundy, 7 U. S. 3 Cranch, 343, 2 L. ed. 461 (1806).

So, one of several coheirs of lands descended from an intestate may be called as a witness by the defendant in an action brought for the recovery thereof, and required to testify against the other coheirs where he is not a party to the suit. Nass v. Vanswearingen, 7 Serg. & R. 192 (1821).

And a person called as a witness for the plaintiff cannot refuse to testify upon the ground that he will be required to disclose facts which will show that he was a partner in the transaction out of which the cause of action arose, and that he is equally liable with the defendant to the plaintiff. Zollicoffer v. Turney, 6 Yerg. 297 (1834).

And an attorney employed by parties served, who entered an appearance for all the defendants including parties not served, is a competent witness in a subsequent action for contribution brought by those served against those not served, and the fact that his evidence may disclose matter which will support a civil action against him is no excuse for not testifying. Cox v. Hill, 3 Ohio, 412 (1828).

And the payees in several notes given by an agent for the purchase of goods for the purposes of a voyage are competent witnesses, and may be compelled to testify in an action brought by one of the vendors for the use of himself and other vendors, against the persons interested in the voyage, in behalf of the defendants, as to whether or not the vendors had knowledge that other persons besides the agent were interested in the purchase. French v. Price, 24 Pick. 13 (1833).

So a witness in a bankruptcy proceeding may be compelled to answer a question in the regular line of the investigation concerning transactions with the bankrupt, though the examination may establish a liability on his part to the bankrupt's estate. *Re* Stuyvesant Bank, 6 Ben. 33 (1872).

And a witness who is assignee of certain claims due from the bankrupt cannot refuse to testify before the register in the bankruptcy proceeding on the ground that the consideration did not come from the bankrupt or his estate, and that to answer would be revealing his private business to his prejudice in another case. *Re* Trask, 7 Ben. 60 (1873).

And the wife of a bankrupt, summoned as a witness in a bankruptcy proceeding, may be required to produce a letter from her half-brother accompanying a gift of money with which a house contracted for by her husband was in part paid for. *Re* Schonberg, 7 Ben. 211 (1874).

Neither can a witness be excused from testifying against a sheriff, on a motion against him, on the ground that he is one of his sureties, where he is not a party on the record. Garey v. Frost, 5 Ala. 636 (1843).

Nor can the security of a defaulting sheriff into whose hands the sheriff's books have fallen withhold them, on a bill for a discovery, upon the ground that the disclosure might subject him to suits, but will be compelled to produce them. Hawkins v. Sumter, 4 Desauss. Eq. 103 (1810).

And a security on the bond of a deceased insolvent sheriff, who has obtained possession of the sheriff's books, may be compelled to produce them in evidence by *subpœna duces tecum* in an action between third persons, though he is apprehensive of danger to himself from their disclosure. *Ibid.*

So a stockholder in a bank may be compelled to testify in behalf of the plaintiff in an action against the bank, though his evidence may injuriously affect his interests as such stockholder. *Dictum* in City Bank v. Bateman, 7 Harr. & J. 104 (1826).

And a witness, who is an officer of a corporation, cannot refuse to furnish documentary evidence in a judicial proceeding, on the ground that it might criminate the corporation under the interstate commerce law, as corporations are not liable criminally or exposed to penalties or forfeitures thereunder. *Re* Peasley, 44 Fed. Rep. 271, 3 Inters. Com. Rep. 333 (1890).

necessarily. But his construction of the provisions in question cannot be sustained. These provisions have received a construction at the hands of this court directly at variance with that put upon them by petitioner. Sections 1458–1461 of the Code of Civil Procedure were, prior to the adoption of the codes, a part of the old Probate Act, as sections 116–119; they are a part of the same article, and relate to the same subject, which is expressed in the title as "Embezzlement and surrender of property of the estate." In the case of *Jahns* v. *Nolting*, 29 Cal. 507, this court had occasion to construe section 116 of the Probate Act (now section 1458, Code Civ. Proc.) upon the very feature now involved. That was an action by an administrator to recover property belonging to the estate of his decedent, which he alleged had been embezzled by defendant and converted to his own use. The lower court held that the action was brought under section 116 of the Probate Act, which alone gave plaintiff a remedy for the wrong; that the statute was penal in its nature, and that the plaintiff was bound to prove the embezzlement as alleged, or fail in his action. Judgment having gone against him, the plaintiff appealed, and in disposing of that question the court said: "The position that section 116 affords the exclusive remedy for embezzling and alienating the effects of the deceased, intermediate the death of the deceased and the grant of administration, cannot be maintained, unless that section can be held to be a penal statute. . . . The distinctions between penal and remedial statutes are not always clearly marked, nor are the authorities quite harmonious where statutes very similar in their purpose and general terms have been under review. A penal statute is one that imposes a penalty or creates a forfeiture as the punishment for the neglect of some duty, or the commission of some wrong,

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And the plaintiff in an action for breach of covenant of warranty of title to land, the breach consisting of the taking of the timber therefrom, who has testified in his own behalf that without the timber it was worth but 10 cents per acre, may be asked on cross-examination if he has not been offered $1 per acre for it, as tending to show the bias of the witness. Clark v. Zeigler, 85 Ala. 154 (1887).

And in Ragland v. Wickware, 4 J. J. Marsh. 530 (1830), which was an action against a sheriff for an alleged illegal seizure, a person who had previously warranted the title of the property seized was held to be compellable to testify, but the decision was placed upon the ground that he would not be liable on his warranty.

The refusal of the court below, however, to compel a witness to answer, who refuses on the ground that it might subject him to a civil liability, is not a ground for reversal on appeal, where the answer would have been irrelevant or inadmissible. Naylor v. Seemes, 4 Gill & J. 273 (1832).

And even if a witness is to be regarded as privileged from answering questions against his interest, the privilege would extend only to refusing to answer particular questions, and would not justify a refusal to testify at all. Judge of Probate v. Green, 1 How. (Miss.) 146 (1834); Hemphill v. McBride, 12 Smedes & M. 620 (1849).

d. *The contrary doctrine.*

The contrary doctrine, that a witness cannot be compelled to testify against his own interests, has been adopted, and seems to remain the rule of conduct in Connecticut.

This was held in Storrs v. Wetmore, Kirby (Conn.) 203 (1787); Starr v. Tracey, 2 Root, 528 (1797); and Benjamin v. Hathaway, 3 Conn. 528 (1821).

And in Benjamin v. Hathaway, *supra*, it was held that a sheriff cannot be compelled to give evidence for the purpose of falsifying his return, the sheriff being liable by statute for a false return, the court saying that in its opinion the result would be the same if the effect of the testimony were merely to subject the witness in debt.

And in Treat v. Browning, 4 Conn. 408, 10 Am. Dec. 156 (1822), holding a certificate of the good character of another, given several years before by a witness who testified on the trial that his character was below the common level, was admissible in evidence, the court said that if there had been any inconsistency between the certificate and the evidence the witness should have claimed his privilege of exemption from testifying in disparagement of himself, but that the evidence was not subject to objection by the party seeking to impeach such person's character.

But a witness is not privileged from testifying where he voluntarily acquired an interest after the interest of the party in his testimony was acquired; but he cannot be compelled to divulge matters coming to his knowledge after he became interested. Simons v. Payne, 2 Root, 406 (1796).

And one who executes a promissory note in behalf of another, and afterwards gives bond conditioned that his principal will prosecute an appeal from a judgment on the note, cannot refuse to testify in behalf of the payee of the note as to its execution on the ground that it would be against his interest, as he voluntarily assumed that interest after the payee acquired an interest in his testimony, and did not acquire it in the common course of business for his own profit. Phelps v. Riley, 3 Conn. 266 (1820).

So there are also a number of cases from other states and jurisdictions, mostly of an early date, holding, either directly or by implication, substantially the same rule as the Connecticut cases. But though not expressly mentioned, it would seem that all, or nearly all, of them must be regarded as overruled by subsequent inconsistent decisions.

Thus, in Bank of United States v. Washington, 3 Cranch, C. C. 295 (1828), it was held that a bookkeeper of a bank cannot be compelled to answer a question, in an action by the bank for an overdraft paid by mistake, the answer to which if given might render him liable for the loss.

And in *Re* Hill, 6 Ct. Cl. 83 (1870), it was held that a witness should not be required to answer a question which in his opinion relates to another suit in which he is claimant, and not to the suit on trial, unless assurance is given to the court that it is intended to elicit testimony relevant to the issue.

But see United States v. Grundy, *Re* Stuyvesant Bank, *Re* Trask, and *Re* Schonberg, set forth *supra* in the preceding subdivision.

So in Appleton v. Boyd, 7 Mass. 131 (1810), the court refused to sustain an objection to the refusal of the court below to compel a person who was interested in the event of the suit to testify therein against his interests.

But see Massachusetts cases set forth *supra* in the preceding subdivision.

So in Bell's Case, 1 Browne (Pa.) 376 (1811), it was held that a witness should not be compelled to answer a question which might affect him civilly, as well as those which might tend to criminate him.

And in Long v. Bailie, 4 Serg. & R. 222 (1818), it was held that a witness cannot be excused from

that concerns the good of the public, and is commanded or prohibited by law. The law generally first prescribes what shall or shall not be done, and then declares the penalty. Its primary object is punishment, and to deter others from offending in like manner, though it may give the penalty, or some portion of it, to the person who may prosecute the action. *Reed* v. *Northfield*, 13 Pick. 94, 23 Am. Dec. 662; *Suffolk Bank* v. *Worcester Bank*, 5 Pick. 106; *Frohock* v. *Pattee*, 38 Me. 103; *Bayard* v. *Smith*, 17 Wend. 88; Sedgw. Stat. & Const. L. 390." And it was held that the section was not penal, but purely remedial. Sections 1459 and 1460 are strictly within the principles of construction announced in that case. They are no more penal in their essential features than is section 1458. It is true that, as urged by petitioner, they provide for pains and penalties, in the way of imprisonment and damages, under certain contingencies; but the essential distinction between these provisions and a penal statute is that the penalty is not imposed as a punishment for a public wrong, but as redress for a private grievance. And it is not unusual to find provisions of a similar character in statutes purely remedial. Both before and since *Jahns* v. *Nolting*, *supra*, these sections have several times been under consideration by the court. In *Beckman* v. *McKay*, 14 Cal. 250, the court considered the action, which was brought under section 116 of the Probate Act, as in the nature of an action of trover and conversion; and in *Mesmer* v. *Jenkins*, 61 Cal. 151, it is said "that under a statute very similar, if not precisely like, sections 1458–1461, Code Civ. Proc., the power of a judge of probate, in respect of matters of this kind, is analogous in its extent and object to the power exercised by courts of chancery upon bills of discovery."

Petitioner relies largely in support of his position upon *Boyd* v. *United States*, 116 U.

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testifying because he believes himself to be interested in the event when in fact he has no interest; or when his interest consists of a mere honorary engagement to pay the debt in suit if not otherwise liquidated, which could not be enforced at law.

But see subsequent Pennsylvania cases set forth in the preceding subdivision.

So, in Maurau v. Lamb, 7 Cow. 174 (1827), holding that a party in interest cannot be compelled to testify, the question whether a witness can be compelled to answer a question when his answer would tend to subject him to a civil suit was discussed but not decided, though the court seems to have favored the opinion that he could not.

And in Shotwell v. Morris, 1 N. J. L. 224 (1794), it was held that bail is not precluded from giving evidence against his principal, but that he cannot be compelled to do so, though objection must come from him personally.

And in Helm v. Handley, 1 Litt. (Ky.) 221 (1822), it was said that whether or not a witness has the privilege of not deposing when his own interests may be affected, if he does depose to facts prejudicing them in another controversy, there is no law which prevents the use of his deposition therein.

So in Cook v. Corn, 1 Overt. 340 (1806), the rule was laid down that no one can be obliged in a court of law to give evidence against himself.

But in Zollicoffer v. Turney, 6 Yerg. 297 (1834), it was said that in Cook v. Corn, *supra*, something was said as to whether a witness could be compelled to testify when his evidence would disclose that he owed a debt, but nothing decided.

So, in *Re* Osborne, 141 Mass. 307 (1886), the court refused to compel a former member of a board of water commissioners, whose conduct was being investigated before a committee of a city council, to give evidence which could be used in a suit subsequently brought by the city against him, but the decision was based upon the ground that he had been removed from office, and such changes had taken place that the questions involved were mere moot questions, and investigation was continued for the sole purpose of procuring evidence for use in such suit.

e. Parties in interest.

At common law, parties to actions and parties in interest were also excused from testifying. This rule, however, would seem to have been based on the question of competency rather than privilege, the evidence of the party being excluded because he was not regarded as a competent witness, and not as a protection against self-accusation; and therefore the cases supporting it have been omitted; though the following cases are included as bearing to some extent upon the question of the privilege of a witness.

Thus, statutory provisions that a witness shall not be excused from answering on the ground that the answer may establish or tend to establish that he owes a debt or is otherwise subject to a civil suit do not affect the privilege of a party in interest to refuse to testify. Cook v. Spaulding, 1 Hill, 586 (1841).

But a provision that in civil actions a party may be examined as a witness either in his own behalf or at the instance of the opposite party, and that no witness shall be excluded on account of interest, abrogates, so far as civil actions are concerned, the common-law principles that a party to an action or a person interested in the event shall not be permitted to give evidence in favor of himself, and that no man shall be compelled to give evidence against himself. Walsh v. Sayre, 52 How. Pr. 334 (1868).

II. *Unreasonable searches and seizures.*

The provision of the 4th Amendment of the Federal Constitution, that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and similar provisions of state constitutions have also been frequently interposed, particularly in revenue matters, as a protection against being compelled to give evidence against one's self.

Thus, it was said in Boyd v. United States, 116 U. S. 616, 29 L. ed. 746 (1885), and repeated in Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816 (1891), that the unreasonable searches and seizures condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment, and that no substantial difference can be seen between seizing a man's private books and papers to be used in evidence against him, and compelling him to be a witness against himself.

And the compulsory production of one's private books and papers for use in suits for criminal acts or for penalties or forfeitures is compelling him to be a witness against himself, and is equivalent to an unreasonable search and seizure, within the meaning of the Fourth Amendment. Boyd v.

See also 31 L. R. A. 163.

S. 616, 29 L. ed. 746, and *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816. But we think those cases entirely distinguishable in principle from, and not at all in conflict with, the views expressed in *Jahns* v. *Nolting*. There are, it is true, some general expressions and language in those cases which, read without reference to the particular facts of those cases, might be construed as supporting the petitioner's position. But when considered in the light of what was before the court, and the premises from which they were reasoning, any seeming conflict fades away. In the case of *Boyd* v. *United States*, a statute declared that any person who, with intent to defraud the revenue of the United States, should commit or omit certain acts, should for such offense be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both; and, in addition, should forfeit the merchandise in respect to which the wrongful acts were performed. Under this statute an information was filed against certain goods charging an offense under the act, and asking the forfeiture of the goods. In the course of the proceeding, Boyd having appeared as a claimant of the property, and denied any act of forfeiture, and it being important to the government to show the quantity and value of the goods, a motion was made by the United States district attorney for an order directing the claimant to bring into court a certain invoice alleged to be in his possession and to contain proof of the truth of the allegations of fraud made by the United States. Such order was made, and, in obedience to it, the claimants produced the invoice, which was used as evidence against them on the trial. Speaking of the character of the proceeding, it was said by the court (page 634, 116 U. S., and page 752, 29 L. ed.): "In this very case,

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United States and Counselman v. Hitchcock, *supra*.

And is within the scope of the prohibition of that amendment in all cases in which a search and seizure would be, as it is a material ingredient and effects the sole object and purpose of search and seizure. Boyd v. United States, *supra*.

And making the nonproduction of books and papers and invoices a confession of the allegations which it is claimed they would prove if produced is equivalent to their compulsory production, within the spirit and meaning of the constitutional prohibition. *Ibid.*

The constitutional provision with reference to unreasonable searches and seizures, however, applies to prevent investigation into private affairs only, and does not interfere with investigation into matters of a public or quasi public nature or in which the public has an interest.

Thus, the Act of Congress of July 20, 1868, giving supervisors of internal revenue the right to examine such books and papers as show the operation of banking institutions with the public and connected with the internal revenue of the United States, but not authorizing investigation into any of their private affairs, is not repugnant to the Fourth Amendment of the Federal Constitution. Stanwood v. Green, 2 Abb. (U. S.) 184 (1870).

And in United States v. Three Tons of Coal, 6 Biss. 379 (1875), it was held that the Fourth Amendment of the Federal Constitution is intended for the protection of purely private rights, and does not apply to a seizure of books and papers in a proceeding against a distillery for forfeiture under the revenue laws, as the books and papers called for pertain to a business in which the government as a supervising power, under the revenue laws, has an interest, the business being regulated by law.

This case is overruled, however, so far as it holds that a compulsory disclosure can be required in an action for a forfeiture. See Boyd v. United States, *supra*.

And this provision, like that with relation to compelling a person to be a witness against himself, applies to criminal actions and proceedings for penalties and forfeitures only, and has no application to civil proceedings. *Re* Meador, 1 Abb. (U. S.) 317 (1869); *Re* Strouse, 1 Sawy. 605 (1871).

Account books, letters, and other documents seized under a search warrant issued prior to the institution of a suit to recover duties and penalties for illegal importation, for the purpose of the discovery of fraud upon the revenue, are admissible in evidence therein without reference to the question of the legality of the search warrant. Stockwell v. United States, 3 Cliff. 284 (1870).

III. *Right of trial by jury.*

The claim has been made, but not sustained, that certain statutory requirements as to compulsory examinations and production of books and papers in revenue matters were in contravention of the constitutional right of trial by jury.

Thus, the Act of Congress of June 22, 1874, providing that the claimant or defendant in a proceeding arising under the revenue laws may be required to produce his books, invoices, and papers for examination, or in default thereof the allegations which it is claimed they would have established are to be taken as confessed, does not contravene the provisions of the Seventh Amendment of the Federal Constitution that in suit at common law when the value in controversy shall exceed $20 the right of trial by jury shall be preserved, the provision being in the nature of a penalty for refusal to produce, though when the cause is ready for trial the claimants would have a constitutional right to demand a jury. United States v. Distillery No. Twenty-Eight, 6 Biss. 483 (1875).

So the proceedings provided for by the Act of Congress of 1868, § 49, empowering supervisors of internal revenue to examine premises and issue summons requiring persons to appear before them and testify under oath and produce books and papers, etc., for the purpose of the prevention, detection, and punishment of frauds with relation to the collection of taxes, are ministerial and not judicial, and not unconstitutional as infringing the right of trial by jury, the summons provided for not being a judicial writ but a mere notice. *Re* Meador, 1 Abb. (U. S.) 317 (1869).

IV. *Due process of law.*

So in *Re* Meador, 1 Abb. (U. S.) 317 (1869), protection was sought under the constitutional guaranty of due process of law with the same result: it being held therein that the Act of Congress of 1868, § 49, empowering supervisors of internal revenue to examine premises and to issue summons requiring persons to appear before them and testify under oath and produce books and papers, etc., for the purpose of the prevention, detection, and punishment of any frauds with relation to the collection of taxes, and the Act of July, 1868, § 9, providing the mode of compelling obedience to the summons, are not unconstitutional as contravening the Fifth Amendment to the Federal Constitution providing

the ground of forfeiture as declared in the 12th section of the Act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute, and it is declared that the offender shall be fined not exceeding $5,000 nor less than $50, or be imprisoned not exceeding two years, or both; and, in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts, the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. . . . As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. . . ."

The difference in character between the proceeding under discussion there and the proceeding complained of here by petitioner was, however, recognized in the same opinion in the following language (page 624, 116 U. S., and 749, 29 L. ed.): "The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution; nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those amendments. But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession, and in the case of excisable or dutiable articles, the government has an

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that no one shall be deprived of life, liberty, or property without due process of law.

And in *Re* Platt & Boyd, 7 Ben. 261 (1874), it was held that the Act of Congress of March 2, 1867, § 2, authorizing the entry into any place or premises where any invoices, books, or papers are deposited relating to merchandise with respect to which fraud upon the revenues is alleged to have been committed, and the seizure, examination, and retention thereof, is a provision in aid of the due enforcement of the revenue laws and not repugnant to the provision of the Federal Constitution that no person shall be deprived of life, liberty, or property without due process of law.

V. *Distinction between civil and criminal or penal proceedings.*

Constitutional prohibitions against compelling a person to be a witness against himself and against unreasonable searches and seizures having been held to be applicable to penal and criminal proceedings only, it becomes necessary, when the question arises, to determine the character of the proceeding in which the evidence is sought or designed to be used, the availability of the constitutional prohibition depending upon whether it is remedial or penal in its nature.

This was the question upon which the principal case turned, and the distinction there drawn, that compulsory disclosures may be required where the proceeding is purely remedial and the penalty, if any, is not imposed as a punishment for a public wrong, but as a redress for a private grievance, but not where the primary object of the penalty or forfeiture is punishment for a violation of duty or a public wrong and to deter others from offending in a like manner, seems to accord with the authorities on the subject.

Thus, a proceeding to forfeit a person's goods for an offense against the laws, though civil in form, and whether *in rem* or *in personam*, is a criminal case within the meaning of the Fourth and Fifth Amendments to the Federal Constitution prohibiting unreasonable searches and seizures and providing that no person shall be compelled in any criminal case to be a witness against himself. Boyd v. United States, 116 U. S. 616, 29 L. ed. 746 (1885).

In that case the rule was applied to a proceeding to establish a forfeiture, pursuant to the Act of Congress of June 22, 1874, § 12, of goods alleged to have been fraudulently imported without payment of duties in which an order was made requiring the claimant of the goods to produce certain invoices for inspection and introduction in evidence, which was held to be erroneous and illegal. *Ibid.*

And the Act of Congress of June 22, 1874, authorizing courts of the United States in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, or else the allegations of the attorney to be taken as confessed, is unconstitutional and void as applied to suits for penalties or to establish a forfeiture of the party's goods, as being repugnant to those provisions. *Ibid.*, overruling United States v. Three Tons of Coal, 6 Biss. 379 (1875); United States v. Distillery No. Twenty-Eight, 6 Biss. 483 (1875); United States v. Mason, 6 Biss. 358 (1875),—as to this point.

It is also to be observed that *Re* Platt & Boyd and United States v. Hughes, set forth *infra*, and Stockwell v. United States, set forth *supra*, under *Unreasonable searches and seizures*, are also overruled by Boyd v. United States, *supra*, so far as they uphold the compulsory production of papers in proceedings for a penalty or forfeiture.

So, an investigation by a grand jury as to whether there has been a violation of the interstate commerce act is a criminal case within the meaning of the Fifth Amendment of the Federal Constitution providing that no person shall be compelled in a criminal case to be a witness against himself. Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816 (1891).

And an action for a penalty under the Contract Labor Law of 1885, § 3, providing that such penalties

interest in them for the payment of the duties thereon, and until such duties are paid, has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery." In the *Counselman Case*, which was a case growing out of the refusal of Counselman to testify before a grand jury upon an investigation of alleged violations of "An act to regulate commerce," on the ground that his answers might tend to criminate him, the court held it was within the principles announced in the *Boyd Case*, and reaffirmed those principles. The case of *Lees* v. *United States*, 150 U. S. 476, 37 L. ed. 1150, is another case falling strictly within the principles of *Boyd* v. *United States*.

These considerations dispose of the main objection of petitioner. The other objections to the constitutionality of the statute are, in our judgment, without merit. Nor is the objection tenable that the proceeding in the probate court involves passing upon the title to property, and is, on that ground, without the court's jurisdiction. *Ex parte Casey*, 71 Cal. 269; *Re Curry*, 25 Hun, 321.

Writ denied.

We concur: **Fitzgerald**, *J.*; **Harrison**, *J.*; **Garoutte**, *J.*; **Beatty**, *Ch. J.*

McFarland, *J.*:

I dissent. This is an original petition here by H. M. Levy for a writ of prohibition to be directed to the superior court of the city and county of San Francisco, department No. 9, and Hon. J. V. Coffey, judge thereof, commanding said court and said Coffey to refrain from further prosecuting a certain proceeding instituted in said court against said petitioner. An alternative writ was issued, and on the return day the respondent demurred and answered, and the matter was then submitted.

It appears that the administration of the estate of one Morris Hoeflich, deceased, is pending in the court of respondent, sitting as a probate court, and that one Solomon Hoeflich is administrator of said estate. On the ——— day of June, 1893, the said Solomon Hoeflich, as such administrator, filed in said court, in the matter of said estate, a certain writing, or petition, the contents of which are substantially these: It is therein averred that, from information derived from persons

may be sued for as debts of like amount are now recovered, though civil in form is criminal in nature, and one in which the defendant is entitled to protection under the Fifth Amendment of the Federal Constitution. Lees v. United States, 150 U. S. 476, 37 L. ed. 1150 (1893).

So, a summary proceeding under Cal. Pen. Code, § 772, for the removal of a sheriff from office is a criminal proceeding in which the defendant has constitutional protection against being compelled to be a witness against himself, removal from office being a punishment for wrongdoing. Thurston v. Clark (Cal.) 40 Pac. Rep. 435 (1895).

And an inquisitorial examination under oath of a United States marshal who had assisted in selecting and making up a list of jurors for the trial of a criminal cause, had upon a challenge to the panel of jurors, whose official conduct was impeached by the challenge and who is charged with misconduct which might amount to an indictable offense or furnish grounds for his removal or impeachment, infringes the spirit if not the letter of the provision of the Fifth Amendment to the Federal Constitution that no person shall be compelled in a criminal case to be a witness against himself, and is repugnant to the principles of personal liberty embodied in the common law. United States v. Collins, 1 Woods, C. C. 499 (1873).

And in Jackson v. Humphrey, 1 Johns. 498 (1806), it was said that a public officer would not be bound to answer any questions impeaching the integrity of his conduct as such.

So a proceeding for contempt against a person charged with inducing witnesses to absent themselves and avoid process is one in which the person charged cannot be required to testify in proof of the charge as he would be thereby required to criminate himself, the contempt being a statutory crime. *Re* Nickell, 47 Kan. 734 (1892).

And a person accused of contempt of court cannot be compelled to submit to examination as a witness on the hearing of an order to show cause why he should not be punished therefor, under Cal. Const. art. 1, § 13, providing that no person shall be compelled in a criminal case to be a witness against himself, contempt of court being a public offense. *Ex parte* Gould, 99 Cal. 360, 21 L. R. A. 751 (1893).

The Act of Congress of March 2, 1867, § 2, authorizing the entry into any place and premises where any invoices, books, or papers are deposited relating to merchandise with respect to which fraud upon the revenue is alleged to have been committed, and the seizure, examination, and retention thereof, however, is a provision in aid of the due enforcement of the revenue laws and not repugnant to the Fourth Amendment to the Federal Constitution providing that the right of the people to be secure against unreasonable searches and seizures shall not be violated. *Re* Platt & Boyd, 7 Ben. 261 (1874).

And proceedings under the Act of Congress of June 30, 1864, as amended by the Act of July 13, 1866, to compel the production of books and the giving of evidence before the assessor concerning assessments under the internal revenue acts, are civil and not criminal proceedings, and do not contravene the provision of the Fourth and Fifth Amendments of the Federal Constitution protecting the people against unreasonable searches and seizures, and being compelled in a criminal case to be witnesses against themselves. *Re* Strouse, 1 Sawy. 605 (1871).

And the proceedings provided for by the Act of Congress of 1868, § 49, empowering supervisors of internal revenue to examine premises and issue summons requiring persons to appear before them and testify under oath and produce books and papers, etc., for the purpose of the prevention, detection, and punishment of frauds with relation to the collection of taxes, and the Act of July, 1866, § 9, providing the mode of compelling obedience thereto, are civil and not criminal proceedings, and not within the prohibition of the Fourth and Fifth Amendments of the Federal Constitution, and such acts are not unconstitutional. *Re* Meador, 1 Abb. (U. S.) 317 (1869).

So, in United States v. Hughes, 12 Blatchf. 553 (1875), it was held that the discovery of evidence contemplated by the provision of U. S. Rev. Stat.

whose names said administrator is unwilling to disclose, he has ascertained that the said deceased, Morris Hoeflich, prior to and down to the time of his death, "was either a full partner with the said H. M. Levy, or engaged with him jointly in a large number of transactions" in stocks and mines in California and Nevada, and in other property, "the exact nature and extent of which transactions, and of the real and personal estate resulting therefrom, can be ascertained by an examination of the said H. M. Levy and other witnesses under oath, and by the production and examination of books of account, correspondence checks, deeds, conveyances, bonds, contracts, and other writings and documents now in the exclusive possession of said H. M. Levy;" and also by examination of other named persons and documents, etc., in their possession. It is also averred that said Hoeflich, deceased, before his death represented to a number of persons, whose names the administrator is unwilling to disclose, "that he was in partnership and had large joint interests with said H. M. Levy;" and that the fact that he made such representation "confirms and strengthens the information otherwise received by your petitioner, and the conviction produced thereby." It is also averred in geneal terms that said Levy has concealed, conveyed away, and disposed of moneys, etc., of the said deceased, and has in his possession and within his knowledge deeds and other documents and writings "which contain evidences of and tend to disclose the right, title, interest, and claim of the said decedent to real and personal property," portions of said property being particularly described. The foregoing are, in brief, the material averments of said petition; and it was prayed therein that said Levy be cited to appear before said probate court and undergo an examination under oath as to all the matters set forth in said petition, and subject all his documents, writings, and papers to inspection and examination. A citation was issued according to the prayer of the petition to said Levy, who appeared and demurred to the petition; and, the demurrer having been overruled, he filed a lengthy written verified answer, in which he specifically denied all the material averments of said petition, and denied that he had any property in which the said decedent was interested, either as a partner or otherwise, or that he had any documents or writings of the character alleged in said petition. He also filed written objections to any further proceeding in the matter of said petition and citation; but the court overruled the objections, and set a day for the examination. Whereupon the said Levy filed here the pres-

§ 860, that no discovery or evidence obtained by means of any judicial proceeding from any party of witness shall be given in evidence or used against him for the enforcement of any penalty or forfeiture, is of a personal nature to which the party can make oath, and not such as may be derived from an examination of books and papers seized under a warrant issued in a proceeding for forfeiture for violation of revenue laws.

But see Boyd v. United States, 116 U. S. 616, 29 L. ed. 746 (1885), set forth *supra* in I. a., *Limitation to criminal proceedings*, and in II., *Unreasonable searches and seizures*.

And in *Re* Meador, *supra*, it was said that persons who applied for, obtained, and accepted a license under the revenue law subsequent to the enactment of the Act of Congress of 1868, § 49, empowering the supervisors of revenue to examine premises and issue summons requiring persons to appear before them and testify under oath and produce books and papers, etc., for the purpose of prevention, detection, and punishment of frauds with relation to the collection of taxes, impliedly contracted to be governed by existing provisions of law affecting the business licensed, and cannot afterwards impugn the constitutionality of that act or refuse to obey its provisions.

But see Boyd v. United States, *supra*, in which a somewhat similar provision was permitted to be questioned under similar circumstances.

So the vendor of an infringing device is not rendered incompetent to prove its purchase and use by persons to whom he has sold it in a suit for infringement to which he is not a party, by U. S. Rev. Stat. §§ 4919, 4921, empowering the court in its discretion to impose additional damages against an infringer as violating the constitutional provision that no person shall be compelled in any criminal case to be a witness against himself, on the ground that he may, under such sections, subject himself to penalties and forfeitures in an accounting with the complainant. Masseth v. Johnston, 59 Fed. Rep. 613 (1892).

And a proceeding in which a county treasurer is subpœnaed before a committee appointed by a board of supervisors to answer interrogatories concerning moneys in his hands pursuant to New York Laws of 1858, chap. 190, § 3, is not a criminal case within the provision of the New York Constitution, art. 1, § 6, that no person shall be compelled in a criminal case to be a witness against himself. *Re* Dickinson, 58 How. Pr. 260 (1879).

So, in People v. Board of Police Comrs., 32 N. Y. S. R. 824 (1890), it was held that a police officer charged with conduct unbecoming an officer in that he engaged in an altercation with another officer, cannot refuse to testify as the first witness on the investigation upon the ground that he cannot be compelled to be a witness against himself, as the investigation was not a criminal proceeding.

Daniels, J., dissented from this determination, however, on the ground that the proceeding was one for the forfeiture of an office, but the decision was affirmed by the court of appeals in 123 N. Y. 512.

And it would appear that the prohibition would apply only to violations of public law, and not to violations of city ordinances.

Thus, in Greeley v. Hamman, 12 Colo. 99 (1888), in which the question was whether or not the city had a right to appeal, it was held that a prosecution for the violation of a city ordinance is a civil and not a criminal action, within Colo. Code, § 689, defining crimes and misdemeanors to consist of violations of public law, though punishable by fine and imprisonment, when not punishable by general statute.

And it was also held that the phrases "criminal prosecution," "criminal case," etc., in the Colorado Constitution do not refer to prosecutions for acts which were not criminal at the time of its adoption, or which have not since been declared criminal by statute. Greeley v. Hamman, *supra*.

See also, as to distinction between remedial and penal proceedings, *infra*, I., a and b. F. H. B.

ent petition for a writ of prohibition, setting up all the foregoing facts, and praying that the respondents be restrained from proceeding with said examination; and he contends that said proposed examination is beyond the jurisdiction of said court, and that certain provisions of the code of civil procedure, upon which he contends the proceeding is based, are unconstitutional and void.

The proceeding sought to be prohibited, if valid at all, must rest for its validity upon sections 1459 and 1460 of the Code of Civil Procedure. Our general law of procedure is averse to proceedings which are in their character inquisitorial. The only provision in the code of civil procedure in the nature of a bill of discovery, other than said sections 1459 and 1460, is contained in section 1000, which provides that "any court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action or the defense thereto;" and the proceeding here in question is certainly not under that section. Of course, the probate court would have no jurisdiction over any action to determine conflicting rights of property between the estate of Hoeflich and the petitioner herein, H. M. Levy. Moreover, no such action is pending.

Sections 1459 and 1460, above referred to, are as follows:

"Section 1459. If any executor, administrator, or other person interested in the estate of a decedent, complains to the superior court or a judge thereof, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where the decedent dies, or where letters have been granted, he may be cited and examined either before the superior court of the county where he is found, or before the superior court of the county where the decedent dies, or where letters have been granted. But if, in the latter case, he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

"Section 1460. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidences of or tending to disclose the right, title, interest, or claim of the decedent to any real or personal estate, claim, or demand, or any lost will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. The order of such disclosure made upon such examination shall be prima facie evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court, or jury, or for return of the property and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side."

It is contended by petitioner herein that these provisions are in contravention of section 13 of article 1 of the State Constitution, which provides that "no person shall . . . be compelled in any criminal case to be a witness against himself;" and of section 19 of the same article, which provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated." He also contends that they contravene section 11 of said article, which provides that "all laws of a general nature shall have a uniform operation," and section 25 of article 4, which provides that no special law shall be passed "regulating the practice of courts of justice," for the reason that they give special privileges to administrators over other litigants. It is also contended that the probate court could not make the orders sought here to be restrained without passing upon rights of property between the estate of Hoeflich and said Levy, which it has no jurisdiction to do.

I shall not discuss any of the above positions taken by petitioner, except the first two. The two provisions that a person shall not be compelled to be a witness against himself in a criminal case, and shall be secure against unreasonable seizures and searches, are so akin to each other that they are both covered by those judicial decisions and constitutional inhibitions which have established the personal rights and liberties of Englishmen and Americans. A compulsory production of a man's private papers is, in effect, compelling him to be a witness against himself. It will be sufficient, however, in this case, to particularly consider only the first of these two provisions, although the second is necessarily involved. And, basing our decision on that provision, I am of the opinion that upon the principles announced,

and the decisions made by the Supreme Court of the United States in the cases of *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746; *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816; and *Lees* v. *United States*, 150 U. S. 476, 37 L. ed. 1150,—the contention of petitioner must be sustained, and that the writ of prohibition should issue as prayed for. If the proceeding in the probate court sought here to be restrained were, in form, a "criminal case," there could be no plausible contention that, in view of section 13 of article 1 of the state Constitution, the petitioner could be compelled to be a witness against himself. But in the *Boyd Case* it was held that the Fourth and Fifth Amendments to the Federal Constitution—which are similar to said sections 13 and 19 of our state Constitution—applied to a proceeding to recover a penalty or forfeiture, although the proceeding was not criminal in form. That was a suit to forfeit Boyd's property for an alleged violation of a revenue law, and the court held that to compel him to produce books and papers as evidence against him was a violation of said amendments. The court says that suits for penalties and forfeitures "are within the reason of criminal proceedings for all the purposes of the Fourth Amendment to the Constitution, and of that provision of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself." The court further says that "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure," and that "this can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual deprivation of the right, as if it consisted more in sound than substance." Afterwards the same court, in *Counselman* v. *Hitchcock*, *supra*, expressly approved the decision in the *Boyd Case*, and declared that in the *Boyd Case* it was held that a statute which authorized a court to require a party to produce his private papers in court was "unconstitutional and void, as applied to a suit for a penalty or to establish a forfeiture of the goods of the party, because it was repugnant to the Fourth and Fifth Amendments of the Constitution;" and, furthermore, that "it is an ancient principle of the law of evidence that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him, or to subject him to fines, penalties, or forfeitures." But the principle was still more directly decided in the late case of *Lees* v. *United States*, *supra*. That was a civil action brought by the United States to recover a penalty of $1,000 for the violation of an act of congress prohibiting the importation of aliens under contracts for labor. The circuit court compelled Lees, one of the defendants, to become a witness for the government, against his objection that the suit was in the nature of a criminal proceeding, and that he could not be compelled to testify; and on a writ of error to the United States Supreme Court the judgment was reversed. The Supreme Court, by *Mr. Justice* Brewer, said: "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of *Boyd* v. *United States*, *supra*. The question was fully and elaborately considered . . . in that case. And within the rule there laid down it was error to compel this defendant to give testimony in behalf of the government."

It is quite clear that said sections 1459 and 1460 include a "penalty" within the meaning of the authorities above noticed. Indeed, the whole scope of the proceeding which it is their purpose to authorize is, in its nature, quasi criminal. It is founded upon the fact that the party to be examined "is suspected" of being guilty either of the embezzlement or smuggling, or of the fraudulent concealment and secret and unlawful disposition of property of another. Certain things are to be done if he "is found innocent." But, if the contrary is found, then an order for disclosure is to be made, which he must obey or be sent to jail. And then it is provided that such order for disclosure shall be prima facie evidence of the right of the administrator to the property involved in any action brought for the recovery of such property; and that "any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property, and damages in addition thereto equal to the value of such property." It is thus sought to compel the party examined to testify, and to produce his private papers for the purpose of furnishing evidence upon which may be based an order that will make a prima facie case against him in an action for a penalty which may be of the most grave character. If he be defeated in such action, although he may have defended it with the utmost good faith, and under an honest claim of right, the judgment against him will not be, as in ordinary civil actions, for the value of the property or its return with the usual incidental damages, but, in addition to that, the judgment "must be" for a second full value of the property as a penalty, and cases might easily arise where the amount of such penalty would greatly exceed the highest fine provided as punishment for a crime by any section of the penal code. I am satisfied, therefore, that the said sections of the code are within the inhibition of the constitutional provision of said section 13 of the Constitution of the state. And, under the rule and the authorities above cited, a person in the position of the petitioner cannot be compelled to give testimony or produce papers which would tend to make a case against him, or furnish data or links of evidence favorable to such case. I have just noticed the recent case of *United States* v. *James*, reported in 60 Fed. Rep. 257, 26 L. R. A. 418, in which *Judge* Grosscup of the United States district court, northern district of Illinois, in a very interesting opinion, discusses the

subject here under review at great length. In that case the learned judge holds that a person cannot be compelled to testify or produce documents that may tend to criminate him, although there be a statute providing that he shall not be prosecuted or punished for the matter about which his testimony is sought. He holds that the purpose of the Fourth and Fifth Amendments was not confined to the protection of a witness against "law-inflicted pains and penalties only," but that the purpose was "to make the secrets of memory, so far as they brought one's former acts within the definitions of crime, inviolate as against judicial probe or disclosure;" and that "the privilege of silence, against a criminal accusation, guaranteed by the Fifth Amendment, was meant to extend to all the consequences of disclosure." This doctrine is perhaps extreme. It may be that a statute exempting a witness from prosecution and from any exposure to penalties or forfeitures for the acts or things about which he is called upon to testify might remove him from behind the constitutional shield. I have noticed the *James Case*, however, because it is the latest judicial expression upon the general subject, and because the opinion discusses very fully the personal rights of individuals under English and American institutions. Of course, if our views hereinbefore expressed, and the authorities therein cited, are correct, the petitioner herein can invoke these constitutional principles equally with one who is a party to an action which is strictly in form criminal.

If the administrator of the estate of Hoeflich, deceased, believes, from information which he has, that said estate has a just cause of action against the petitioner herein, he has the privilege of bringing an action against said petitioner in the proper court; and when said action is pending he may avail himself, like other litigants, of the provisions of section 1000 of the Code of Civil Procedure to have an inpection of such books, documents, and papers in the possession of said petitioner as the court may deem proper, and may also examine said petitioner as a witness in the case. I think that a peremptory writ of prohibition should issue as prayed for in the petition.

I concur: **De Haven, J.**

VIRGINIA SUPREME COURT OF APPEALS.

NORFOLK & WESTERN R. CO., *Plff. in Err.*,
v.
H. W. WHEELER, Admr., etc., of George De Board, Deceased.

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

A railroad company is not liable for injuries to a licensee by the sliding of a bank along the top of which was a footpath which he was using, in consequence of the removal of a boulder to prevent its falling on the tracks, unless the person doing the work knew that such removal left the path unsafe and failed to use reasonable precautions to avoid injury to persons likely to use it, or to notify them of the danger.

(July 18, 1895.)

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

The facts are stated in the opinion.

Messrs. **Bolling & Stanley,** for plaintiff in error:

Deceased was on private property, and in assuming to himself the right to go upon it he relieved the owner thereof from any care or responsibility in his behalf.

Finlayson v. *Chicago, B. & Q. R. Co.* 1 Dill. 579; *Illinois C. R. Co.* v. *Godfrey*, 7 Ill. 500, 22 Am. Rep. 112; *McClaren* v. *Indianapolis & V. R. Co.* 83 Ind. 319; *Palmer* v. *Chicago, St. L. & P. R. Co.* 112 Ind. 250; *Cauley* v. *Pittsburgh, C. & St. L. R. Co.* 98 Pa. 498; Whart. Neg. pp. 351, 352.

He was not a licensee in the true sense of the word, and if he could be considered as such in any sense, on account of the continued use of the path, it could be only as a bare or naked licensee, to whom the defendant owed no duty, and who went upon its lands at his own peril.

Beach, Contrib. Neg. pp. 26, 57; *Hargreaves* v. *Deacon*, 25 Mich. 1; *Evansville & T. H. R. Co.* v. *Griffin*, 100 Ind. 221, 50 Am. Rep. 784; *Reardon* v. *Thompson*, 149 Mass. 267; Whart. Neg. p. 351; 1 Thomp. Neg. pp. 333, 361, § 3; *Hogan* v. *Chicago, M. & St. P. R. Co.* 59 Wis. 139; *Central Railroad* v. *Brinson*, 70 Ga. 207; *Parker* v. *Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262; Whittaker's Smith, Neg. pp. 61 *et seq.*, and *note; Cahill* v. *Layton*, 57 Wis. 600, 46 Am. Rep. 46; *Union Stock Yards & Transit Co.* v. *Rourke*, 10 Ill. App. 474; *Metcalfe* v. *Cunard S. S. Co.* 147 Mass. 66; *Heinlein* v. *Boston & P. R. Co.* 147 Mass. 136; *Faris* v. *Hoberg*, 134 Ind. 269.

The mere fact that people have frequently trespassed upon a railroad track, with no effort by the company to stop them, will not create any right in the public.

Central Railroad v. *Brinson*, 70 Ga. 207.

Messrs. **Cole & Bell,** for defendant in error:

The court's instruction was a full, clear, and accurate definition of a licensee.

Davis v. *Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 667; *Virginia Midland R. Co.* v. *White*, 84 Va. 498; *Norfolk & W. R. Co.* v. *Carper*, 88 Va. 556; *Graves* v. *Thomas*, 95 Ind. 361, 48 Am. Rep. 727.

NOTE.—For general subject of liability for negligence in respect to grounds beside frequented path, see *note* to Lepnick v. Gaddis (Miss.) 26 L. R. A. 686.

See also 34 L. R. A. 459.

If the jury say by their verdict that one thing was the cause of the fall, and counsel contend that it was not that thing, but that it was some other thing, the contention of the latter will not be considered or noticed, unless they can show an utter failure of all evidence supporting the finding of the jury.

Va. Code 1887, § 3484; Barton, Law Pr. 1st ed. p. 221, § 34, and cases there cited.

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

This is a writ of error to a judgment of the circuit court of Smyth county. The action was brought by the defendant in error to recover of the plaintiff in error damages for alleged injuries to defendant in error's decedent, caused by the negligence of the plaintiff in error; and the case, briefly stated, is as follows: George De Board, at the time of the accident from which this suit arose, occupied a blacksmith shop on a 3-acre lot of ground lying on the south side of plaintiff in error's line of railroad, about 1½ miles west of Marion station, and adjacent to a private crossing called Hull's Crossing. De Board, together with the other occupants of this 3 acres of land, and perhaps other persons in the neighborhood, has been in the habit for a number of years of using a path which crossed this lot of ground and ran along the edge of the railroad embankment or cut a short distance to Hull's crossing; De Board using the path chiefly to go over and get water from a spring on the north side of the railroad. In the afternoon of December 6, 1892, De Board was found in the ditch at the bottom of the railroad embankment or cut, just under where the path ran along on the edge of the embankment, and near the side and at the end of the cross-ties of the company's railroad, so much injured that he could not stand alone, and was carried to the house of his son-in-law, the plaintiff in this case, where he, from his injuries, died, as alleged, some time in the following January. This suit was brought by his personal representative at the first March rules, 1893, and the declaration filed charges that De Board's death was caused by the careless and negligent action of the plaintiff in error, through its agents or employés, in removing rock and earth from underneath the path in question, leaving the surface of the path unsupported, and thus making a trap or pit-fall for any one passing over or along the path, whereby De Board, in passing along the path, which he had been doing for a number of years past, broke through and fell upon the company's railroad track below, and received the injuries from which he afterwards died. At the trial of the case the court below instructed the jury as follows: "No. 1. The jury are the triors of the facts as to whether or not George De Board was a licensee on the defendant's right of way. If the jury believe from the evidence that the deceased, George De Board, when he received his injuries, was traveling along the footpath or way over the defendant's land, which had been long used as a walk way, leading to a crossing over defendant's track, by himself and certain other individuals, occupants of an adjoining lot or close, or by the general public, with the knowledge of the defendant company, and without any objection on its part, then the jury must find that said George De Board was not a trespasser while traveling said path, but that he was a licensee, and not wrongfully traveling said path." "No. 2. The court further instructs the jury that, if they find that George De Board was traveling said path as such licensee, no duty was imposed upon the defendant company to keep the said path in good order and repair, and the said George De Board traveled thereon at his peril. But if the jury believe from the evidence that the defendant company did carelessly and negligently make an excavation beneath said pathway, not open to the common observation of persons walking along said path, and no notice or warning had been given to said De Board, and that said De Board, while walking along said path or way with due caution and care, was injured and killed by reason of said excavation, then the said defendant company is liable to answer therefor in damages. But if the jury believe from the evidence that the supposed excavation complained of was open to the common observation of those traveling along said pathway, and that said De Board, by the exercise of ordinary care, could have observed the same, and that he carelessly and negligently stepped into said excavation, then he was chargeable with contributory negligence, and is not entitled to recover." "No. 3. And the court instructs the jury that, if they find for the plaintiff, in assessing the damages they are not limited to the actual loss of service of deceased, George De Board, but they may assess such sum as to them may seem fair and just, looking to all the circumstances of the case, not exceeding the amount claimed in the declaration."

We are of opinion that these instructions fairly expound the law applicable to the case; but the question to be determined here is, Does the evidence in the case sustain the verdict of the jury in favor of the defendant in error, assessing his damages at $505? Though the jury might have been warranted in finding, from all the circumstances surrounding the case, that De Board was a licensee upon the plaintiff in error's property at the time of his injury, plaintiff in error could not be held liable in damages for the injuries he sustained, unless the evidence showed that the agents or employés of plaintiff in error, having charge of the repairs to its railroad track at this point, knew of the dangerous condition in which the path in question was left after the removal of the rock and earth, as alleged in the declaration. The evidence in the case shows that the section hands of the railroad company, a few days prior to the injury of De Board, had taken out a rock immediately west (about one foot west) of where persons usually traveling this path step over a fence which ran to the railroad embankment at that point, because the rock was loose and dangerous, and was liable to fall into the track and cause the wreck of trains,—the person who took out the rock, testifying for the defendant in error, stating that he had been over the path once or twice;

that he knew something of the rock; that he took it out, but did not meddle with the path after taking the rock out; that the rock was loose, and thrown down with little or no exertion, and fell and rolled on the railroad track, and rested against the rail. The evidence for defendant in error further shows that the rock, before it was taken down, was visible above the ground for three or four inches, and dipped south under the path, and had often been sat upon by one of the witnesses, and that any one going along the path, who took the trouble to look, could have seen the rock; that from the top of the bank on which the path ran to the point in the ditch below where the plaintiff's intestate was found, in a "perpendicular line, was about 7 feet, being measured to the top of the crossties." This is all the evidence that even tends to show that the employés of the railroad company had any sort of knowledge that the path in question was left in a dangerous condition after this rock had been removed from the bank as stated, and it can ot be questioned that it was entirely proper that this rock should have been removed. There could be no carelessness or negligence on the part of the plaintiff in error, under the circumstances surrounding the removal of this rock, for which it could be held liable in damages to defendant in error, unless it be shown by satisfactory proof that the section hands, or employés, of the company, when they removed the rock, knew that the path was left in an unsafe condition, and failed to restore it to its original state, or use reasonable precaution to avoid injury to those likely to pass along the path, or notify such persons of the danger; and as the evidence in this case does not, in our opinion, sufficiently show that the employés of the plaintiff in error had knowledge of the dangerous condition of this path after the removal of the rock, the verdict of the jury is without sufficient evidence to sustain it.

It was therefore error in the circuit court of Smyth county to overrule the motion made by plaintiff in error for a new trial on the ground that the verdict is contrary to the law and the evidence; and for this error its *judgment must be reversed*, and this cause remanded for a new trial, to be had in accordance with this opinion.

LYNCHBURG NATIONAL BANK, *Plff. in Err.*,
v.
SCOTT BROTHERS *et al.*

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

Usury forming part of the face of a renewal note discounted in the regular course of business at the legal rate, without notice and before maturity, is not an available defense under a statute changing the law making usurious contracts "void," so that they shall be "deemed to be for an illegal consideration" as to the interest

(July 11, 1895.)

ERROR to the Circuit Court for Washington County to review a judgment in favor of defendants in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

The facts are stated in the opinion.

Messrs. **Honaker & Hutton** and **White & Penn,** for plaintiff in error:

The change in the act from "void" to "be deemed to be for an illegal consideration" puts a negotiable instrument in the hands of an innocent holder on the same footing with innocent holders of negotiable paper, when the illegality arises from any other cause than the statute.

A purchaser or holder of a negotiable instrument, who has taken it, bona fide, for a valuable consideration, in the ordinary course of business, when it was not overdue, without notice of its dishonor, and without notice of the facts which impeach its validity, as between antecedent parties, has a title unaffected by those facts.

Dan. Neg. Inst. § 769; 1 Barton, Law Pr. p. 552; Story, Prom. Notes, 3d ed. § 192; 3 Kent, Com. p. 100, *note 4; Norris* v. *Langley*, 19 N. H. 423; *Converse* v. *Foster*, 32 Vt. 828; *Johnson* v. *Meeker*, 1 Wis. 436; Chitty, Bills & Notes, 11th Am. ed. *81, 95; 1 Parsons, Notes & Bills, p. 279; *Glenn* v. *Farmers' Bank*, 70 N. C. 191; *Paton* v. *Coit*, 5 Mich. 505, 72 Am. Dec. 58; *Hay* v. *Ayling*, 16 Q. B. 423; *Vallett* v. *Parker*, 6 Wend. 615; *Pickaway County Bank* v. *Prather*, 12 Ohio St. 497; *Oates* v. *First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *Sondheim* v. *Gilbert*, 117 Ind. 71, 5 L. R. A. 432; *Fleckner* v. *Bank of United States*, 21 U. S. 8 Wheat. 338, 5 L. ed. 631.

Independently of the fact that the plaintiff bank is protected as an innocent holder of the note sued on, the circuit court erred in holding that the usurious interest paid the Bank of Abingdon by Scott Brothers (the makers) could be credited upon the principal of the debt in the hands of the plaintiff.

Moseley v. *Brown*, 76 Va. 423; *Clarkson* v. *Garland*, 1 Leigh, 162; *Spengler* v. *Snapp*, 5 Leigh, 505; 3 Minor, Inst. 350, *Money had and received; Astley* v. *Reynolds*, 2 Strange, 915; *Smith* v. *Bromley*, 2 Dougl. 697; *Fitzroy* v. *Gwillam*, 1 T. R. 153.

The purpose and effect of the statute, from its very terms, are only to give the borrower the right at law to recover back the excess beyond the legal interest paid, in any case, from the person paying the same, and to limit the right of that recovery to one year from the date of such payment; and this remedy is exclusive.

Matthews v. *Paine*, 47 Ark. 54; *Presbrey* v. *Thomas*, 1 D. C. App. 171; *Carter* v. *Carusi*, 112 U. S. 478, 28 L. ed. 820; *Hinman* v. *Goodyear*, 56 Conn. 210; *Pixley* v. *Ingram*, 53 Hun, 93; *Cummings* v. *Knight*, 65 N. H. 202; Wood, Limitation of Actions, p. 237, § 168; *Barnet* v. *Muncie Nat. Bank*, 98 U. S. 555, 25 L. ed. 212;

NOTE.—As to effect on notes in hands of bona fide holders, of a statute declaring the notes void, see *note* to Voreis v. Nussbaum (Ind.) 16 L. R. A. 45.

For general rules as to rights of bona fide holders, see *note* to Canajoharie Nat. Bank v. Diefendorf (N. Y.) 10 L. R. A. 676.

Walsh v. *Mayer*, 111 U. S. 31, 28 L. ed. 338; *Driesbach* v. *National Bank*, 104 U. S. 52, 26 L. ed. 658; *Farmers' & M. Nat. Bank* v. *Dearing*, 91 U. S. 29, 23 L. ed. 196; *Cook* v. *Lillo*, 103 U. S. 792, 26 L. ed. 460; *Stephens* v. *Monongahela Nat. Bank*, 111 U. S. 197, 28 L. ed. 399.

Mr. **Daniel Trigg** for defendants in error.

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

This was a suit at law instituted in the circuit court of Washington county, in December, 1893, by the Lynchburg National Bank against Scott Bros., upon a negotiable note for $1,000, bearing date June 3, 1893, executed by Scott Bros., and payable four months after date to S. L. Scott, at the Bank of Abingdon, Va., indorsed by S. L. Scott and the Bank of Abingdon, and discounted by the Lynchburg National Bank. The note sued on is the last of a series of renewals of a similar note discounted by the Bank of Abingdon, December 17, 1888, at a usurious rate of interest, the usurious interest paid said bank aggregating the sum of $506.38. The plaintiff bank discounted the note sued on before maturity, in the due course of business, at 6 per cent interest, without notice of any fact connected with its history, or of any illegality which affected it in the hands of antecedent parties. Before the maturity of the note sued on, the Bank of Abingdon made a general deed of assignment for the benefit of all of its creditors. Among the defenses set up by the defendants Scott Bros. was that of usury, and all questions of law and fact were, by agreement, submitted to the court, which gave judgment for the plaintiff for the sum of $1,002.25, the principal of said note, and charges of protest, subject to a credit of $506.38, with interest on the balance from the date of said judgment. Objections to the rulings of the circuit court adverse to the plaintiff being regularly saved by bills of exceptions, application was made to this court for a writ of error, which was granted.

In the petition the plaintiff assigns four grounds of error, all raising questions of far more than ordinary interest. In the view, however, taken of the case by this court, it becomes unnecessary to consider but one; and that is, Can the defendants Scott Bros., in this action, avail themselves of the defense of usury against the plaintiff bank, a bona fide holder of the note sued on, for value, and without notice of any taint of usury, and received in the due course of business, before maturity, and at a legal rate of discount?

The Statute of Virginia (Code, § 2818) provides as follows: "All contracts and assurances, made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than is allowed by the preceding section, shall be deemed to be for an illegal consideration, as to the excess beyond the principal amount so loaned or forborne." This section of the Code is in the words of the Act, as passed March 24, 1874, and has been the law in Virginia since that date. By the terms of the statute which was in force in this state prior to April 1, 1873, all contracts and assurances for the loan or forbearance of money founded upon a usurious consideration were declared to be void.

The question to be considered is the effect, as to negotiable instruments, of this change in the statute, declaring that such contracts shall be deemed to be for an illegal consideration instead of void, as formerly.

These are not meaningless words, and it cannot be doubted that the legislature had some wise purpose in adopting the one rather than the other.

The purchaser or holder of a negotiable instrument, who has taken it bona fide, for a valuable consideration, in the ordinary course of business, when it was not overdue, without notice of its dishonor, and without notice of facts which impeach its validity as between antecedent parties, has a title unaffected by those facts, and may recover on the instrument, although it may be without any legal validity, as between the antecedent parties. 1 Dan. Neg. Inst. p. 576, § 769.

I believe the foregoing strong statement of the favor with which negotiable instruments are regarded by the law is universally accepted as sound. So far as I have been able to examine the authorities, there is but one exception to the rule just laid down, and that is when the statute renders such instruments void. The law extends this peculiar protection to negotiable instruments because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect. The same author says: "When the statute merely declares, expressly or by implication, that the consideration shall be deemed illegal, the bill or note founded upon such consideration shall be valid in the hands of the bona fide holder without notice, but the burden of proof will be upon the plaintiff, when the illegal consideration appears, to show that he is a bona fide holder without notice." In sections 807 and 808 the same author says: "In many localities negotiable instruments executed upon gaming or usurious considerations are upon the same footing as those executed for other illegal considerations—that is, void between the parties, but valid in the hands of a bona fide holder. . . . And that when the instrument was executed upon an illegal consideration, especially if illegal by statute (but not absolutely avoiding the instrument), it throws upon the holder the burden of proving bona fide ownership for value. . . . And in all cases where the statute does not declare the instrument void, bona fide ownership for value being proved, the holder is entitled to recover."

Story, Prom. Notes, 3d ed. § 192, says: "The same doctrine will generally apply to all cases of a bona fide holder for value, without notice, before it becomes due, where the original note, or the indorsement thereof, is founded on an illegal consideration; and this upon the same general ground of public policy, without any distinction between a case of illegality founded in moral crime or turpitude, which is *malum in se*, and a case founded in the positive prohibition of a stat-

ute, which is *malum prohibitum;* for, in each case, the innocent holder is, or may be, otherwise exposed to the most ruinous consequences, and the circulation of negotiable instruments would be materially obstructed, if not totally stopped. The only exception is, where the statute creating the prohibition has at the same time, either expressly or by necessary implication, made the instrument absolutely void in the hands of every holder, whether he has such notice or not."

In *note 4* to Kent's Commentaries, 11th ed., vol. 3, p. 100, it is said: "If a note is not declared void by statute, mere illegality in its consideration will not affect the rights of a bona fide holder for value;" citing *Norris* v. *Langley*, 19 N. H. 423; *Converse* v. *Foster*, 32 Vt. 828; *Johnson* v. *Meeker*, 1 Wis. 436.

The principles in the foregoing text-books are sustained by the following adjudicated cases: *Glenn* v. *Farmers' Bank*, 70 N. C. 191; *Paton* v. *Coit*, 5 Mich. 505, 72 Am. Dec. 58; *Hay* v. *Ayling*, 16 Q. B. 423; *Vallett* v. *Parker*, 6 Wend. 615; *Oates* v. *First Nat. Bank*, 100 U. S. 239, 249, 250, 25 L. ed. 580, 584, 585; *Sondheim* v. *Gilbert*, 117 Ind. 71, 5 L. R. A. 432.

In the case of *Converse* v. *Foster*, 32 Vt. 828, cited in *note 4* to Kent's Commentaries, *supra*, *Judge* Poland says: "The English statutes against usury and gaming, not only impose a penalty for such illegal acts, but expressly declare that all notes, bills, bonds, and other securities given upon such illegal considerations shall be utterly void. All the cases that have been cited, and all that can be, so far as we know, both English and American, upon this subject, turn upon this very distinction and difference between these statutes. In those cases in which the legislature has declared that the illegality of the contract or consideration shall make the security, whether bill or note, void, the defendant may insist on such illegality, though the plaintiff or such other party between him and the defendant, took the bill or note bona fide, and gave a valuable consideration for it. But unless it has been so expressly declared by the legislature, illegality of consideration would be no defense in an action at the suit of a bona fide holder for value, without notice of the illegality."

"If a statute declares a security void," says *Judge* Rodman in the case of *Glenn* v. *Farmers' Bank*, 70 N. C. 191, "then it is void in whosesoever hands it may come. If, however, a negotiable security be founded on an illegal consideration (and it is immaterial whether it be illegal at common law or by statute), and no statute says it shall be void, the security is good in the hands of an innocent holder, or of any one claiming through him.

"The case of *Hay* v. *Ayling*, above cited, is a notable illustration of the difference.

"Gaming securities were declared void by 9 Anne, chap. 14, § 1, and it was held that they were void in the hands of a bona fide innocent indorsee. The Act of 5 & 6 Wm. IV., chap. 41, § 1, modified the Act of Anne, and declared they should be illegal. The court held that after that act they could be recovered on by an innocent holder."

Mr. Justice Story, in the case of *Fleckner* v. *Bank of United States*, 21 U. S. 8 Wheat. 338, 5 L. ed. 631, in delivering the unanimous opinion of the court, says: "The statutes of usury of the states, as well as of England, contain an express provision that usurious contracts shall be utterly void; and without such an enactment the contract would be valid, at least, in respect to persons who were strangers to the usury."

In *Vallett* v. *Parker*, 6 Wend. 615, *Chief Justice* Savage said: "Wherever the statutes declare notes void, they are, and must be so, in the hands of every holder; but where they are adjudged by the court to be so, for failure, or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have had notice of the consideration."

In *Sondheim* v. *Gilbert*, 117 Ind. 71, 5 L. R. A. 432, Mitchell, *J.*, says: "The authorities justify the statement that a defendant may insist upon the illegality of the contract or consideration, notwithstanding the note is in the hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the legislature that the illegality insisted upon shall make the security, whether contract, bill, or note, void. But unless the legislature has so declared, then, no matter how illegal or immoral the consideration may be, a commercial note in the hands of an innocent holder for value will be held valid and enforceable;" citing a number of authorities.

This court, in *Branch* v. *Sinking Fund Comrs.*, 80 Va. 427, 56 Am. Rep. 596, says that a note in the hands of the maker, before delivery, is not property, nor the subject of ownership as such; that it must be issued or delivered by the maker before any one can become the bona fide holder of it. This view is not in conflict with the position taken here, where the question being considered is the difference between contracts declared by the statute to be void, and those declared to be for an illegal consideration, and where the note sued on was issued and delivered by the maker. Nor are the authorities quoted to sustain the conclusion here reached in conflict with the view expressed in 80 Va. 427, 56 Am. Rep. 596.

If the word "illegal" were construed to mean "void," as contended for by the learned counsel for the appellees, the change in the statute would be meaningless. A glance at the history of the statute makes it clear that the legislature had an object in its change. The revisers of the Code of 1849 recommended that what is now section 2818 should be adopted by the legislature. The legislature, however, refused to adopt the report of the revisers, and the law still declared all usurious contracts void, until the law was modified, and declared they should be void only as to the interest in excess of 6 per cent per annum, but the Legislature of 1874 declared that it should be deemed to be for an illegal consideration, as to the excess beyond the principal sum loaned or forborne. Commercial paper has ever been regarded with favor by the law, and, in view of its growing importance and its universal convenience in

the affairs of men, it is not strange that the lawmaker, in the interest of a wise public policy, should desire to exempt such paper, in the hands of a bona fide holder for value, and without notice, from the hazard and uncertainty to which it was subjected by the law under a statute which declared the usurious contract void. But, whatever may have been the motive of the legislature in making this change, it is the duty of the court to enforce the law as it is made. And it is perfectly clear, upon reason and authority, that, no matter how illegal the consideration may be, a negotiable note in the hands of a bona fide holder, for value, without notice, will be held valid and enforceable.

If the maker of a negotiable note contests the right of one who has acquired it by indorsement, for value, before maturity, and without notice of any defense, to recover of him the amount of the note, he must, to prevail, be able to show a statute that in express terms, or by necessary implication, declares the note to be void.

The agreed statement of facts in this case shows that the plaintiff in error discounted the note sued on before maturity, and in the due course of business, at 6 per cent interest; that the plaintiff in error had no notice or knowledge when it discounted the note that it was a renewal of any other note, or that it had ever theretofore been discounted by the Bank of Abindgon, or that any one had at any time received from the defendants in error usurious interest thereon.

The Statute (sec. 2818) declaring that all usurious contracts shall be deemed to be for an illegal consideration as to the interest, instead of void, as formerly, it follows from what has been said that the defendants in error could not avail themselves of the defense of usury, to defeat the plaintiff bank of its recovery of the note sued on, or any part thereof.

The judgment of the Circuit Court being in conflict with this opinion, it must be reversed and set aside, and this court will enter such judgment as the said circuit court ought to have entered.

MISSOURI SUPREME COURT.

Henry H. SCHUFELDT *et al.*, *Respts.*,
v.
J. Francis SMITH *et al.*, *Appts.*

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

1. **A deed of trust by an insolvent corporation is not void** as matter of law from the fact that the directors vote themselves preferences in payment of debts.

2. **Directors of an insolvent corporation, who vote themselves preferences** over other creditors, must show that all their secured claims are honest and justly due them.

(July 9, 1895.)

APPEAL by defendants from a judgment of the Circuit Court for Buchanan County in favor of plaintiffs in an action brought to set aside a trust deed executed by James Walsh Mercantile Company for the benefit of creditors. *Reversed.*

The facts are stated in the opinion.

Messrs. **Huston & Parrish, S. S. Brown,** and **H. K. White,** for appellants:

A corporation in the transaction of its business, though embarrassed, can convey its assets by way of deed of trust, making a preference among its creditors.

2 Kent, Com. 281, 315, *note g;* Cook, Corp. 2d ed. 691; Ang. & A. Priv. Corp. 11th ed. 187; 1 Beach, Priv. Corp. 358; 2 Potter, Corp. 695; Burrill, Assignm. 5th ed. 64; *St. Louis City & County* v. *Alexander*, 23 Mo. 483; *Kitchen* v. *St. Louis, K. C. & N. R. Co.* 69 Mo. 224; *Shockley* v. *Fisher*, 75 Mo. 498; *Foster* v. *Mullanphy Planing Mill Co.* 92 Mo. 79; *Larrabee* v. *Franklin Bank*, 114 Mo. 592; *Alberger* v. *National Bank of Commerce*, 123 Mo. 313; *LaGrange Butter Tub Co.* v. *National Bank of Commerce*, 122 Mo. 154; *Catlin* v. *Eagle Bank*, 6 Conn. 233; *Savings Bank* v. *Bates*, 8 Conn. 505; *Pondville Co.* v. *Clark*, 25 Conn. 97; *Smith* v. *Skeary*, 47 Conn. 47; *Warner* v. *Mower*, 11 Vt. 385; *Sargent* v. *Webster*, 13 Met. 497, 46 Am. Dec. 743; *Pond* v. *Framingham & L. R. Co.* 130 Mass. 94; *Olney* v. *Conanicut Land Co.* 16 R. I. 597, 5 L. R. A. 361; *DeRuyter* v. *St. Peter's Church Trustees*, 3 Barb. Ch. 119, approved in 3 N. Y. 238; *Hoyt* v. *Sheldon*, 3 Bosw. 267; *Duncomb* v. *New York, H. & N. R. Co.* 84 N. Y. 190, 88 N. Y. 1; *Lane* v. *Wheelwright*, 69 Hun, 180; *Brower* v. *Brooklyn Trust Co.* 50 N. Y. S. R. 620; *Vail* v. *Jameson*, 41 N. J. Eq. 648; *Bergen* v. *Porpoise Fishing Co.* 42 N. J. Eq. 397; *Sewell* v. *East Cape May Beach Co.* 50 N. J. Eq. 717; *Dana* v. *Bank of United States*, 5 Watts & S. 223; *Gordon* v. *Preston*, 1 Watts, 385, 26 Am. Dec. 75; *State* v. *Bank of Maryland*, 6 Gill & J. 205, 26 Am. Dec. 561; *Burr* v. *McDonald*, 3 Gratt. 215; *Planters' Bank* v. *Whittle*, 78 Va. 737; *Ruffner Bros.* v. *Welton Coal & Salt Co.* 36 W. Va. 244; *Dabney* v. *Bank of State of S. C.* 3 S. C. N. S. 124; *Baring* v. *Dabney*, 86 U. S. 19 Wall. 1, 22 L. ed. 90; *Carey* v. *Giles*, 10 Ga. 9; *Globe Iron Roofing & C. Co.* v. *Thacher*, 87 Ala. 458; *Goodyear Rubber Co.* v. *George D.*

NOTE.—For preferences by insolvent corporations, see *note* to Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. (Tex.) 22 L. R. A. 802.

See also 31 L. R. A. 265, 497; 39 L. R. A. 254; 44 L. R. A. 766.

Scott Co. 96 Ala. 439; *Arthur* v. *Commercial & R. Bank*, 9 Smedes & M. 394, 48 Am. Dec. 719; *Ex parte Conway*, 4 Ark. 302; *Ringo* v. *Biscoe*, 13 Ark. 563; *Worthen* v. *Griffith*, 59 Ark. 562; *Gould* v. *Little Rock, M. R. & T. R. Co.* 52 Fed. Rep. 682; *United States Bank* v. *Huth*, 4 B. Mon. 423; *Newport & C. Bridge Co.* v. *Douglass*, 12 Bush, 673; *Hopkins* v. *Gallatin Turnp. Co.* 4 Humph. 403; *Lippincott* v. *Shaw Carriage Co.* 25 Fed. Rep. 577; *Reichwald* v. *Commercial Hotel Co.* 106 Ill. 439; *Town* v. *Bank of River Raisin*, 2 Dougl. (Mich.) 530; *Covert* v. *Rogers*, 38 Mich. 363, 31 Am. Rep. 319; *Turnbull* v. *Prentiss Lumber Co.* 55 Mich. 387; *Kendall* v. *Bishop*, 76 Mich. 634; *Bank of Montreal* v. *J. E. Potts Salt & L. Co.* 90 Mich. 345; *Hills* v. *Stockwell & D. Furniture Co.* 23 Fed. Rep. 432; *Buell* v. *Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Garrett* v. *Burlington Plow Co.* 70 Iowa, 697, 59 Am. Rep. 461; *Warfield* v. *Marshall County Canning Co.* 72 Iowa, 666; *Rollins* v. *Shaver Wagon & C. Co.* 80 Iowa, 380; *Hospes* v. *Northwestern Mfg. & Car Co.* 48 Minn. 174, 15 L. R. A. 470; *Poole* v. *West Point Butter & C. Asso.* 30 Fed. Rep. 513; *Milroy* v. *Eager*, 30 Fed. Rep. 544; *Allis* v. *Jones*, 45 Fed. Rep. 148; *Hays* v. *Citizens' Bank*, 51 Kan. 535; *Fogg* v. *Blair*, 133 U. S. 534, 33 L. ed. 721; *George T. Smith Middlings Purifier Co.* v. *McGroarty*, 136 U. S. 237, 34 L. ed. 346; *Re Patent File Co.* L. R. 6 Ch. 83; *Re Wincham Shipbuilding B. & S. Co.* L. R. 9 Ch. Div. 322.

The fact that one of the claims preferred was guaranteed by the president of the corporation, and that another was the property of the estate of a decedent of which the president of the corporation was administrator, will not invalidate the deed in any respect.

St. Louis City & County v. *Alexander*, 23 Mo. 483; *Foster* v. *Mullanphy Planing Mill Co.* 92 Mo. 79; *Buell* v. *Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Hallam* v. *Indianola Hotel Co.* 56 Iowa, 179; *Garrett* v. *Burlington Plow Co.* 70 Iowa, 697; *Farmers' & M. Bank* v. *Wasson*, 48 Iowa, 336; *Bank of Montreal* v. *J. E. Potts Salt & L. Co.* 90 Mich. 345; *Ex parte Conway*, 4 Ark. 302; *Ringo* v. *Biscoe*, 13 Ark. 563; *Worthen* v. *Griffith*, 59 Ark. 562; *Planters' Bank* v. *Whittle*, 78 Va. 739; *Hospes* v. *Northwestern Mfg. & Car Co.* 48 Minn. 174, 15 L. R. A. 470; *Catlin* v. *Eagle Bank*, 6 Conn. 233; *Wilkinson* v. *Bauerle*, 41 N. J. Eq. 635; *Whitwell* v. *Warner*, 20 Vt. 425; *Gordon* v. *Preston*, 1 Watts, 385; *Ashhurst's App.* 60 Pa. 290; *Duncomb* v. *New York, H. & N. R. Co.* 84 N. Y. 190; *Central R. & Bkg. Co.* v. *Claghorn*, 1 Speers, Eq. 545; *Brown* v. *Grand Rapids Parlor Furniture Co.* 58 Fed. Rep. 286, 22 L. R. A. 817; *Gould* v. *Little Rock, M. R. & T. R. Co.* 52 Fed. Rep. 680; *Hills* v. *Stockwell & D. Furniture Co.* 23 Fed. Rep. 432; *McCracken* v. *Robison*, 57 Fed. Rep. 375; *Taylor County Ct.* v. *Baltimore & O. R. Co.* 35 Fed. Rep. 161.

Walsh's vote as director was not necessary to order the deed of trust. Two of the directors, Byrne and McGuire, constituted a quorum, and their votes in favor of the deed of trust made it the act of the corporation, even if Walsh's vote in its favor be excluded.

Foster v. *Mullanphy Planing Mill Co. supra*; Cook, Stock & Stockholders, 713; *Buell* v. *Buckingham, supra.*

Even if a single director's interest in the claims, one of which he held as administrator and another of which he had indorsed, rendered the deed invalid as to those claims, the deed remains good as to the others.

Jones, Chat. Mortg. 336; *Hardcastle* v. *Fisher*, 24 Mo. 70; *Foster* v. *Mullanphy Planing Mill Co.* 92 Mo. 79; *Morris* v. *Lindauer*, 54 Fed. Rep. 23, 6 U. S. App. 510; *Cohn* v. *Ward*, 32 W. Va. 39; *Riggan* v. *Wolf*, 53 Ark. 537.

Messrs. **Vinton Pike, Stauber & Crandall, Willard P. Hall,** and **Dowe, Johnson & Rusk,** for respondents:

The directors of an insolvent corporation cannot be made preferred creditors for unsecured debts. This rule is universal where the vote of the preferred director or directors is necessary to the giving of the preference.

Suddath v. *Gallagher*, 126 Mo. 393; *Bridgens* v. *Dollar Sav. Bank*, 66 Fed. Rep. 9; *La Grange Butter Tub Co.* v. *National Bank of Commerce*, 122 Mo. 154; *Hill* v. *Rich Hill Coal Min. Co.* 119 Mo. 9; *Roan* v. *Winn*, 93 Mo. 503; *Foster* v. *Mullanphy Planing Mill Co.* 92 Mo. 79; *Williams* v. *Jackson County Patrons of Husbandry*, 23 Mo. App. 132; *Adams* v. *Kehlor Mill. Co.* 35 Fed. Rep. 433; *Consolidated Tank Line Co.* v. *Kansas City Varnish Co.* 43 Fed. Rep. 204, 45 Fed. Rep. 7; *Mallory* v. *Mallory Wheeler Co.* 61 Conn. 131; *Olney* v. *Conanicut Land Co.* 16 R. I. 597, 5 L. R. A. 361; *Hopkins's App.* 90 Pa. 69; *Richards* v. *New Hampshire Ins. Co.* 43 N. H. 263; *Sicardi* v. *Keystone Oil Co.* 149 Pa. 148; *Lowry Bkg. Co.* v. *Empire Lumber Co.* 91 Ga. 624; *Corey* v. *Wadsworth*, 99 Ala. 68, 23 L. R. A. 618; *Gibson* v. *Trowbridge Furniture Co.* 96 Ala. 357; *Lippincott* v. *Shaw Carriage Co.* 25 Fed. Rep. 577; *Beach* v. *Miller*, 130 Ill. 162; *Roseboom* v. *Whittaker*, 132 Ill. 81; *Peterson* v. *Brabrook Tailoring Co.* 150 Ill. 290; *Hays* v. *Citizens' Bank*, 51 Kan. 535; *Howe* v. *Sanford Fork & T. Co.* 44 Fed. Rep. 231; *Bosworth* v. *Jacksonville Nat. Bank*, 64 Fed. Rep. 615; *Sutton Mfg. Co.* v. *Hutchinson*, 64 Fed. Rep. 497; *Gaslight Imp. Co.* v. *Terrell*, L. R. 10 Eq. 168; *Haywood* v. *Lincoln Lumber Co.* 64 Wis. 639; *Thompson* v. *Huron Lumber Co.* 4 Wash. 600; *Hill* v. *Pioneer Lumber Co.* 113 N. C. 173, 21 L. R. A. 560; *Chamberlain* v. *Pacific Wool-Growing Co.* 54 Cal. 103; *Blalock* v. *Kernersville Mfg. Co.* 110 N. C. 99; 2 Morawetz, Priv. Corp. § 787, par. 3; 17 Am. & Eng. Encyclop. Law, p. 122; Gluck & Becker, Receivers, § 49; Wait, Insolv. Corp. § 162; *Lamb* v. *Laughlin*, 25 W. Va. 300; Wait, Fraud. Conv. § 470.

A corporation is insolvent within the rule as to preferring creditors when its assets are insufficient to pay its debts, and it has ceased to do business, or is in the act of taking a step which will practically incapacitate it for conducting the corporate enterprise.

Corey v. *Wadsworth*, 99 Ala. 68, 23 L. R. A. 618; *Dodge* v. *Mastin*, 17 Fed. Rep. 660; 11 Am. & Eng. Encyclop. Law, pp. 168, 172; Morse, Banks & Banking, § 662; Gluck & Becker, Receivers, §§ 14, 49; *Reid* v. *Lloyd*, 52 Mo. App. 282; *State* v. *Koontz*, 83 Mo. 323; *Eddy* v. *Baldwin*, 32 Mo. 369; *Buchanan* v. *Smith*, 83 U. S. 16 Wall. 277, 21 L. ed. 280.

Directors are charged with knowledge as to the solvency of their corporation.

McDaniel v. *Harvey*, 51 Mo. App. 198; *Hop-*

kins's App. 90 Pa. 69; *Sicardi* v. *Keystone Oil Co.* 149 Pa. 148; *Lowry Bkg. Co.* v. *Empire Lumber Co.* 91 Ga. 624; *Corey* v. *Wadsworth, supra; Jones* v. *Arkansas Mechanical & Agri. Co.* 38 Ark. 25.

The execution of a conveyance of all its property by a corporation is a confession of insolvency.

Kellog v. *Richardson*, 19 Fed. Rep. 71; *Oliver-Finne Grocer Co.* v. *Miller*, 53 Mo. App. 107; *Walton* v. *First Nat. Bank*, 13 Colo. 265, 5 L. R. A. 765; *Consolidated Tank Line Co.* v. *Kansas City Varnish Co.* 45 Fed. Rep. 13; Morse, Banks & Banking, § 622.

Inasmuch as the directors were preferred in the deed of trust, they were disqualified by their self-interest from acting and making such preference as trustees of the corporation. The deed of trust is therefore void *in toto* on account of the disqualification of the directors to act as trustees of the corporation in a matter in which they were personally interested.

Suddath v. *Gallagher*, 126 Mo. 393; *Bridgens* v. *Dollar Sav. Bank*, 66 Fed. Rep. 9; *Roan* v. *Winn*, 93 Mo. 503; *Foster* v. *Mullanphy Planing Mill Co.* 92 Mo. 79; *Williams* v. *Jackson Country Patrons of Husbandry*, 23 Mo. App. 132; *Adams* v. *Kehlor Mill. Co.* 35 Fed. Rep. 433; *Consolidated Tank Line Co.* v. *Kansas City Varnish Co.* 43 Fed. Rep. 204, 45 Fed. Rep. 7; *Duncomb* v. *New York, H. & N. R. Co.* 84 N. Y. 190.

When the corporation became insolvent its assets became *ipso facto* a trust fund in the hands of its directors for the benefit of its creditors, and the directors were disqualified from dealing with this fund for their own benefit or advantage. It therefore follows that the attempt on the part of the directors to authorize the execution by the corporation of the deed of trust in which certain debts of the directors were attempted to be preferred was void.

Munson v. *Syracuse, G. & C. R. Co.* 103 N. Y. 73; *Lamb* v. *Laughlin*, 25 W. Va. 300; *Sutton Mfg. Co.* v. *Hutchinson*, 63 Fed. Rep. 496; *Bradley* v. *Farwell*, Holmes, C. C. 433; *Adams* v. *Kehlor Mill. Co. supra; Ward* v. *Davidson*, 89 Mo. 445.

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

This suit is to set aside a certain deed of trust, executed on the 18th day of March, 1893, by the James Walsh Mercantile Company, a business corporation, to defendant J. Francis Smith, as trustee, to secure its creditors in the order therein named. The deed was executed in pursuance of this resolution of the board of directors: "Whereas, this corporation is unable to meet its obligations as they fall due, though its assets are much more than its liabilities: Resolved, that, in order to more economically dispose of such portion of its assets as may be necessary to pay its debts than could be done if legal proceedings should be instituted, the corporation convey all its property, real, personal, and mixed, to J. Francis Smith, as trustee, with powers of sale and collection, and that such trustee pay: First, costs of the trust; second, debts preferred by the state laws of Missouri; third, obligations for borrowed money not secured by collateral; fourth, balance due on notes for borrowed money secured by collateral after application of collateral and their proceeds, and notes of other parties discounted by the company, after due attempt to collect from makers; fifth, other indebtedness of the company not disputed." The deed of trust was drawn in accordance with the resolution. The creditors of the various classes, with the amounts due each, were specified, and directions were given the trustee to pay the debts in the order named.

The debts of the third class as specified in the mortgage aggregated about $35,000, and those of the fourth class about $56,000. The fifth class of creditors secured were the general mercantile creditors of the corporation. The debts of this class aggregated about $30,000. Creditors of this class prosecute this suit. Pending the suit, defendant Smith was appointed receiver. The face value of the assets amounted to about $300,000, but, on account of depreciation, it was thought by the receiver that not more than $100,000 could be realized on them. There would be, therefore, but little, if anything, to apply on the fifth class of debts. Under the deed of trust, power of sale was given the trustee, as also authority to collect the debts due the company. It was charged in the petition "that certain of the indebtedness in preferred classes 3 and 4 is the individual indebtedness of the officers and directors of said corporation, and was contracted for the purpose of protecting the individual liability of said officers and directors." Defendant Smith, by answer, admitted the execution and delivery of the deed of trust, and that, by virtue of the powers thereby conferred, he took into his possession all the property so assigned to him, with a view of administering the same. The other allegations of the petition were in substance denied. The only evidence offered on the trial was directed to the question of the solvency of the corporation at the time the deed of trust was made. The records of the corporation showed that James Walsh was its president. Charles McGinn, vice-president, and John F. Byrne, secretary. It also appears that these were the only directors who passed the resolution. The deed of trust was signed by James Walsh, as president, and attested by John F. Byrne, as secretary. One note placed in class 3, as described in the deed of trust, was dated January 25, 1883, and was executed by the former firm of James Walsh & Co. in the sum of $12,000, payable to Ferdinand Lutz, of St. Joseph, Missouri, payment of which has been assumed by said party of the first part." Another note of the same character, dated in 1889, for $2,000, was also described in the deed of trust. In the same class were two notes made by the corporation to James Walsh, as administrator of the Conrad estate. It was not shown by evidence that the creditor James Walsh was the same person as James Walsh the president and director of the corporation; nor was any evidence offered explanatory of the assumption by the corporation of the note of James Walsh & Co. The case was argued by counsel on both sides, and the identity of James Walsh in each capacity

has been assumed. No evidence was offered tending to prove actual bad faith, either in the execution of the deed, or in creating the debts secured by it. The court found that on the 18th day of March, 1893 (the date of the deed of trust), the defendant James Walsh Mercantile Company was insolvent, and from that date "ceased to be a going concern." Upon this finding a decree was entered setting aside the deed of trust, from which defendants appealed.

Most of the questions involved in this record have in some recent cases in this court been given careful and exhaustive consideration. The investigations given the subject have been more labored and thorough on account of apparent want of harmony in some of the previous decisions of this court, as well as on account of the diversity of opinion in other jurisdictions. The conclusions reached by each of the divisions, which received the concurrence of all the members, may be briefly given in the language of the syllabus prepared by the judge who wrote one of the opinions, as follows: "A corporation in failing circumstances may prefer one creditor to another, in discharging its obligations, if such preference is made in good faith while the property of the company remains in its possession, unaffected by liens or any process of law. Mere insolvency of a corporation does not of itself transform its assets into a trust fund for the equal benefit of all its creditors." *Alberger* v. *National Bank of Commerce*, 123 Mo. 313; *Slavens* v. *John R. Cook Drug Co.* (Mo.) 30 S. W. Rep. 1025; *Waggoner-Gates Mill Co.* v. *Ziegler-Zaiss Commission Co.* (Mo.) (not yet officially reported) 31 S. W. Rep. 28. In the case last cited, which was decided by division 2 of this court, it was also held that preference in the same circumstances may be given to a creditor of a corporation who is secured by the indorsement of some of its directors. It would seem to follow logically from these decisions that a preference may be made to a director for a debt directly due him from the corporation, unless it would be defeated by his own act in voting himself the preference.

But it is insisted with much earnestness, and argued with great ability, that the directors had no power to bind the corporation to an agreement made with themselves, and in which they had a personal interest, and that, therefore, the resolution of the board of directors authorizing preferences to be given the members thereof, over other creditors, and the deed of trust executed in pursuance thereof, were absolutely void. This contention must rest upon one of two theories,—either that the directors of a corporation are trustees for its creditors, and its assets constitute a trust fund which they must apply ratably toward the satisfaction of all the debts, or that such a transaction is, upon its face, constructively fraudulent. As has been seen, the so-called "trust-fund theory," as applied to a corporation, while dominion over its property is retained, is not recognized in this state as being sound. Nothing additional need be said on that subject. The board of directors are undoubtedly trustees for the corporation and stockholders, and, when acting for them, are bound to exercise the utmost good faith. Any attempt in dealing with its property or affairs to secure themselves personal advantages over other stockholders should at least be subject to the most rigorous scrutiny. *Hill* v. *Rich Hill Coal Min. Co.* 119 Mo. 19, and cases cited.

But it cannot be said, as a correct proposition of law, that officers of a corporation cannot themselves and in their own names contract with it. To so hold would virtually deny to corporations the credit upon which so much of the business of the country is transacted, and which is so essential to success. If the stockholders and officers of corporations are not permitted to advance money to them, or to indorse for them, without subjecting themselves to such disadvantages, they would be deprived of their most valuable source of credit. A corporation naturally looks to those interested in its affairs for accommodations. If directors can lend the corporation money, or indorse for it, they should certainly have the same right to collect the debts or secure themselves as is accorded to other creditors. The cases cited abundantly show that a corporation, so long as it has control of its property, though insolvent, may, when acting honestly, prefer one creditor to another. A mortgage, then, giving such preference, is not constructively fraudulent. Neither the corporation nor the other stockholders are injured by the preference given. To defeat them, actual fraud should be shown. The honest debts all stand, and should stand, on equal footing. All the creditors should have equal rights to enter in the race of diligence. The fact that the race may be unequal should not deprive the winner of his reward. An individual debtor can prefer his family, his neighbors, and his friends. If the preferred debt is honest, the preference cannot be impeached, though the wife of the debtor secure the advantage. *Hart* v. *Leete*, 104 Mo. 338; *Riley* v. *Vaughan*, 116 Mo. 176. No reason can be seen why a corporation may not also prefer its friends. There is no more equity in allowing an individual debtor to prefer his creditor, wife, or children than in allowing a corporation to prefer its stockholders and officers. To permit equities to control would defeat all preferences. While the owner of property retains the power of its disposal he may apply it to the payment of any honest debt, is the rule upon which the right to make preferences among creditors rests. The rule should apply as well to corporations as to individuals, and any change should be made by the legislature, and not by the courts. If the debt is an honest one, and the corporation had the power to contract it, it has the right to pay or secure it, and no fraud can be imputed to it from the fact that it is paid or secured in preference to another. "It may be conceded," said *Judge* Taft in a recent case, "that the trust relation justifies and requires courts of equity to subject preferences by an insolvent corporation of its own directors to the closest scrutiny, and of showing beyond question that he had a bona fide debt; but we do not see why, if a corpora-

tion may prefer one creditor over another, it may not prefer a director who is a bona fide creditor. Preferences are not based on any equitable principle. They go by favor. And, as one individual may prefer among his creditors his friends and relations, so a corporation may prefer its friends." *Brown* v. *Grand Rapids Parlor Furniture Co.* 58 Fed. Rep. 286, 22 L. R. A. 817. See also *Worthen* v. *Griffith*, 59 Ark. 562, and cases cited.

We do not think, therefore, that the deed of trust is constructively fraudulent for the reason that it gives preferences to a director of the corporation. When the right of the corporation to give preferences to any of its creditors is conceded, the logical conclusion follows that it can give them to any creditor who holds an honest debt against it, though he be an officer or stockholder. This conclusion is in accord with the declaration of Sherwood, *J.*, in a recent case. He says: "A corporation, within the scope of the purposes for which it was incorporated, may do any act in furtherance of these purposes which an individual in similar circumstances might do, and, though insolvent, may prefer some creditors to others, even though such creditors are among the directors of the corporation." *Foster* v. *Mullanphy Planing Mill Co.* 92 Mo. 87. While the directors of a corporation do not sustain the strict relation of trustees for its creditors, yet their duties to them and their relation to the corporation itself are such as impose upon them some of the obligations of trustees. In dealing with the corporation, they deal with themselves. They determine the liability of the corporation to themselves. They should therefore be required, in case they give themselves a preference over other creditors, to show that all their secured debts are fair, honest, and justly due them. This burden properly rests upon them. From this record it appears that the invalidity of the deed of trust in question was declared to result from the mere insolvency of the corporation at the time it was executed. The question of the bona fides of the debts of directors, who were given preferences, was not gone into on the trial. The act of the directors in voting themselves preferences would make the deed of trust prima facie fraudulent in fact but not conclusively so as a matter of law. The court evidently did not decide the case upon the presumption of fact that the deed was fraudulent, which it might have indulged.

We therefore reverse the judgment and remand the cause for a new trial.

Brace, *P. J.*, and **Barclay** and **Robinson**, *JJ.*, concur.

Rehearing denied.

WYOMING SUPREME COURT.

PEOPLE of the State of Wyoming, *ex rel.* Isaac CHANDLER,
v.
N. D. McDONALD, Warden of the Penitentiary.

(.....Wyo.....)

A statute is not an ex post facto law because it abrogates the provision existing when an offense was committed, that the accused may secure a change of magistrate or place of preliminary examination upon his affidavit of belief of the prejudice of the magistrate before whom he is brought for examination.

(October 25, 1895.)

APPLICATION for a writ of habeas corpus to obtain the release of relator from defendant's custody to which he had been committed after conviction of assault and battery with intent to kill. *Denied.*

The facts are stated in the opinion.

Mr. **Charles F. Tew**, for plaintiff:

The repeal and re-enactment is an *ex post facto* law as to this case if it alters the situation of the accused to his disadvantage or robs him of a substantial right.

7 Am. & Eng. Encyclop. Law, p. 526; *Kring* v. *Missouri*, 107 U. S. 221, 27 L. ed. 506; *Garvey* v. *People*, 6 Colo. 559, 45 Am. Rep. 531.

Under the information system of criminal procedure the presentment stands in the place and stead of the presentment by a grand jury.

Re Wright, 3 Wyo. 487, 13 L. R. A. 748; *Fauer* v. *People*, 34 Mich. 286; *White* v. *State*, 28 Neb. 341.

Such presentment by a magistrate, under the information system or by a grand jury under the grand jury system is necessary to confer jurisdiction upon the trial court.

White v. *State*, *supra*; *People* v. *Chapman*, 62 Mich. 280; *People* v. *Smith*, 25 Mich. 497; *State* v. *Sorenson*, 84 Wis. 30; *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849; *Ex parte Lange*, 85 U. S. 18 Wall. 168, 21 L. ed. 875; *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89.

The right to a change of venue at a preliminary examination under the information system is to a defendant an important and substantial right.

State v. *Sorenson*, *supra*.

Mr. **Benjamin F. Fowler**, for defendant:

A law which operates as a mere change of criminal procedure, without affecting any substantial right of the accused, is not *ex post facto*, as applied to crimes committed before it took effect.

Cooley, Const. Lim. p. 329; *State* v. *Manning*, 14 Tex. 402; *State* v. *Clarkson*, 59 Mo.

NOTE.—On the subject of *ex post facto* laws, see also Anderson v. O'Donnell (S. C.) 1 L. R. A. 632, and *note*; State v. Cooler (S. C.) 3 L. R. A. 181, and *note*; *Re* Tyson (Colo.) 6 L. R. A. 472; *Ex parte* Larkins (Okla.) 11 L. R. A. 418; *Re* Wright (Wyo.) 13 L. R. A. 748; Com. v. Graves (Mass.) 16 L. R. A. 256; People v. Hayes (N. Y.) 23 L. R. A. 830; Boyd v. Mills (Kan.) 25 L. R. A. 486; French v. Deane (Colo.) 24 L. R. A. 387.

See also 35 L. R. A. 238.

149; *State* v. *Williams*, 2 Rich. L. 418, 45 Am. Dec. 741; *People* v. *Phelps*, 5 Wend. 9; *Rand* v. *Com.* 9 Gratt. 738; 7 Am. & Eng. Encyclop. Law, p. 581; *Re Wright*, 3 Wyo. 478, 13 L. R. A. 748.

A law is not unconstitutional which precludes a defendant in a criminal case from taking advantage of variances which do not prejudice him.

Com. v. *Hall*, 97 Mass. 570.

Nor is a law unconstitutional which reduces the number of the prisoner's peremptory challenges.

Dowling v. *State*, 5 Smedes & M. 664.

A law is not unconstitutional which, though passed after the commission of the offense, authorizes a change of venue to another county of the judicial districts.

Gut v. *Minnesota*, 76 U. S. 9 Wall. 35, 19 L. ed. 573. See also *Holt* v. *State*, 2 Tex. 363; 1 Kent, Com. 408; *Calder* v. *Bull*, 3 U. S. 3 Dall. 388, 1 L. ed. 649; *Strong* v. *State*, 1 Blackf. 193; *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 138, 3 L. ed. 178; *State* v. *Cooler*, 30 S. C. 105; *Com.* v. *Phillips*, 11 Pick. 28.

A defendant on trial for a criminal offense has no vested right in the manner of procedure established by law at the time of the commission of the alleged crime.

Marion v. *State*, 20 Neb. 233, 57 Am. Rep. 825; *State* v. *Manning*, 14 Tex. 402; *State* v. *Ryan*, 13 Minn. 370; *Walston* v. *Com.* 16 B. Mon. 16; *Warren* v. *Com.* 37 Pa. 45.

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

The petitioner for the writ of habeas corpus, Isaac Chandler, was convicted in the district court for Laramie county of the crime of assault and battery with the intent to kill and murder, and on the 7th day of June, A. D. 1895, was sentenced to imprisonment in the penitentiary for the term of fourteen years. He applies for the writ of habeas corpus, alleging that his imprisonment is unlawful, because the justice of the peace before whom he was examined on said charge refused to grant him, upon his sworn application therefor alleging the prejudice of the magistrate, an examination before some other justice of the peace of the county wherein the offense was alleged to have been committed. The time fixed in the information or complaint before the justice of the peace, when the offense was committed was January 3, 1895. At the time of the commission of the offense, as alleged in the complaint, the statute (section 3441 of the Revised Statutes of Wyoming, as amended by chapter 17 of the Session Laws of 1890) provided, among other things, that if, upon the return of the process, or the appearance of the parties in any civil cause or proceeding "or upon any criminal examination," either party, his agent, or attorney shall make affidavit that, from prejudice, bias, or other cause, he believes that the justice of the peace before whom the cause is pending will not decide impartially in the matter, the said justice shall transfer said suit and all papers appertaining thereto to some other justice of the peace of the same or adjoining precinct against whom no such objection has been raised, who may thereupon proceed to hear and determine the same in the same manner as it would have been lawful for the justice before whom the cause or proceeding was commenced to have done. This last-mentioned act was repealed, and section 3441 of the Revised Statutes, amended thereby, was re-enacted, in such manner as to remove all reference to criminal proceedings or criminal examinations, by chapter 84 of the Session Laws of 1895, which by its terms took immediate effect, and which became a law upon the approval of the governor, February 18, 1895, two days before the complaint was made before the justice of the peace, and before the preliminary examination of the petitioner. The petitioner, at his preliminary examination, notwithstanding the repealing statute, filed his affidavit and motion before the examining magistrate, the affidavit alleging that the "affiant has been reliably informed and verily believes that there exists in the mind of H. Glafcke [the magistrate] a prejudice against said defendant such as would preclude said Glafcke from giving said defendant a fair and impartial hearing or examination," and, further, "that said affiant has been informed and verily believes that there exists in the mind of L. E. Stone, a justice of the peace of Cheyenne precinct, in Laramie county, Wyoming, and in the mind of one Charles Carlstrum, of Pine Bluffs precinct, in said county and state, and a justice of the peace within and for said precinct, a prejudice such as would preclude both said L. E. Stone and said Carlstrum from giving said defendant a fair and impartial examination in said matter." The objection was therefore made to three justices of the peace of the county wherein the offense was alleged to be committed by this affidavit. The justice of the peace refused the application for change of venue, doubtless because of the passage of the repealing statute taking away the right of a defendant in a criminal cause or proceeding to a change of venue in a preliminary examination. The attention of the district court was called to this matter by a plea in abatement before the trial and by a motion in arrest of judgment, both of which were overruled by the trial court.

The petitioner claims that the statute (Sess. Laws 1895, chap. 84), in repealing or attempting to repeal, without a saving clause, the prior statute providing for a change of venue in a preliminary examination before a justice of the peace in criminal cases, is *ex post facto*, and void as to him, as the offense with which he was charged was alleged to have been committed January 3, 1895, and that the Act of February 18, 1895, could not deprive him of the right to object by affidavit to the justice of the peace before whom he was brought to be examined on said charge, upon the grounds mentioned in the statute in force at the time of the alleged commission of the offense. He contends that, notwithstanding the repeal of the statute providing for a change of venue in preliminary examinations, he was entitled to it, when he applied therefor, under the law as it existed at the time of the commission of the offense alleged; that the jurisdiction of the justice as an examining tribunal or court of inquiry

was defeated after the application for change of venue had been made; that the magistrate was without jurisdiction to proceed with the examination; that, as the subsequent proceedings of the magistrate were void, the accused had no preliminary examination; and that, therefore, as the statute then provided for such an examination in trials upon information of the prosecuting attorney, and where the accused had not been indicted by a grand jury, the district court was without jurisdiction to try the defendant, and that all its proceedings, resulting in the conviction and sentence of the petitioner, are wholly void. The relator insists that he has been deprived of a substantial right by the repealing statute, that of the right to object to the examining magistrate upon the belief of the petitioner of his bias and prejudice, and to secure, by merely filing an affidavit stating such belief, a change of place of trial or in the personnel of the examining tribunal.

It is doubtful if the record discloses sufficient facts to enable us to determine whether or not the offense with which the petitioner is charged occurred prior to the passage of the Statute of February 18th, which took away the right to a change of the place of the examination or in the examining magistrate. We do not have before us, in this proceeding, the record of the district court, sufficient to show when the alleged offense was committed. The allegation in the information, filed before the examining magistrate on the 20th of February, 1895, alleges that the offense occurred on the 3d day of January of that year, but this is not conclusive upon the prosecution, and, under a familiar rule of criminal law, the prosecution may lay one day in the information and prove that the offense was committed upon any day prior to the filing of the accusation. The offense may, then, have occurred, for aught we know to the contrary, on the 19th or 20th day of February, 1895, and after the passage of the challenged act of the legislature became a law by the signature of the governor, in which event, the contention of the petitioner would amount to nothing. However, we have determined to decide this proceeding upon the question involved in the briefs of counsel, and to consider only the validity of the statute which it is claimed took away the right of the petitioner in the examining court to secure a change of magistrate or place of trial, and treating the date of the commission of the offense to be prior to the enactment of the challenged statute.

There is no doubt that the statute as it originally stood was liable to great abuse, and it is no wonder that the legislature sought to repeal it. In the case at bar, the relator objected to three magistrates of the county, and it would seem that he could have objected to all but one, and thus have chosen his magistrate, or, for that matter, to all of the magistrates in the county, and thus have forced the prosecution to resort to a grand jury to secure an indictment; for, as the act stood in its primitive simplicity, it provided that, if the affidavit be filed that from prejudice, bias, or other cause the defendant believes that the justice will not decide impartially in the matter, the proceeding shall be transferred to some other justice of the same or adjoining precinct "against whom no such objection has been raised." It will be seen, therefore, that the relator under the provisions of this statute was quite modest, as he objected to but three justices of the peace, when he might have filed his affidavit against every one in the county, if he "believed" that they were all prejudiced against him. It is asserted that the petitioner was deprived of a substantial right by the repealing statute, and, that being so, deprived of a substantial protection afforded to him by the law existing at the time of the commission of the offense, that of the right upon information and belief to object to one, three, or any number of examining magistrates of the county, including the one before whom he was brought for examination. Nothing appears in the record that the magistrate was biased or prejudiced against the accused; nothing but the bare allegation that the defendant believed that there existed in the mind of the magistrate a prejudice against the relator which would preclude the magistrate from giving the defendant a fair and impartial hearing and examination. It does not appear that the magistrate was prejudiced, but merely that the defendant was reliably informed and verily believed such to be the case. An affidavit is classed as the lowest grade of proof known in courts of justice, and an affidavit upon information and belief may well be termed the lowest grade of the lowest grade of proof. A fair and impartial jury, as we must consider them to be, and a judge not objected to, sat in the trial court wherein the defendant was convicted of the felony charged against him, and such must have been the atrocious nature of the felonious assault that was proven that the judge felt compelled to sentence the defendant to the full extent of the law. We are now asked to set aside the trial, and perhaps discharge the defendant from custody and all future punishment, because he has been deprived of the benefit of this statute. If his rights have been invaded, either as secured to him by constitutional or statutory law, this duty must be fearlessly done, but this must be clear to warrant the exercise of such a power.

The development of the law relating to the guaranty of the Federal Constitution that "no state shall pass an *ex post facto* law" (art. 1, § 10) is remarkable. It has sprung from definitions in decisions wherein such definitions are the clearest *dicta*, and it will be somewhat interesting to trace the federal decisions to the present time, and to ascertain what the views of the national tribunal of last resort have been and are for the definition and classification of *ex post facto* laws. The rule established by that great tribunal should be followed, as the determination of what is or what is not an *ex post facto* law is necessarily, under the guaranty of the Federal Constitution, a federal question, as well as a question arising under the provisions of our state constitution. In the case of *Calder* v. *Bull*, 3 U. S. 3 Dall. 390, 1 L. ed. 650, *Mr. Justice* Chase defined what he considered *ex*

post facto laws as follows. "(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) Every law that aggravates a crime, or makes it greater than it was, when committed. (3) Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. (4) Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender." These views were not adopted by the majority of the court in that case, and were, indeed, mere *dicta*, as the act of the legislature of the state of Connecticut, setting aside a decree of a court of probate and granting a new hearing before the same court, with liberty of appeal, was held not to be an *ex post facto* law, within the meaning of section 10 of article 1 of the Constitution of the United States, as that article had reference only to crimes, and this was the main question decided. But the court really adopts this definition in *Cummings* v. *Missouri*, 71 U. S. 4 Wall., at page 325, 18 L. ed. 363, where, in the language of *Mr. Justice* Field, delivering the opinion of the majority, it is said: "By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed, or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Mr. Justice* Miller dissented in this case, and in the case of *Ex parte Garland, Petitioner*, following (71 U. S. 4 Wall. 390, 18 L. ed. 374), and says of the case of *Calder* v. *Bull, supra:* "The first case on the subject is that of *Calder* v. *Bull*, and it is the one in which the doctrine concerning *ex post facto* laws is most fully expounded." He further states that the court, in that case (*Calder* v. *Bull*), divides all laws which come within the meaning of that clause into four classes, and then names the classifications made by *Mr. Justice* Chase, quoted fully, *supra*. In the celebrated case of *Kring* v. *Missouri*, 107 U. S. 228, 27 L. ed. 508, in which the court apparently assumed by a bare majority a new position, *Mr. Justice* Miller says, of the definition given by *Mr. Justice* Chase, in *Calder* v. *Bull:* "But it is not to be supposed that the opinion in that case undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable." This learned jurist adopts, as supplementary to the views of *Mr. Justice* Chase, the language of *Mr. Justice* Washington, in *United States* v. *Hall*, 2 Wash. C. C. 366, Fed. Cas. No. 15,285, that an *ex post facto* law is one, "in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage," the words herein quoted being italicized in the opinion of the majority of the court, and 10 U. S. 6 Cranch, 171, 3 L. ed. 189, is cited as showing that the case of *United States* v. *Hall* was affirmed, but the opinion on affirmance makes no reference to *ex post facto* laws, and the case was disposed of on other grounds. The opinion in the case in 6 Cranch was delivered by *Mr. Chief Justice* Marshall, and if the case had rested upon the invalidity of the law, such a matter would hardly have escaped the attention of that great jurist. In the *Kring Case*, the following language is used in the majority opinion: "Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by state legislation after the offense was committed, and such legislation not held to be *ex post facto* because it relates to procedure, as it does according to Mr. Bishop? And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot." Upon these excerpts last quoted have been built up many hopes of convicted criminals, but we think this language is *dictum*, and it has so been held by other state courts than this. *Lyharger* v. *State*, 2 Wash. 552; *Re Wright*, 3 Wyo. 478, 13 L. R. A. 748. In the majority opinion in *Ex parte Medley*, 134 U. S., at page 171, 33 L. ed. 640, written by *Justice* Miller, the court goes further, and defines an *ex post facto* law to be, among other things, one "which alters the situation of the accused to his disadvantage," leaving out, evidently unintentionally, the important qualifying words, used in almost every other case in the Federal Supreme Court on this subject, "in relation to the crime and its consequences."

We think that these cases have not been followed by the great tribunal in which they were rendered, and that what may be termed extreme terms used in them have not been crystallized into law. The cases where this sweeping language has been employed have been those where the punishment has been increased, either by restoring the death penalty, where the accused has once been acquitted of a capital offense, or where the punishment has been increased, or where some legislative act, in relation to the crime or its consequences, has imposed a greater degree of punishment than that inflicted at the time it was committed. The definitions of an *ex post facto* law have sprung from the *dicta* of jurists, adopted by the court, but, however apt or exact as to the case under consideration, can hardly be said to have been accepted as legal definitions or axioms. A review of the cases in the Federal Supreme Court will establish this fact. In the case of *Hopt* v. *Utah*, 110 U. S. 574, 28 L. ed. 262, a law of the territory of Utah was challenged as *ex post facto*, which repealed a statute providing that "persons against whom judgment has been rendered upon a conviction for felony, unless pardoned by the governor, or such judgment has been reversed on appeal, shall not be witnesses," after the commission of the crime of one accused of murder; but the court held unanimously that the repealing act merely enlarged the class of persons who might be competent to testify, and was not *ex post facto*. It was said that such statutory alterations "only remove existing restrictions upon the competency of certain classes of per-

sons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure." And the testimony of one who was convicted of the crime of murder was held to be rightfully admitted by the trial court against the defendant, although the law making such testimony incompetent was repealed after the offense was committed, leaving the statute in such shape as to make such testimony competent. The case of *Holden* v. *Minnesota*, 137 U. S. 483, 34 L. ed. 734, is distinguished from *Ex parte Medley, supra.* But in a comparatively recent case (*Cook* v. *United States*, 138 U. S. 157-183, 34 L. ed. 906-913), the court says: "It is said that the construction we place upon the 2d section of article 3 makes it obnoxious to the *ex post facto* clause of the Constitution. In support of this position reference is made to *Kring* v. *Missouri*, 107 U. S. 221, 27 L. ed. 506, where it was declared that any statute passed after the commission of an offense, which, 'in relation to that offense or its consequences, alters the situation of a party to his disadvantage,' is an *ex post facto* law. This principle has no application to the present case. The Act of 1889 does not touch the offense nor change the punishment therefor. It only includes the place of the commission of the alleged offense within a particular judicial district, and subjects the accused to trial in that district rather than in the court of some other judicial district established by the government against whose laws the offense was committed. This does not alter the situation of the defendants in respect to their offense or its consequences. 'An *ex post facto* law,' this court said, in *Gut* v. *Minnesota*, 76 U. S. 9 Wall. 35-38, 19 L. ed. 573, 574, 'does not involve, in any of its definitions, a change of the place of trial of an alleged offense after its commission.'" See *Duncan* v. *Missouri*, 152 U. S. 377, 38 L. ed. 485.

This *résumé* of the authoritative federal decisions, however conflicting they may seem, or however unsatisfactory they may be in defining what is and what is not an *ex post facto* law, shows, we think, that the court has not established as law the broad definitions laid down in the *Kring* and *Medley Cases*, but that the definition of *Mr. Justice* Washington, quoted in *Kring* v. *Missouri*, may be relied upon, that a law which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage, is an *ex post facto* law, as this formula evidently comprehends and is the sum of all the definitions.

The state courts have strongly leaned to the position that a mere change in procedure is not an *ex post facto* law, and to the doctrine that an act, to be denounced as unconstitutional in this respect, must make punishable that which was not punishable at the time the act was committed, or which aggravates the punishment, or operates to the disadvantage of the accused in relation to the crime or its punishment. Laws have been held constitutional which, after the commission of an offense, decrease the number of a jury in trials for misdemeanors (*State* v. *Carter*, 33 La. Ann. 1214); which provide that, in all questions affecting the credibility of a witness, his general moral character may be given in evidence (*Robinson* v. *State*, 84 Ind. 452); which authorize the punishment of a person for an offense previously committed, and as to which all prosecution and punishment were barred at its passage, according to pre-existing statutes of limitation (*State* v. *Moore*, 42 N. J. L. 208); which reduce the number of peremptory challenges allowed the accused (*Dowling* v. *State*, 5 Smedes & M. 664; *Mathis* v. *State*, 31 Fla. 311); which change the manner of summoning a jury (*Perry* v. *Com.* 3 Gratt. 632); which allow amendments to pending indictments (*State* v. *Manning*, 14 Tex. 402); which prevent the defendant from taking advantage of variances in the indictment (*Com.* v. *Hall*, 97 Mass. 570); which give the state seven peremptory challenges (*State* v. *Ryan*, 13 Minn. 370 [Gil. 343]; *Walston* v. *Com.* 16 B. Mon. 16, 40); requiring the jury, instead of the court, to fix the punishment (*Holt* v. *State*, 2 Tex. 363); making the court, instead of the jury, judges of the law (*Marion* v. *State*, 20 Neb. 236, 57 Am. Rep. 825); changing the place of trial after the commission of the offense (*State* v. *Gut*, 13 Minn. 341 [Gil. 315]); clothing justices of the peace with jurisdiction over crimes previously committed (*State* v. *Welch*, 65 Vt. 50); dividing a county into judicial districts (*Potter* v. *State*, 42 Ark. 29); repealing a law providing for preliminary examinations after indictment found (*Jones* v. *Com.* 86 Va. 661); changing method of prosecution from indictment to information by prosecuting attorney (*People* v. *Campbell*, 59 Cal. 243, 43 Am. Rep. 257; *Lybarger* v. *State*, 2 Wash. 552; *Re Wright*, 3 Wyo. 478, 13 L. R. A. 748).

By our statute taking away the right of the accused to object, by an affidavit made upon information or belief, to the examining magistrate, after the commission of felony, the petitioner was not deprived of any substantial right or protection, as it is within the power of the legislature to change the form and method of procedure in any manner which, in relation to the crime or its consequences, does not alter the situation of the accused to his disadvantage, and the situation of the prisoner was not so changed by the statute challenged by him. It cannot be seriously contended that all who may have committed criminal offenses prior to the date of the statute repealing the law providing that the defendant may, upon his own statement upon information and belief, secure a change of place of trial, shall have the right for years to come (as we have no statute of limitations relating to crimes or misdemeanors) to be considered as pardoned by the legislature, or as entitled to the right under a repealed statute to object to the magistrate before whom they are brought upon complaint and warrant to answer a criminal charge of which the magistrate has not full jurisdiction to hear, try, and determine. True, in one case, the right of a change of venue in preliminary examinations is said to be a substantial and important right, of which the accused cannot be deprived except by his own act (*State* v. *Sorenson*, 84 Wis.

27); but this is a right given under a statute already existing. If the statute had been repealed, it is doubtful if the Wisconsin court would hold, in face of all the authorities, that the right to a change of place of trial, being a method of procedure, in which no one has a vested right, cannot be taken away by a statute after the commission of the offense. *Cook* v. *United States*, 138 U. S. 183, 34 L. ed. 913; *Gut* v. *Minnesota*, 76 U. S. 9 Wall. 38, 19 L. ed. 574; *Hopt* v. *Utah*, 110 U. S. 589, 28 L. ed. 268. The right to a change of place of trial, or a change of judge, in case where the magistrate or judge is disqualified by prejudice, or where there cannot be a fair trial owing to the prejudice in the community against the accused, always existed at common law, but the venue was never changed upon the mere opinion or belief of the party applying therefor at common law, as the rule was that facts and circumstances must appear satisfying the court. 1 Bishop, Crim. Proc. 70, 71.

By no accepted definition of an *ex post facto* law is this statute, which sweeps away the provision that the accused may secure a change of magistrate or place of preliminary examination in a criminal case upon his affidavit of belief of the prejudice of the magistrate before whom he has been brought for such examination, an *ex post facto* law. It does not make criminal what before its enactment was innocent; it does not inflict greater punishment than was attached to the crime when committed; it does not alter the rules of evidence, and direct that less or different testimony may be received than required at the time of the commission of the offense; and it does not alter, in relation to the crime or its consequences, the situation of the accused to his disadvantage. If we go further, and add other means invented in some of the cases for the detection of an *ex post facto* law, it does not deprive him of any substantial or vested right provided by law at the time of the guilty act for his protection. It is necessary, in the administration of justice, that one accused of crime should have a fair trial before an impartial and unprejudiced judge and jury, and even an examination on the initial or preliminary inquiry before an impartial and unprejudiced magistrate. Nowhere does the record show that the petitioner has been shorn of any of these substantial rights and privileges; for, if the examining tribunal, the court of inquiry, was prejudiced against him, we have no knowledge of that fact from the record, and it is not even asserted that the allegations of the defendant, upon information and belief, made in his affidavit, alleging such prejudice before the examining magistrate were true. It merely appears that he believes them to be true, and this is insufficient under the statute in force at the time that he was complained against at the preliminary examination. Endless confusion would result from a decision by us that the legislature had no right to make new regulations as to methods of procedure in the courts of justice, or to remove and repeal old rules that may be found to be a temptation to perjury or liable to abuse, and which in no way affect the right of the accused to a fair and impartial hearing, either in the examining or in the trial court.

The writ is disallowed, and the petition for the writ is dismissed. In accordance with the provisions of the habeas corpus act, the clerk of this court will return the petition for the writ to the petitioner, or the person applying for the writ, with a certified copy of this opinion containing the reasons of this court for disallowing and refusing the writ.

Conaway and **Potter**, *JJ.*, concur.

CALIFORNIA SUPREME COURT.

SAN DIEGO WATER CO., *Appt.*,
v.
SAN DIEGO FLUME CO., *Respt.*

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

1. A prayer of a complaint for damages for breach of a contract and for specific performance of the same, based upon the same facts, does not render the complaint obnoxious to the objection that it joins several causes of action without separately stating them.

2. Trustees appointed by parties to a contract to manage the details of the business done thereunder are not necessary parties to an action thereon.

3. A contract between corporations organized to distribute and furnish water to consumers in a county and city, for co-operation in supplying water to the city, is not *ultra vires* because one officer of each corporation is appointed a trustee and they together given general charge of the operation of the works, and of keeping the accounts of receipts and expenses, with a limited power of determining what shall be charged to the account of operating expenses, and with other powers and duties simply executory and such as could not be discharged by any board of directors otherwise than through an agent.

4. The appointment by a corporation, by its board of directors, of another corporation to act as its sole agent in the sale of water within a city, to be distributed by means of plants of both corporations, is not in violation of Civ. Code, § 354, subdivs. 5, 8, where the agency, although exclusive, is not unlimited or unrestricted.

5. A contract between corporations organized to distribute and furnish water to consumers in a county and city, one of which owns a supply of water and a pipe line ending at the city limits, and the other a distributing plant within the city, for co-operation in

NOTE.—The general subject of monopolies and combinations by corporations will be found treated to a considerable extent in the *note* to People v. Chicago Gas Trust Co. (Ill.) 8 L. R. A. 497.

For right of one corporation to hold the stock of another, see *note* to Buckeye Marble & T. Co. v. Harvey (Tenn.) 13 L. R. A. 252.

See also 39 L. R. A. 299.

supplying water to the city and providing a method of determining the price of water, is not in violation of public policy as a combination to create a monopoly, since the California constitution reserves to municipal corporations the power of regulating water rates.

(August 26, 1895.)

APPEAL by plaintiff from a judgment of the Superior Court for San Diego County in favor of defendant in an action brought to enforce specific performance of a contract for the furnishing of water to the City of San Diego and for damages for its breach. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. **Works & Works,** for appellant:

As to the extent to which a corporation may go, in making contracts, without bringing itself within the prohibitory rules,—

See *Ellerman* v. *Chicago Junction R. & U. S. Y. Co.* 49 N. J. Eq. 217; *Union Water Co.* v. *Murphy's Flat Fluming Co.* 22 Cal. 621; *Sutro Tunnel Co.* v. *Segregated Belcher Min. Co.* 19 Nev. 121; *Leslie* v. *Lorillard*, 110 N. Y. 519, 1 L. R. A. 456; 1 Wood, Railway Law, pp. 491–499; *Bissell* v. *Michigan S. & N. I. R. Co.* 22 N. Y. 258; *Kent* v. *Quicksilver Min. Co.* 78 N. Y. 159; *Chicago, St. L. & N. O. R. Co.* v. *Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97; *Elkins* v. *Camden & A. R. Co.* 36 N. J. Eq. 241; *Central Shade Roller Co.* v. *Cushman*, 143 Mass. 353; *State* v. *Hancock*, 35 N. J. L. 537; *Miners' Ditch Co.* v. *Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Sussex R. Co.* v. *Morris & E. R. Co.* 19 N. J. Eq. 13.

If the corporation has derived any benefit from the execution, or partial execution, of the contract, it can be compelled to perform on its part, to the extent, and up to the time, such contract had been acted upon.

Kelsey v. *National Bank*, 69 Pa. 426; 1 Wood, Railway Law, pp. 491-502; *Bissell* v. *Michigan S. & N. I. R. Co. supra; Witter* v. *Grand Rapids Flouring Mill Co.* 78 Wis. 543; *Heims Brewing Co.* v. *Flannery*, 137 Ill. 309; *Holmes* v. *Willard*, 125 N. Y. 75, 11 L. R. A. 170; *Manchester & L. R. Co.* v. *Concord R. Co.* 66 N. H. —, 9 L. R. A. 689, 3 Inters. Com. Rep. 319; *State Board of Agriculture* v. *Citizens' Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702; *Bradley* v. *Ballard*, 55 Ill. 413, 8 Am. Rep. 656; *Oil Creek & A. R. R. Co.* v. *Pennsylvania Transp. Co.* 83 Pa. 160; *Main* v. *Casserly*, 67 Cal. 127.

In *Heims Brewing Co.* v. *Flannery, supra,* it is said: "The defense of *ultra vires* cannot avail the defendant. Even admitting that entering into said contract was in excess of the defendant's corporate powers, yet, having entered into said contract and enjoyed its benefits, it should be estopped to appeal to the limitations imposed by its charter for the purpose of escaping payment of the stipulated consideration."

See also *Manchester & L. R. Co.* v. *Concord R. Co.* and *Oil Creek & A. R. R. Co.* v. *Pennsylvania Transp. Co. supra.*

This was not a copartnership contract.

Hanna v. *Flint*, 14 Cal. 74; *Wheeler* v. *Farmer*, 38 Cal. 203; *Stuart* v. *Adams*, 89 Cal. 367; *Smith* v. *Schultz*, 89 Cal. 526; *Loomis* v. *Marshall*, 12 Conn. 69, 30 Am. Dec. 596; *Keiser* v. *State*, 58 Ind. 379; *Boyce* v. *Brady*, 61 Ind. 432; *Harvey* v. *Childs*, 28 Ohio St. 319, 23 Am. Rep. 387; 17 Am. & Eng. Encyclop. Law, p. 845.

Messrs. **McDonald & McDonald,** for respondent:

Enough appears upon the face of the complaint to show that said contracts were and are void because beyond the powers of the respective corporations and against the public policy of the state.

The primary object of the two corporations in entering into those contracts was to control the water supply, and thereby enhance the price of water in the city of San Diego, and to create and maintain a monopoly of the water business of said city. This rendered the contracts void.

Spelling, Trusts & Monopolies, §§ 82, 106-109; *Arnot* v. *Pittston & E. Coal Co.* 68 N. Y. 559, 23 Am. Rep. 190; *Ford* v. *Gregson*, 7 Mont. 89; *Santa Clara Valley Mill & L. Co.* v. *Hayes*, 76 Cal. 387.

A corporation can exercise no other powers than such as are specifically granted, or such as are necessary for carrying into effect the powers granted.

Vandall v. *South San Francisco Dock Co.* 40 Cal. 83; Morawetz, Priv. Corp. § 316; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55.

The authority of every agent of a corporation is derived, directly or indirectly, from the agreement of the shareholders as expressed in their charter or articles of incorporation.

The board of directors cannot depart from the company's chartered purposes under any circumstances.

Morawetz, Priv. Corp. § 514.

Whatever tends to injustice or oppression, restraint of liberty, commerce, and natural or legal right; whatever tends to the obstruction of justice, or to the violation of a statute; and whatever is against good morals,—when made the object of a contract is against public policy, and, therefore, void, and not susceptible of enforcement.

9 Am. & Eng. Encyclop. Law, p. 880. See also Greenhood, Pub. Pol. p. 2; *Kreamer* v. *Earl*, 91 Cal. 117; *Dial* v. *Hair*, 18 Ala. 800, 54 Am. Dec. 179; *Smith* v. *Johnson*, 37 Ala. 636; *Damrell* v. *Meyer*, 40 Cal. 170; *Beard* v. *Beard*, 65 Cal. 354; *Alpers* v. *Hunt*, 86 Cal. 78, 9 L. R. A. 483; *Gridley* v. *Dorn*, 57 Cal. 78, 40 Am. Rep. 110; *Mitchell* v. *Cline*, 84 Cal. 409.

The state has declared all water appropriated for the purposes of sale, rental, or distribution to be charged with a public use, and has indicated the policy of the state to the prevention of monopolies so far as furnishing light and water to cities and their inhabitants is concerned.

People v. *Stephens*, 62 Cal. 209; *People* v. *Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497; *McCrary* v. *Beaudry*, 67 Cal. 120.

The franchises of a corporation are privileges granted and held in personal trust by it, and cannot be transferred, either by forced sale or by voluntary assignment, except by permission of the legislature, and when that permission is granted the mode of transfer

pointed out is the measure of the power; and any attempt on the part of the corporation to devest itself of its franchise and thus disable itself from performing its duties to the public, without legislative authority is *ultra vires* and void.

Wood v. *Truckee Turnp. Co.* 24 Cal. 474; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Stockton* v. *Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97; *Randolph* v. *Larned*, 27 N. J. Eq. 557; *Troy & B. R. Co.* v. *Boston, H. T. & W. R. Co.* 86 N. Y. 107; *Fanning* v. *Osborne*, 102 N. Y. 441; *Peoria & R. I. R. Co.* v. *Cool Valley Min. Co.* 68 Ill. 489; *Richardson* v. *Sibley*, 11 Allen, 65, 87 Am. Dec. 700; *Middlesex R. Co.* v. *Boston & C. R. Co.* 115 Mass. 347; *Stewart's App.* 56 Pa. 413; *Gibbs* v. *Drew*, 16 Fla. 147, 26 Am. Rep. 700; Ray, Contractual Limitations, pp. 273, 278.

This agreement is also *ultra vires* and illegal, for the reason that it undertakes to constitute the parties partners in the business of furnishing water to the city of San Diego and its inhabitants.

1 Morawetz, Priv. Corp. § 421; 2 Beach, Corp. § 843; Ray, Contractual Limitations, § 56; *People* v. *North River Sugar Ref. Co.* 121 N. Y. 582, 9 L. R. A. 33, 54 Hun, 355, 5 L. R. A. 386; *Mallory* v. *Hanaur Oil Works*, 86 Tenn. 598; *Pearce* v. *Madison & I. R. Co.* and *Peru & I. R. Co.* 62 U. S. 21 How. 441, 16 L. ed. 184; *Burke* v. *Concord Railroad*, 61 N. H. 169; *Quinn* v. *Quinn*, 81 Cal. 14.

This agreement is contrary to public policy, for the reason that it is a combination between the parties for the purpose of creating a monopoly for the sale of water to the city of San Diego and its inhabitants.

Pacific Factor Co. v. *Adler*, 90 Cal. 110; *Santa Clara Valley Mill & L. Co.* v. *Hayes*, 76 Cal. 387; Ray, Contractual Limitations, pp. 212, 213, 234, 238, and cases cited; *Richardson* v. *Buhl*, 77 Mich. 632, 6 L. R. A. 457.

The general rule that contracts in partial restraint of trade are not invalid does not apply to corporations engaged in a public business in which the public are interested.

Chicago Gas Light & Coke Co. v. *People's Gas Light & Coke Co.* 121 Ill. 530; *People* v. *Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497; *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979; *West Virginia Transp. Co.* v. *Ohio River Pipe Line Co.* 22 W. Va. 600, 46 Am. Rep. 527; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55; *Miner's Ditch Co.* v. *Zellerbach*, 38 Cal. 543, 99 Am. Dec. 300.

When the illegal purpose is disclosed, whether the shelter be under form of partnership of individuals or of corporations, the grasp of a court of equity will be equally powerful to control the trust.

Ray, Contractual Limitations, pp. 234, 279; *Stockton* v. *Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97; *People* v. *North River Sugar Ref. Co.* 54 Hun, 354, 5 L. R. A. 386.

These corporations not having had the power to enter into this agreement, it is void *in toto*, and the defendant may avail itself of the plea of *ultra vires*.

Miner's Ditch Co. v. *Zellerbach*, *Thomas* v. *West Jersey R. Co.*, and *Central Transp. Co.* v. *Pullman's Palace Car Co.*, *supra*.

Haynes, *Ch. J.*, filed the following opinion:

Defendant's demurrer to the complaint was sustained, and, the plaintiff declining to amend, judgment of dismissal was entered, from which judgment it appeals. The only questions to be considered, therefore, are those presented by the demurrer.

The complaint alleges, in substance, that both the parties to this action are corporations organized and existing under the laws of this state for the purpose of distributing, selling, and furnishing water to consumers in the county and city of San Diego; that the plaintiff is the owner of a complete distributing plant for furnishing water to the city of San Diego and its inhabitants; that the defendant is the owner of water rights, reservoirs, and a supply of water outside of said city, from which the water is conducted by flumes and pipes to the city boundary, where, during all the times mentioned in the complaint, they were and are connected with the water mains and pipes of the plaintiff; that the defendant was not and is not the owner of any water pipes within the city, and was unable to distribute or furnish its water to the city or its inhabitants. Under these circumstances, the parties to this action executed two written agreements, both bearing date November 6, 1890, which are referred to as Exhibits A and B, respectively, but which constitute one contract. By the first, the flume company appoints the water company its sole agent for the exclusive sale of its water within the corporate limits of the city, as then or thereafter established, excepting the peninsula of San Diego; but all sales made by the water company "shall be subject to the approval of the party of the first part [the flume company], and no sales shall be made without the consent of the party of the first part." It was further provided that said appointment should continue and be in force during the continuance of the other contract of the same date, namely, twenty years. The other contract—Exhibit B—is very long, but for the purpose of disposing of the questions made upon this appeal may be greatly condensed. By this agreement E. S. Babcock and J. W. Sefton, the former the president of the plaintiff corporation, and the latter the president of the defendant, were appointed trustees, to whom were given the control of the properties of these corporations, respectively, "so far as the same may be confined to the corporate limits of the city of San Diego," to operate and control the same for the use and benefit of the respective parties thereto. These trustees were selected and named, one by each corporation, and each was to hold said office of trustee at the pleasure of the party naming him, who should also appoint his successor, and the compensation of each should be fixed and paid by the party appointing

him; that "the use, operation, and control of these properties by the said trustees shall be for the purpose of furnishing the water supply to the city of San Diego and its inhabitants, the profits arising therefrom to be subject to the control and use of the parties hereto, as hereinafter mentioned; said parties hereto agreeing to combine their joint endeavor for the advancement of their respective interests under this trust, subject to the conditions as hereinafter mentioned." The water company agreed to furnish its entire plant, and the flume company agreed to deliver at the city limits a sufficient quantity of good water for the supply of the city and its inhabitants, to be used by the trustees for that exclusive purpose. The trustees were to keep three separate accounts, one designated as the "operating account," another as "first-division account," and the third, as "second-division account." The second and third accounts were for the purpose of distributing the profits between the respective corporations. The agreement stated, in a general way, what should be charged to operating expenses, and except as provided, and excluding certain specified matters, the trustees were empowered to determine what should constitute a proper charge to that account. It was also provided that the flume company might use the water company's system of pipes for conducting water to parties outside the city limits, the compensation therefor to be fixed by the trustees.

The complaint further alleged that the parties thereto entered upon the performance of said agreement, that the plaintiff in all things carried out and performed the same on its part, that plaintiff and defendant and their said trustees failed to agree as to the proper basis of division of the accounts between them, and especially as to the amount to be expended for the extension of plaintiff's plant, and have been unable to agree upon a settlement of their said accounts; alleged plaintiff's willingness to settle and adjust the same, but that defendant made said differences an excuse for not furnishing the water required by the contract, and had wholly failed since May 2, 1892, to comply with said contract, though plaintiff had demanded in writing such performance; alleged that upon a true and just accounting there was due to it from defendant the sum of about $50,000, but that if the court should find otherwise, and that it was indebted to the defendant, it thereby offered to pay the same; that, by the defendant's failure to comply with its said contract, plaintiff had been damaged in the sum of $100,000; that, acting under said contract, plaintiff contracted with the city of San Diego to supply it with water for the term of twenty years at a reasonable profit, but that defendant, after furnishing water for said purpose for about a year, failed and refused to longer furnish the same, whereby plaintiff sustained special damage in the sum of $100,000.

The prayer is for an accounting, for damages, and for a specific performance of the contract, and for general relief.

The demurrer was upon several grounds, viz.: (1) For want of facts sufficient to constitute a cause of action; (2) that two alleged causes of action for damages are joined with an alleged cause of action for specific performance, without separately stating said several causes of action; (3) for defect of parties, in that Babcock and Sefton, the trustees, are not made parties; and (4) that the complaint is uncertain, in that several causes of action are joined without being separately stated and numbered.

The second and fourth grounds of demurrer go to the joinder of several causes of action without being separately stated. Different causes of action are not stated, however. Both legal and equitable relief is sought, but the right to such relief is based upon the same facts. Pom. Rem. § 452. Nor is the third ground of demurrer well taken. The trustees were simply the agents or instruments of the parties to the contract, and had no interest in the controversy in any legal sense.

Whether the complaint states facts sufficient to constitute a cause of action is the principal question in the case. Respondent contends "that enough appears upon the face of the complaint to show that said contracts were void, because beyond the powers of the respective corporations, and against the public policy of the state." The questions here presented were discussed by counsel in another action between the same parties, but that case went off upon another point, and no opinion was expressed upon them. *San Diego Water Co.* v. *San Diego Flume Co.* 100 Cal. 43.

It is contended that the contract in question was *ultra vires*, because under it the management of the affairs of the two corporations were taken from their respective boards of directors and transferred to two trustees, each of whom is a stranger to the corporation appointing the other. This statement of the effect of the contract is too broad. When analyzed, the powers of the trustees are very limited. By that part of the contract called "Exhibit A," the plaintiff, as a corporation, was appointed the agent of the defendant corporation for the sale of water within the city of San Diego; but all sales were subject to the approval of the defendant, and no sales could be made without its consent. The trustees were not given any power or authority over the sale of the water. They were given the general charge of operating the works of the plaintiff in distributing the water furnished by the defendant, and of keeping the accounts of receipts and expenses, with a limited power of determining what should be charged to the account of operating expenses; and, with that exception, their whole powers and duties were executory, and such as could not be discharged by any board of directors otherwise than through an agent. Nor is it material whether these agents were or were not connected with either corporation. They derived their authority from the agreement, and, as they were named in the agreement, each corporation acted upon and consented to the appointment of both. It is not contended that two corporations may not enter into contracts with each other. Their power to do so de-

pends, however, upon the character of the contract, examined in the light of their charters and of public policy. So far as the subject-matter of the contract is concerned, it relates to the sale and distribution of water, and to that extent, at least, it relates to the very purpose of the organization of each of these corporations, and is therefore presumably within their power. It is contended, however, in support of the demurrer, "that, under the power conferred by subdivisions 5 and 8 of section 354 of the Civil Code, the defendant, by its board of directors, was only authorized to appoint such agents and enter into such contracts as were essential to the transaction of its ordinary affairs; and that any attempt to make the plaintiff its exclusive agent for the sale of water was illegal and beyond the powers of the corporation." The statement that plaintiff is made "the exclusive agent" of the defendant for the sale of water is too broad. Such agency is confined to the corporate limits of the city of San Diego, within which the plaintiff alone had the means of distributing water to consumers. The agency, however, while exclusive, was not unlimited or unrestricted; but all sales of water were to be subject to the approval of the defendant, and no sale could be made without its consent. It is not suggested that the plaintiff corporation could not legally become an agent as to matters consistent with or in furtherance of the objects of its organization, nor that the defendant, within similar limitations, could not appoint an agent; but the real question involved lies back of and beyond these objections, which go only to the instrumentalities used to carry out the ultimate purpose of the parties in making the contract in question, viz., that the contract is against public policy, and therefore void.

It is urged that "both corporations were formed for the purpose, among other things, of furnishing water to the city of San Diego and its inhabitants, and are, therefore, quasi public corporations;" and that "the agreement is contrary to public policy, for the reason that it is a combination between the parties for the purpose of creating a monopoly for the sale of water to the city of San Diego and its inhabitants." That the contract is consistent with the purpose of the organization of each of these corporations, viz., "to furnish the city of San Diego and its inhabitants with water," is too clear for discussion. The question is therefore narrowed down to this: Does the agreement create a monopoly, or in any manner injuriously affect the interests of the city or its inhabitants? "Monopoly" signifies the sole power of dealing in a particular thing, or doing a particular thing, either generally or in a particular place. A monopoly is usually, though not necessarily, harmful or injurious to public interest, though, as that term is generally used, injury to the public is implied, and competition is therefore regarded as favorable to the public interest. But there is a competition which tends to monopoly by driving out all but the stronger competitor, when prices are again increased so as not only to yield a profit upon the original investment, but to recoup the losses incurred in breaking down competitors; or, where the competitors are of equal strength and tenacity of purpose, it may result in the destruction of the public service by the collapse of all of them. At and before the date of the contract in question, the plaintiff was the owner of a pumping plant, and of a system of mains and pipes for the distribution of water to the city of San Diego and its inhabitants, and was engaged in supplying them with water. The defendant was the owner of a reservoir supplied with water, together with flumes and pipes by which the water was conveyed to the borders of the city; but it owned no distributing plant by which it could dispose of its water within the city. To enable it to do so, it must either purchase plaintiff's distributing plant, or construct a distributing system of mains and pipes of its own, or sell its water within the city by or through the plaintiff, under some agreement for that purpose. It is not suggested that one distributing plant is not sufficient for all the wants of the city and its inhabitants, and certainly we cannot assume that it is not. Some agreement of the character here in question which would effectuate the evident intention of the parties would appear to be to the best interest of both corporations; and if the city and its inhabitants can be properly served through one distributing system, at reasonable rates, it is obviously to its best interest that its streets should not be subjected to the burden of laying and keeping in repair an additional system of mains and pipes. So far as the parties to this contract are concerned, the restraint is only partial. It is confined to the city of San Diego, or rather to that part of it which did not include the peninsula; and this, we think, was upon a sufficient consideration, and not an unreasonable restriction as between the parties. See *Mitchel v. Reynolds*, 1 Smith, Lead. Cas. 8th ed. 417. Nor does it injuriously affect the city or its inhabitants. Our constitution provides that "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law;" and it further provides that the rate or compensation to be collected for the use of water supplied to any city or town or its inhabitants shall be fixed annually by the governing body of the city and county, or city, or town, and any person or corporation collecting water rates "otherwise than as so established" shall forfeit the franchises and waterworks of such person or corporation to the city, etc. Const. art. 14, § 1. In *Spring Valley Water Works v. San Francisco City & County*, 82 Cal. 286, 6 L. R. A. 756, it was held that, when the constitution provides for the fixing of rates or compensation for the use of water, it means reasonable rates and just compensation; that the power of regulating rates is not a power of confiscation, or to take the property of the water company without just compensation.

Under the constitution, and the construction thus given its provisions, we fail to

perceive how the agreement in question can create a monopoly, or in any manner increase the rate or compensation to be paid by the city or its inhabitants for the water supplied. Indeed, it is evident that water can be supplied more cheaply through one distributing plant than through two; and the governing body of the city, in whom is vested the power to fix the water rates, is bound to take that fact into consideration, as well as all other facts which will enable it to fix "reasonable rates" and award a "just compensation." In Morawetz, Priv. Corp. § 1129, it is said that the same rule which applies to traffic arrangements between competing railroads applies also to telegraph, water, and gas companies; and, in relation to traffic arrangements between competing roads, it is said, at section 1131: "It is certainly not true that all agreements or combinations restricting competition are illegal at common law. . . . Even if there were such a rule as has been claimed, applicable to competition in trade, the principle and policy of the rule would not be applicable to traffic arrangements designed merely to prevent ruinous competition and 'wars' among railroad companies. The main objection which has been urged against combinations restraining competition in trade, namely, that such combinations tend to produce monopolies and cause extortion, has no application to combinations among railroad companies, for railroad companies are prohibited by law, irrespective of any combination, to charge more than reasonable rates. . . . Public policy clearly does not demand that railroad companies operating competing lines shall engage in strife causing their financial ruin." With even greater force may it be said in this case that public policy does not condemn nor prohibit an arrangement intended to prevent a competition between these corporations which would inevitably result in the financial ruin of one or both of them, and which could not in any event benefit the city or its inhabitants.

The contention that the agreement in question creates a partnership between these corporations is without force. It does not appear that it covers all of the business of either party, though the whole of the business of each relates to the sale of water. In a partnership, each partner has authority to represent all the partners, and to bind them by his acts so far as they relate to the partnership business. Here the agency is not of that character, but is expressly limited. It simply provides a mode of determining the compensation the defendant shall receive for the water furnished by it to the plaintiff,—an arrangement made necessary by the fact that neither of the parties nor both, combined, could determine the rate at which the water could be sold to consumers, nor accurately fix the cost of distribution, nor the quantity of water required.

The judgment should be reversed, with directions to overrule the demurrer to the complaint.

We concur: **Vanclief, C.; Belcher, C.**

29 L. R. A.

Per Curiam:

For the reasons given in the foregoing opinion, *the judgment appealed from is reversed*, with directions to overrule the demurrer to the complaint.

PEOPLE'S HOME SAVINGS BANK
v.
SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, (Department No. 4).

(104 Cal. 649.)

1. A by-law providing that no proxy shall be voted by any one who is not a stockholder of the corporation is invalid under Civ. Code, § 312, providing generally that stockholders may be represented by proxies.

2. The substitution of an attorney for a corporation in a proceeding to restrain a receiver cannot be prevented by the prior attorney on the ground of disqualification by reason of his relations to the receivers, so long as the parties do not object.

NOTE.—*Right to vote by proxy in private corporations.*

I. *At common law.*
II. *Under statutes and by-laws.*
  a. *Statutes.*
  b. *By-laws.*
III. *Form of proxy.*
IV. *When and for what purpose a proxy may be used.*
V. *Rejection of proxy by inspectors.*
VI. *Revocation of proxy.*
VII. *Directors voting by proxy.*
VIII. *Miscellaneous matters.*

I. *At common law.*

It must be regarded as entirely settled that there is no common-law right of voting by proxy on shares of stock in a corporation. While there is no attempt in this note to make a collection of the statutes of the different states on the subject, it may be said that in most of the states enactments have been made giving the right of shareholders to be represented by proxies. For many years these provisions in the state of New York were limited in their scope and were different for different classes of corporations, but by the Corporation Law of 1892 a sweeping provision is made authorizing the use of proxies in all private corporations except religious corporations. The statutes of the different states generally provide now for such proxy voting. A collection of them is made in Thompson on Corporations, vol. 1, § 738.

That proxies could not be used at common law by a member of a corporation unless some specific provision enabled him to do so, is declared in Harben v. Phillips, L. R. 23 Ch. Div. 14, 48 L. T. N. S. 324, 31 Week. Rep. 173.

The proposition that the right of voting by proxy is not a general right, and that the party who claims it must show a special authority for that purpose, is affirmed in People v. Twaddell, 18 Hun, 427.

So, it is held in Pennsylvania that in the absence of any express authority to vote by proxy, given either by the charter of the corporation or by any by-law, the stockholders cannot vote by proxy. Com. v. Bringhurst, 103 Pa. 134, 49 Am. Rep. 119;

See also 35 L. R. A. 209.

(December 3, 1894.)

APPLICATION for a substitution of another attorney in place of those representing petitioner in a proceeding to obtain a writ of prohibition requiring the Superior Court of the City and County of San Francisco to abstain from continuing to take jurisdiction in a proceeding to annul the petitioner's charter. *Application granted.*

The facts are stated in the opinion.

Mr. **John H. Durst**, with *Mr.* **James Alva Watt**, *in propria persona*, in support of the application:

The code gives to stockholders the absolute right, not merely of voting their stock in person, but of voting it by proxy.

Civil Code, §§ 307–312.

The code gives to corporations the power of regulating by the by-laws the mode of voting by proxy.

Civil Code, § 303.

It does not confer power by by-law to abridge or restrict the statutory right of voting by proxy.

By-laws must not be in violation of the provisions of the charter or general laws under which the corporation was formed, nor can the substantial rights of a shareholder be abridged thereby.

1 Morawetz, Priv. Corp. 2d ed. § 487; 2 Am. & Eng. Encyclop. Law, p. 707, *note 2*, and cases cited.

The right to vote at a meeting cannot be taken away or restricted.

Morawetz, Priv. Corp. § 496; 17 Am. & Eng.

Wilson v. American Academy of Music, 43 Leg. Int. 86. 2 Pa. Co. Ct. 280.

While the right to vote by proxy is declared not necessarily to arise in the case because the use of the proxies did not change the result, the court in Philips v. Wickham, 1 Paige, 590, expressed the opinion that the right of voting by proxy is not a general right, and that the party who claims it must show a special authority for that purpose, declaring that the only case in which it is allowable, at common law, is by the peers of England, and that is said to be in virtue of special permission of the king. The court proceeds to say: "It is possible that it might be delegated in some cases by the by-laws of a corporation, where express authority was given to make such by-laws, regulating the manner of voting. I am not aware of any other case in which the right was ever claimed; and the express power which is generally given to the stockholders of monied and other private corporations is opposed to the claims in this case, where there is no express or implied power contained in the act."

Without proceeding to collect here all the citations to cases in which the same doctrine is recognized, if not expressly declared, and which are set forth in detail under the subsequent headings of this note, it may be said that the doctrine above stated is fully established without conflict of the decisions. It is universally conceded that the right to vote by proxy in private corporations must depend on express authority of statute or by-law.

II. *Under statutes and by-laws.*

a. *Statutes.*

When statutes expressly authorize voting by proxy, as is now quite generally the case, there is no question as to the right, except so far as it may arise in construing the statute. The validity of such statutes is unquestioned.

Where the charter of a corporation expressly gives power to vote in person or by lawful proxy, a stockholder is bound by the vote cast by his duly constituted proxy, whether it is cast in his interest or not. Mobile & O. R. Co. v. Nicholas, 98 Ala. 92.

The main case of PEOPLE'S HOME SAV. BANK v. SAN FRANCISCO CITY & COUNTY SUPER. CT. cites as an authority the case of *Re* Lighthall Mfg. Co., 47 Hun, 258, which held that under a statute providing in general terms that the election shall be made by such stockholders as attend either in person or by proxy, a by-law providing that proxies can be held and voted upon only by persons who are stockholders is void, because it restricts the right which the statute gives.

See a somewhat similar decision in *Re* White v. New York State Agri. Soc. 45 Hun, 580, *infra*, III.

The right to vote by proxy, expressly given by the act of incorporation, is involved in the case of Monsseaux v. Urquhart, 19 La. Ann. 482, in which the test was respecting other requisites of the right to vote.

But, expressing an opinion without deciding that stockholders cannot vote by proxy in ordinary cases, it is decided in Brown v. Com., 3 Grant, Cas. 209, that, where the charter declares that "each person being present at the election" shall be entitled to vote, without making any provision for proxies, proxy voting cannot be allowed.

Although the statutes provide for certain regulations of elections of corporations, and designate the mode of voting by proxy, this does not defeat the jurisdiction of equity to issue an injunction against voting certain shares of stock. Webb v. Ridgely, 38 Md. 364. But the ground of the injunction in this case does not appear to have been connected with the use of proxies, but rather the evasion of the statute limiting the number of votes to be cast by any stockholder by means of a colorable transfer of shares without consideration.

On a motion for a preliminary injunction made in a federal court sitting in one state to prevent voting by proxy at a corporate election in another state, on which it was contended that voting by proxy could be authorized only by express statute, the court refused to interfere on that ground, but acted on the presumption that the officers conducting the election would recognize and be governed by the laws of the state in which the election was held. Woodruff v. Dubuque & S. C. R. Co. 30 Fed. Rep. 91.

b. *By-laws.*

In deciding that stockholders might by by-law provide for the right to vote by proxy in the absence of any statute to the contrary, it is said in Com. v. Detwiller, 131 Pa. 614, 7 L. R. A. 357: "When the methods of voting are not fixed by general law, the corporators may make the law for themselves, subject to the qualification that such laws and regulations as they make shall not conflict with the laws of the state or of the United States." The court again says also: "They had the power to refuse to receive votes unless offered by the voters in person, but, upon consideration, they decided that votes might be cast by proxy. This also was a reasonable regulation, uniform in its application, works no wrong to any shareholder, and conflicts with no law of the commonwealth. It is therefore a valid and binding law, made by the shareholders for their own government."

But the power of a corporation to authorize by by-law the practice of voting by proxy is expressly denied in Taylor v. Griswold, 14 N. J. L. 222, 27 Am. Dec. 33, in the absence of express authority by statute to enact such by-laws. It is declared that the right to make such a by-law is not incident to a corporation, as it is not essential or even apparently necessary to carry into effect its objects, and it is further decided that charter authority to make by-laws, provided they be not repugnant to that act nor to the constitution and laws of the state, is not sufficient to authorize a by-law permitting proxies. The court disapproves of the

Encyclop. Law, p. 45; *Brewster* v. *Hartley*, 37 Cal. 24, 99 Am. Dec. 237.

Where there is no conflict between the interests of two parties, although on different sides, an attorney may appear for both without professional impropriety.

Weeks, Attorneys at Law, 2d ed. § 120 *a*, p. 256.

Sometimes in chancery suits he may appear for different parties, some of whom are plaintiffs and some defendants.

Id. 2d ed. § 271, p. 548.

So for plaintiff and intervenor.

Deering v. *Hurt* (Tex.) 2 S. W. Rep. 42; Weeks, Attorneys at Law, 2d ed. § 120 *a*, p. 256.

The solicitor of the complainant in a chancery cause may, without impropriety, draw and file answers for any of the defendants who admit the allegations of the bill and make no defense.

Cargile v. *Ragan*, 65 Ala. 287; Weeks, Attorneys at Law, 2d ed. § 120 *a*, p. 256.

In the case at bar the petitioner desiring to dismiss, what impropriety is there in the attorney for respondent appearing for them to make such dismissal? No other parties are before the court. It is only where, in the same action, or in a different action, where the same matter comes necessarily into controversy, that an attorney without breach of professional obligation cannot appear at the same or at different times, for different parties.

Herrick v. *Catley*, 30 How. Pr. 208; *Re Cowdery*, 69 Cal. 32, 58 Am. Rep. 545; *People* v. *Spencer*, 66 Cal. 128, and other authorities cited.

Connecticut case of State v. Tudor, 5 Day, 329, 5 Am. Dec. 162, which, it says, stands alone. The clause of the charter prohibiting by-laws repugnant to the law of the land is held to prohibit a by-law of this kind on the ground that such a by-law is repugnant to the common law as part of the law of the land, under which all votes were required to be given in person. After an elaborate opinion in this case the court says: "Finally, the by-law in question is not authorized by the charter; is inconsistent with the popular spirit and design of the institution; is not essential or necessary to effect the object the legislature had in view; is contrary to the great principles and policy of our laws; and is not even for the apparent good of the company itself. It is therefore void."

But it is this New Jersey case, rather than the Connecticut case, which stands alone. We have found no other case which denies the validity of by-laws authorizing proxies.

In the Connecticut case just mentioned, State v. Tudor, 5 Day, 329, 5 Am. Dec. 162, the court holds that such a by-law is a reasonable one and in the absence of any statute to the contrary is valid, although at common law votes by members of a corporation could be given only in person. So, under the act of incorporation of a benevolent society providing for an election of trustees, directors, or managers, in such manner as may be specified in its by-laws, a by-law authorizing members to vote either in person or by proxy is held valid in People v. Crossley, 69 Ill. 135. A constitutional provision that the general assembly shall provide that in all elections for directors or managers of incorporated companies every stockholder shall have the right to vote in person or by proxy for the number of shares owned by him, either for as many persons as are to be elected or to cumulate said shares is said to be a constitutional expression in favor of voting by proxy in private corporations, whether or not it applies to corporations of this character, and therefore it cannot be said that the by-law is inconsistent with the constitution and laws of the state.

Such a by-law is also held valid in Wilson v. American Academy of Music, 43 Leg. Int. 86, 2 Pa. Co. Ct. 280.

III. Form of proxy.

Inspectors of election cannot reject a vote offerred by proxy when proxies are authorized by statute, merely because the written proxy was not acknowledged or proved. *Re* Election of Directors of St. Lawrence S. B. Co. 44 N. J. L. 529. In this case the court said: "A stockholder who desires to exercise his right to vote on his stock by proxy is undoubtedly bound to furnish his agent with such written evidence of the latter's right to act for him as will reasonably assure the inspectors that the agent is acting by the authority of his principal. But the power of attorney need not be in any prescribed form, nor be executed with any particular formality. It is sufficient that it appear on its face to confer the requisite authority, and that it be free from all reasonable grounds of suspicion of its genuineness and authenticity; and the court, in reviewing the proceedings at an election, must be satisfied that the inspectors had reasonable grounds for rejecting the proxy."

But a provision in articles of association that a proxy "shall be attested by one or more witnesses" is held to be mandatory and not merely directory, and a resolution of the company changing the form of proxies, which was fixed by another, by leaving out the words respecting attestation, was held insufficient to change this requirement. Harben v. Phillips, L. R. 23 Ch. Div. 14, 48 L. T. N. S. 334, 31 Week. Rep. 173.

A proxy is not invalid because it varies from the form prescribed by articles of association merely by describing the person giving the proxy as a "proprietor of shares" instead of describing him as a "member." *Re* Indian Zoedone Co. L. R. 26 Ch. Div. 70, 53 L. J. Ch. 468, 50 L. T. N. S. 547, 32 Week. Rep. 481.

The fact that the day of the month is left blank in a proxy, which is otherwise regular in form, does not make it insufficient. *Re* Townshend, 46 N. Y. S. R. 135.

A proxy purporting to be given by a cashier without even alluding to the bank which owned the stock is held insufficient in *Re* Mohawk & H. R. R. Co. 19 Wend. 135. The court says the bank should have been named as principal and the proxy sealed with its corporate seal, if it had power to delegate the right to vote on the stock. Such right is denied in this case on the ground that the stock did not stand in the name of the bank on the transfer books.

Another defect in the above case was that it was given by a person named as cashier, while the stock stood in the name of a former cashier on the books of the corporation, and therefore the statutory provision that stock could be voted only in the the name standing on the transfer books, either in person or by proxy, would permit the use of a proxy only when it was given by that person whose name appeared on the books.

At a meeting of creditors who were entitled to vote by person or proxy on a scheme of arrangement or compromise of the affairs of a corporation under the English Joint-Stock Companies Arrangement Act of 1870, where Australian creditors were present by proxy or agent, but his proxy papers were not in England, it was ordered by the court that the particulars of the proxies might be communicated by telegraph to the official receiver for use at such meeting. On appeal from such order it was held to be valid, and that it was not necessary to have the proxy papers produced at the meeting. This was based on section 2 of such Act giving the

Where the same matter is not necessarily in litigation, although collaterally involved, the attorney may appear.

Musselman v. *Barker*, 26 Neb. 737.

Messrs. **Delmas & Shortridge**, *contra.*

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

The present proceeding is a motion for a substitution of attorneys in the above entitled cause. Mr. James Alva Watt, claiming authority to represent the petitioner, makes the motion. The solution of the question here presented is dependent upon the following state of facts: One E. H. Knight, a creditor, commenced an action in the superior court of the city and county of San Francisco, Department No. 4, against the petitioner, People's Home Savings Bank, and its directors, for the purpose of enforcing his demand, and asked that the board of directors be enjoined from the further transaction of business; that they be removed from office; that a receiver be appointed; and that the bank corporation be thrown into liquidation. Certain allegations of plaintiff's complaint, charging fraud of the board of directors in the administration of the business of the corporation, and insolvency of the bank, form the basis for the relief prayed for. In this action, John F. Sheehan was by the court appointed receiver to take possession of the assets of the corporation, etc., and he retained James Alva Watt as his attorney and legal adviser in carrying on the business of the receivership. Thereafter, the petitioner in the above-entitled cause, to wit, the People's Home Savings Bank, made an applica-

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court power to order that the meeting of the creditors be summoned in such manner as the court shall direct as well as a provision in the Act of 1862, § 91, providing that the court may direct such meetings to be held and conducted in such manner as the court directs for the purpose of ascertaining the wishes of the creditors. *Re* English S. & A. Chartered Bank [1893] 3 Ch. 385.

Such proxies not having been stamped, but being subject to the 10*s.* stamp under clause 6 of the Stamp Act of 1891, § 80, which did not expressly provide when the stamp should be affixed, it was held that section 15 applied, providing that in case of instruments executed abroad they might be stamped within thirty days after their receipt in the united kingdom. *Ibid.*

The fact that the name of the person who was to be agent was specified in the instruments of proxy was held no objection in this case; neither was it any objection that there was no special day named in the proxy paper. *Ibid.*

Where objection to voting by proxy is based solely on the claim that it is not lawful to vote in that manner, it will be presumed by the court that the proxies were in valid form and properly executed. People v. Crossley, 69 Ill. 195.

A resolution of the New York State Agricultural Society to the effect that no proxy shall be voted unless shown, within itself, that it was specifically intended to be used at the meeting at which it is offered, is held to be void because repugnant to the statute, where its charter provided that members should be entitled to vote at all elections for officers by proxy. *Re* White v. New York State Agri. Soc. 45 Hun, 580.

IV. *When and for what purpose a proxy may be used.*

The extent of the right of a proxy to vote is considered in Forsyth v. Brown, 13 Pa. Co. Ct. 567, 33 W. N. C. 72, 2 Pa. Dist. R. 765, where it is held that persons holding proxies can vote on motions to take a ballot or to adjourn, and do all which a stockholder may do which is necessary to a full and free exercise of the stockholder's right to vote at such meeting.

A proxy given by stockholders of a railroad company for the purpose of voting upon the question of an issue of bonds was held entirely insufficient to authorize a vote for the issue of bonds to be secured by a third mortgage upon the property of the company, since a proxy is nothing more than a power of attorney which must be governed by the rules applicable to that class of instruments. Marie v. Garrison (by Dwight, referee) 13 Abb. N. C. 210.

Proxies authorizing a vote on the single question of the increase of capital stock are held insufficient to give any validity to votes thereon for the disposal of capital stock. *Re* Wheeler, 2 Abb. Pr. N. S. 361.

A proxy is a delegation of an authority for a particular purpose: and, although not defined on the face of it, it will be held to be for the election then in contemplation, and for no other. Where proxies were given in contemplation of an election for the post of surgeon in an infirmary, but the contemplated election was not proceeded with, and the matter dropped, the proxies were not valid at an election several months afterward, which was not resolved upon until about six weeks after the matter had been dropped. Howard v. Hill, 5 R. R. & Corp. L. J. 255.

Under a provision in the articles of association of a company that a poll may be taken if demanded by "shareholders qualified to vote" who hold a certain number of shares, persons holding proxies cannot be regarded as shareholders qualified to vote, for the purpose of demanding a poll. Queen v. Government Stock Invest. Co. L. R. 3 Q. B. Div. 442, 47 L. J. Q. B. 478, 39 L. T. N. S. 230.

The proxies cannot be used upon a show of hands at a general meeting of a company, where its articles of association allow voting by proxy, but a poll must be taken for the purpose. *Re* Caloric Engine & S. F. Signals Co. 52 L. T. N. S. 846.

But the case of *Re* Caloric Engine & S. F. Signal's Co. *supra*, is not followed in *Re* Bidwell Bros. [1893] 1 Ch. 603, 41 Am. & Eng. Corp. Cas. 580, in which it is said by Vaughan Williams, *J.*: "I have come to the conclusion that the votes of the members who were present only by proxy ought to be taken into consideration, even though no poll was demanded." In respect to the former case he says: "I do not know what the particular articles in that case were, and the question does not seem to have been argued at any great length." In the latter case the articles expressly said that votes may be given either personally or by proxy, and this is held to justify voting by proxy whether a poll is demanded or not. This conclusion is also fortified by reference to the decision in Reg. v. Government Stock Invest. Co., *supra*, which denies the right of proxies to demand a poll.

In counting votes by proxy when the vote is taken under a provision requiring a three-fourths majority of the number present personally or by proxy, it is held in *Re* Bidwell Bros., *supra*, that each person present by proxy must vote as one person only, as if actually present, and not according to the number of shares held.

Under an act of incorporation of a bank which to protect small shareholders made a scale of the number of votes proportioned to the number of shares held, and limited the number of votes in any event to sixty, where a firm had bought more than 2,000 shares and transferred them to divers persons unknown, taking in return a power of attorney to vote the shares at their own discretion, it was held that this was an attempt to operate a fraud upon the statute, and an injunction against

tion to this court for a writ of prohibition, asking that the proceedings of the superior court in the matter of the appointment of the receiver be annulled as being in excess of its jurisdiction. This application was made to the court by the petitioner through its regularly appointed attorneys, Messrs. Delmas & Shortridge. Thereafter, a motion for a substitution of James Alva Watt as attorney for petitioner in the above-entitled cause, to act in the place and stead of Messrs. Delmas & Shortridge, was made. This motion was based upon a showing by affidavits to the effect that subsequent to the inception of the prohibition proceeding the directorate of the petitioner corporation had been changed at an election held by the stockholders, and that the corporation petitioner, by its new board of directors, appointed said Watt attorney for the corporation in the above-entitled cause, and revoked the authority of Messrs. Delmas & Shortridge to act for it in any litigation then pending. The legality of Watt's appointment as attorney for the bank depends upon the validity of the election of the board of directors appointing him, and the only serious question presented as to the validity of such election involves the right of a person not a stockholder to participate in the election by virtue of his position as a proxy of a bona fide stockholder, and to this question we shall direct our attention.

While it is provided by section 312 of the Civil Code that stockholders of corporations

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voting under these powers of attorney was sustained. Campell v. Poultney, 6 Gill & J. 94, 26 Am. Dec. 559.

V. *Rejection of proxy by inspectors.*

The rejection of votes by proxy because the persons holding the proxies would not submit to a sort of inquisitorial examination on oath, which the inspectors under a by-law of the company claimed the right to require when votes were challenged, was held irregular and reprehensible where the act of incorporation gave each stockholder one vote on each share which had been held in his own name at least fourteen days prior to the time of voting. People v. Kip, 4 Cow. 382, *note*.

The genuineness of proxies offered to be voted upon is a question which the inspectors of election have no power to pass upon if the proxies are regular in form and apparently executed by stockholders, but if the proxies are invalid for any reason not apparent upon their face, redress must be sought from the courts after the election, if the use of the proxies has worked any detriment. *Re* Cecil, 36 How. Pr. 477.

The declaration by the president of a corporation presiding at a meeting that neither of the proxies which have been given for certain stock should vote upon it, is insufficient to give the proxy who is entitled to vote any cause to attack the vote actually taken, if he did not offer to vote, as he will be held to have acquiesced in the vote actually taken. State v. Chute, 34 Minn. 135.

VI. *Revocation of proxy.*

A stockholder who has given a proxy for a valuable consideration may revoke it on a discovery that it is about to be used for a fraudulent purpose, even if such purpose is not invalid as against public policy. Reed v. Bank of Newburgh, 6 Paige, 337.

An irrevocable power of attorney to vote upon stock is regarded in Brown v. Pacific Mail S. S. Co. 5 Blatchf. 525, as differing very little from a mere proxy, and it is held not contrary to public policy.

Under N. Y. Laws 1892, chap. 687, § 20, which expressly provides that no stockholder shall sell his vote, or issue a proxy to vote upon any stock for any sum of money, or anything of value, a proxy coupled with an interest cannot be given, and another section provides that every proxy shall be revocable at the pleasure of the person executing it. *Re* Germicide Co. 65 Hun, 606.

VII. *Directors voting by proxy.*

The right of a director to vote at a meeting of the board of directors by proxy, when this is not authorized by the by-laws or the general laws, is emphatically denied in Perry v. Tuskaloosa Cotton Seed Oil Mill Co. 93 Ala. 264.

A proxy authorizing a person to vote for stockholders at a stockholders' meeting cannot give him authority to vote for them at a directors' meeting. Craig Medicine Co. v. Merchants' Bank, 59 Hun, 561. This was a peculiar case in which only four persons constituted the corporation, and three of them gave to the fourth a proxy, authorizing him to vote for them at the first meeting of the stockholders on account of the fact that it was inconvenient for them to attend the meeting. As the corporation was to be organized in another state the person holding the proxy went to such state and was the only person present at the stockholders' meeting, at which he proceeded to elect directors. Following that election he, as one of the directors and holding the proxies which had been given him by the other members of the corporation, proceeded to organize the board of directors and elect president, treasurer, and secretary. The court said: "The proxy or power of attorney put in evidence did not give . . . the right to vote in the name of the directors who should be chosen at the stockholders' meeting; and if it did it would have been utterly void."

A letter from one of the directors of a corporation to another authorizing the latter to act for the former in any matters relating to the company cannot make the latter count as two in determining whether there is a quorum of the directors present or not. The court says an absent director could not confer all his powers on another director who was present, the absent director not being told what was going to be done and not having consulted about it on hearing the reasons pro and con. *Re* Portuguese C. C. Co. 60 L. T. N. S. 857.

A director of a company is not bound by the vote of his proxy, even at a shareholders' meeting attempting to bind the company and make the shareholders liable for an obligation outside of the deed of settlement of the company. In reply to the claim that the deed enables the managing directors to attend and vote by proxy, it was said by Parke, *B.*, "but only for purposes within the scope of the deed, which this is not." Brown v. Byers, 16 Mees. & W. 252, 16 L. J. Exch. 112. This was a case of bills accepted by a resident director of the company without authority and which the general meeting of the shareholders resolved was a part of the indebtedness of the company. The distinction between voting as shareholders and as directors is not mentioned in the case.

Proxies given to directors of a corporation for voting on shares of stock at a stockholders' meeting do not necessarily create a trust for the corporation itself. The court says: "Whether it does or not depends upon whether what is done in this behalf is done with corporate funds for the corporation." Woodruff v. Dubuque & S. C. R. Co. 30 Fed. Rep. 91.

Where trustees are appointed to meet and elect a minister for the parish, being charged with the duty of judging of the qualifications of candidates, they cannot delegate that judgment to others, and a proxy given by a trustee is invalid; even if it specifies the persons for whom the vote is to be given, since this is determining the matter without

may be represented at all elections by proxies, yet the by-law of the petitioner bank provides that no proxy shall be voted by any one not a stockholder of the corporation; and it is upon the validity of such by-law that the merits of this case hinge. It is suggested in argument of counsel that all banking corporations have a by-law of similar import; but, notwithstanding this general practice, we have arrived at the conclusion, after careful consideration, that the making of such a law is without the power of the corporation. Corporations have no power to create by-laws that are unreasonable in their practical application, or that are violative of the statute of the state; and we think this by-law an infringement upon the statute, and a most substantial limitation upon the rights of stockholders granted by section 312 of the Civil Code. That section is broad in its terms, and when it says that a stockholder in a corporation may appoint a proxy—an attorney in fact—to represent him at elections held by the corporation, in the absence of limitations in the law, it must be held that the statute gives him the right to name an attorney in fact of his own selection. Any other construction would entirely nullify all benefits intended to be conferred by its provisions. To declare that, though the statute in general terms gives all stockholders of corporations the right to vote by proxy, yet the corporation, by its by-laws, has the power to say who that proxy shall be, is to give the

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hearing the other trustees on the question. Atty-Gen. v. Scott, 1 Ves. Sr. 413.

An objection to the purchase of property by a school corporation on the ground that the vote in favor of the purchase was carried only by counting a vote of one of the directors by proxy, is held not to constitute sufficient ground for an injunction against the purchase, even if the corporation could avoid the purchase on this account. Dudley v. Kentucky High School, 9 Bush, 576.

While the cases immediately preceding are not cases about directors of a private corporation, they are mentioned as analogous, but without any attempt to annotate the general question of the right of members of public boards to act by representatives or proxies. The principles above stated are nevertheless so obvious that there would seem to be little ground for a contrary decision.

The effect of proxies of subordinate lodges on a vote in a grand lodge of Masons is discussed in Smith v. Smith, 3 Desauss. Eq. 557, where it is held that proxies granted for ordinary purposes would not bind them to action attempting to destroy the organization. This seems to involve merely the powers of delegates in such bodies as distinguished from the matter of proxy voting in corporations generally.

VIII. *Miscellaneous matters.*

Voting by proxy is involved in the case of State v. McDaniel, 22 Ohio St. 354, but the right to vote was discussed with reference to the title to the property, and not to the mode of voting.

In a case where stock had been pledged, although the pledgee, in whose name it stands on the corporate records, has a right to vote the stock at a meeting to elect directors, it is held that a court of equity may, in a proper case, compel him to give the pledgeor a proxy. *Re* Argus Printing Co. 1 N. Dak. 434, 12 L. R. A. 781.

And a mortgagee of stock or his trustees was required in Vowell v. Thompson, 3 Cranch, C. C. 428, to give a power of attorney to the mortgagor for voting upon the stock until it should be sold under the mortgage or deed of trust. This was done by bill in equity.

The case of Vowell v. Thompson, *supra*, is cited as authority in Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291, but in the latter case it was held that acquiescence in the control of the stock and the voting thereon by the record owner until the votes are counted, or are being counted, would prevent an attack upon the result of the election.

The right of a pledgeor to vote on stock hypothecated is declared also in *Ex parte* Willcocks, 7 Cow. 402, 17 Am. Dec. 525, but this case does not seem to involve any question of proxy; and the right of the pledgeor or pledgee to vote on pledged stock is not considered in this note except so far as it is connected with the question of proxies.

A proxy may be given by a corporation as well as by any other shareholder, when a corporation is the owner of shares in another company. *Re* Indian Zoedone Co. L. R. 26 Ch. Div. 70, 53 L. J. Ch. 468, 50 L. T. N. S. 547, 32 Week. Rep. 481.

An agreement between stockholders, which, among other things, provides that none of the signers shall vote by proxy, is held to be void as against public policy, in Fisher v. Bush, 35 Hun, 641.

Parol evidence of the contents of proxies is admitted without search for the instruments, in order to prove that the stockholder had acted as such, where it was proved that the written proxies after being used had been thrown away as useless. Haywood & P. Pl. Road Co. v. Bryan, 6 Jones, L. 82.

A proxy was admitted in evidence in Harger v. McCullough, 2 Denio, 119, together with the affidavit of the maker that the stock had not been hypothecated, for the purpose of showing that he was the owner of the stock at the time he gave the proxy.

The right of a trustee of stock to vote upon it in the choice of directors was sustained in *Re* Barker, 6 Wend. 509, but this was on the ground that he was the legal owner of the stock and the trust was not regarded as in the nature of a proxy.

An agreement that a large number of shares of stock should be held in a block with a view to control the management of a corporation is involved in the case of Clarke v. Central R. & Bkg. Co., 50 Fed. Rep. 338, 15 L. R. A. 683, in which the court in substance says it is difficult to perceive how the instrument differs from an ordinary proxy. The court decides that proxy for voting stock of a corporation, made by the holder of the stock while enjoined from voting it directly on the ground of public policy, cannot carry the right to vote it. With the above case is a note on voting trusts of corporate stock.

Where stockholders, who were widely separated, deposited their stock in the hands of a person whose vote was to be directed by a committee appointed by themselves and subject to their control, it was held to be a mere arrangement of convenience from which each could recede at any time and demand the return of his stock, and therefore was not objectionable on grounds of public policy. Ohio & M. R. Co. v. State, 49 Ohio St. 668, affirming State v. Ohio & M. R. Co. 6 Ohio C. Ct. 415.

The right of one railroad company to vote the stock of another company, either by itself or by other persons acting in its interest, is denied in Memphis & C. R. Co. v. Woods, 88 Ala. 630, 7 L. R. A. 605; but this case did not involve any question of proxies, but the decision is based on the rule that one corporation cannot acquire a majority of the stock of another and by voting thereon govern and control the management of the latter.

R. A. R.

corporation full power to throttle the statute. The stockholders of many of our corporations are limited in number, and the case would undoubtedly often arise where the absent stockholder, desirous of being represented at an election, would be unable to find a friend among them in whom to trust his interests. The statute contemplates no such conditions, and neither says nor intended to say that such a stockholder would be deprived of his right to vote by proxy. If you may limit by by-law the right of holding a proxy to stockholders, you may limit it to directors, or the president, or the secretary, and thus the interests in control would have the power to compel the minority interests, if unable to be present in person, to be represented by the very interests to which they are opposed, and to reinstate in office the very men whose election they desire to defeat. The principle of cumulative voting has been authorized and approved in the interests of minority representation, yet this by-law squarely strikes at this principle which has been so carefully fostered. The substantial rights of a stockholder under the law cannot be taken from him, or even abridged, by the by-laws. The right to vote by proxy is a most substantial right, and this by-law handicaps this right out of all usefulness.

While no authority for or against the principles we have here declared was cited by counsel upon the elaborate argument of the case, we had no doubt at the time that they rested upon solid grounds, and since the submission of the cause our investigation has brought to light a recent case fully in line with all that we have said upon the question. The principle here involved was the sole question there involved, and in an opinion covering the entire ground the court there said: "It has not restricted the right of the stockholder to select any person whom he may consider to be advisable for that object to vote under his authority upon his shares as a stockholder. In this respect the largest liberty has been secured and provided for the stockholders, and, being entirely unrestrained by the legislature, this privilege was maintained by the authority of the law. Without having so declared expressly, the clear implication of the section is that it was not intended to impose any restriction whatever upon the stockholder as to the person he should be at liberty to select to act under his proxy; and, the statute having in this manner created this right in as general a manner as it did, the trustees of the corporation were not at liberty to restrict it or declare by their by-laws that it should not be so used." *Re Lighthall Mfg. Co.* 47 Hun, 258. Section 303 of the Civil Code provides: "A corporation may by its by-laws, where no other provision is especially made, provide for: . . . (3) The mode of voting by proxy." This provision does not give the corporation power to pass the by-law here assailed. It refers to the preliminary requirements to be followed in order that the proxy may be entitled to vote, as that the authorization must be in writing, properly witnessed, acknowledged, filed with the records, etc. In creating this provision it was not in the mind of the legislature to curtail the right of voting by proxy, but rather that such right might be exercised by stockholders within any reasonable restrictions which the corporation deemed proper to incorporate into their by-laws. The statute gives to the corporation the power to regulate the exercise of the right, but no power to either qualify or limit the right, and certainly no power to so shackle the right as to result in its nullification.

As a second ground of opposition to the granting of the motion for substitution, it is insisted that James Alva Watt, by reason of his relations to the respondent as attorney, is disqualified to represent the petitioner in the prohibition proceeding. We attach but little importance to this contention, and do not deem it necessary to enter into a discussion of the questions, namely: (1) Are the interests of the receiver and the bank antagonistic? or (2) Is Watt attorney for the respondent in the above-entitled cause? The conclusion we have arrived at upon the preceding question discussed declares the business relations theretofore existing between the bank and its attorneys, Messrs. Delmas & Shortridge, were severed by virtue of the action of the newly and legally elected board of directors, and, such being the case, the attorneys opposing this motion stand before us as strangers to the proceeding, having no interest or standing in the litigation; and we are unable to see that it is of any concern to them who represents the various parties in this preceding. As to Mr. Watt's conduct in the litigation, all that he has done has been open and upon the record. There has been no concealment, no imposition practiced upon the court, but, upon the contrary, all that has been done in the past, and all that he proposes to do in the future, he has done and proposes to do under a claim of right, supported by the law. These things being so, until some party to the litigation objects, we will not investigate. If all parties to the litigation are satisfied, we know of no proper party to object. We might suggest, in conclusion, that Mr. Watt states in open court that he desires to be substituted as attorney for the petitioner bank, in order that he may dismiss the prohibition proceeding. The bank retains him as its attorney to dismiss the proceeding, and there is no reason why it has not the right so to do. Such a dismissal in no aspect of the case prejudices the interests of the respondents, and the bank, the petitioner, has the right to dismiss its petition if it deem such the proper course.

The motion for a substitution as prayed for is granted.

We concur: **Beatty**, *Ch. J.*; **McFarland**, *J.*; **Van Fleet**, *J.*; **Harrison**, *J.*

NEBRASKA SUPREME COURT.

Robert HARE, *Plf. in Err.*,
v.
E. W. MURPHY.

(.....Neb.....)

***Where real estate encumbered by a mortgage is sold and conveyed,** and there is inserted in the deed a clause which states that the grantee assumes and agrees to pay the mortgage debt, and the deed is accepted by the purchaser of the land with knowledge that it contains the clause; or where the purchaser of land agrees, as a part of the consideration for the sale of the property to him, to assume and pay a mortgage indebtedness existing against the land,—he becomes personally liable for the payment of the mortgage debt. And this is true whether his immediate grantor was so liable or not; and the liability thus created may be enforced by the mortgagee or his assigns, as it was for his or their use and benefit that such promise was made.

(September 18, 1895.)

ERROR to the District Court for Lincoln County to review a judgment in favor of defendant in an action to enforce payment of a mortgage debt by an assignee of the mortgaged property. *Reversed.*

The facts are stated in the opinion.

Mr. **F. S. Howell,** for plaintiff in error:

A deed containing an assumption clause found of record is presumptive evidence of the liability of the grantee.

Tracy v. *Reed*, 38 Fed. Rep. 69, 2 L. R. A. 773; *Heil* v. *Redden*, 45 Kan. 562.

A purchase of real estate expressly subject to encumbrance makes the property a fund for the discharge of the encumbrance.

George v. *Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Kruger* v. *Adams & French Harvester Co.* 13 Neb. 100; *Thompson* v. *Thompson*, 4 Ohio St. 333.

The acceptance of a deed containing a clause of the kind herein mentioned binds the grantee to the performance of the conditions thereof, and this is equally true if made by an agent.

Jones, Mortg. § 752; *Bishop* v. *Douglass*, 25 Wis. 696; *Taylor* v. *Whitmore*, 35 Mich. 97; *Fairchild* v. *Lynch*, 10 Jones & S. 265.

And where the grantee in a deed instructs another to have the deed recorded, he thereby makes him his agent, and is bound by the terms of the deed.

Adams v. *Ryan*, 61 Iowa, 733.

The deed was left for several weeks after the alleged discovery of the assumption clause, and until after the plaintiff had purchased the notes and mortgage, relying upon the clause in the deed, thereby becoming an innocent purchaser, and defendant was then estopped to set up his defense. Innocent purchasers will be protected.

Hayden v. *Snow*, 9 Biss. 511; Jones, Mortg. § 764; *New Orleans Canal & Bkg. Co.* v. *Montgomery*, 95 U. S. 16, 24 L. ed. 346; *Carpenter* v. *Longan*, 83 U. S. 16 Wall. 271, 21 L. ed. 314; *Kilmer* v. *Smith*, 77 N. Y. 226, 33 Am. Rep. 613; *Ohio Life Ins. & T. Co.* v. *Urbana Ins. Co.* 13 Ohio, 220; *Hayden* v. *Drury*, 3 Fed. Rep. 782; *Pierce* v. *Faunce*, 47 Me. 507.

A grantee cannot be released from his liability incurred by assuming a mortgage as against a purchaser of a mortgage who may have relied upon the contract of assumption as it appears of record.

Jones, Mortg. § 764.

Where one of two innocent parties must suffer a loss by reason of the fraud of another, the loss must fall upon the one whose acts furnished the means for the commission of the fraud.

Dinsmore v. *Stimbert*, 12 Neb. 438.

Where one person makes a promise to another for the benefit of a third person, the third person may maintain an action on it.

Shamp v. *Meyer*, 20 Neb. 227; *Keedle* v. *Flack*, 27 Neb. 840; *Merriman* v. *Moore*, 90 Pa. 80; *Dean* v. *Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Bay* v. *Williams*, 112 Ill. 91, 54 Am. Rep. 209.

Messrs. **Grimes & Wilcox** and **T. C. Patterson,** for defendant in error:

To create a personal liability on the part of a grantee in a deed to pay a prior mortgage or lien on the premises conveyed, the covenant or words used therein must clearly import that the obligation was intended by the grantor, and knowingly assumed by the grantee.

Holcomb v. *Thompson*, 50 Kan. 598; *Lewis* v. *Day*, 53 Iowa, 575.

A grantee is not liable on a covenant to assume and pay a mortgage, if inserted in the deed without his knowledge, and without intent of parties.

Kilmer v. *Smith*, 77 N. Y. 226, 33 Am. Rep. 613; *Albany City Sav. Inst.* v. *Burdick*, 87 N. Y. 40; *Dey Ermand* v. *Chamberlin*, 89 N. Y. 658.

The plaintiff stands in the same position as either Schuster, Sproul, or Callender would stand, and defendant is entitled to the same defense against plaintiff as he would have against either Schuster, Sproul, or Callender.

Trimble v. *Strother*, 25 Ohio St. 378; *Brewer* v. *Maurer*, 28 Ohio St. 554, 43 Am. Rep. 436.

A person for whose benefit a promise is made cannot maintain an action to enforce the promise, when the promise is void between the promisor and promisee, because of want or failure of consideration, or fraud.

15 Am. & Eng. Encyclop. Law, p. 838, *note 1; Dunning* v. *Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617.

A grantee is not liable to his grantor, unless his grantor is compelled to pay the debt assumed.

Ayers v. *Dixon*, 78 N. Y. 318.

To make the promise of a grantee to pay a mortgage on land conveyed to him available

*Headnote by HARRISON, J.

NOTE.—The above case is against the doctrine hitherto asserted in some courts, that a vendee who assumes payment of a mortgage on the property will not be liable, unless his grantor was liable. For cases on this subject, see *note* to Jefferson v. Asch (Minn.) 25 L. R. A. 257, especially the part beginning on p. 275.

See also 40 L. R. A. 861; 46 L. R. A. 623.

to the mortgagee, it must be made to a person personally liable for the mortgage debt.

15 Am. & Eng. Encyclop. Law, p. 841, *note 2*, and cases there cited; 1 Jones, Mortg. 2d ed. §§ 760, 762; *Wise* v. *Fuller*, 29 N. J. Eq. 257; *Halsey* v. *Reed*, 9 Paige, 446, 4 L. ed. 769.

The person to whom the covenant is given is not a debtor to the one who seeks its benefits.

King v. *Whitely*, 10 Paige, 465, 4 L. ed. 1052; *Meech* v. *Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *Vrooman* v. *Turner*, 69 N. Y. 281, 25 Am. Rep. 195; 15 Am. & Eng. Encyclop. Law, p. 838, *note 1;* *Brown* v. *Stillman*, 43 Minn. 126; *Nelson* v. *Rogers*, 47 Minn. 103; *Stocer* v. *Tompkins*, 34 Neb. 467; *Reeves* v. *Wilcox*, 35 Neb. 779.

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

The plaintiff, as assignee and owner of two promissory notes, and a mortgage on certain real estate, given to secure their payment, instituted this action against the defendant, to whom the real estate had been sold by the grantee or party purchasing from the mortgagor, to recover the amount due upon the notes and mortgage, basing the suit upon a clause in the conveyance of the lands to defendant, by which, it is claimed, defendant assumed and agreed on his part to pay the mortgage indebtedness. The petition in the case recites that on December 26, 1889, D. A. Spraul executed and delivered to Maggie Callender two promissory notes, each in the amount of $250, and a mortgage, to secure their payment, on tracts of land therein described, and situate in Logan county; the conveyance by the mortgagor, on the succeeding day, to William L. Schuster, and the sale and conveyance of the lands again on the 31st day of December, 1889, by Schuster to the defendant, E. W. Murphy, and his agreement, as a part of the consideration or purchase price of the property, to pay the indebtedness shown by the notes and mortgage; and that, pursuant to such promise, and evidencing it, there was inserted in the deed of the lands by Schuster to defendant a clause in which it was stated that the real estate was encumbered, and that the purchaser assumed and agreed to pay the encumbrance. It also states the purchase of the notes and mortgage by the plaintiff, and their transfer and assignment to him, and nonpayment, etc., and closes with a prayer for judgment. The answer contained a denial of any assumption of or agreement by defendant to pay the mortgage indebtedness; a statement that defendant never received or accepted the conveyance or deed described in plaintiff's petition, and that no deed of the lands had ever been delivered to him; that he never entered into or had possession of the premises described in the petition; that a deed, a copy of which was attached to the petition, was caused to be recorded in Logan county by some person unknown to defendant, and without his knowledge or consent; that there was no consideration in the purchase of the lands, or the "equity" of the vendor, Schuster, therein, for an assumption or agreement on his part to pay the amount of the encumbrances or mortgages; and, further, that his grantor, Schuster, had not assumed the payment of the encumbrances, and no liability existed against such grantor for their payment. The reply of plaintiff was, in the main, a general denial of the allegations of the defendant's answer, and also stated that the deed of the lands executed by Schuster, and to defendant, as grantee, was filed for record in the office of the county clerk of Logan county on or about January 2, 1890. That on or about the 7th day of January, 1890, the plaintiff, in the course of some business affairs or settlement between him and another party, was offered the notes and mortgage, the basis of this action, and their purchase by him was solicited. That he made, or caused to be made, an examination of the lands, and the titles to the same, and thus discovered of record the conveyance to the defendant, and the clause asserting the assumption and agreement of the defendant to pay the notes and mortgages; and also investigated, or caused inquiries to be made, with reference to the financial standing or circumstances of the defendant, and ascertained that he was solvent; and that plaintiff, in the purchase of the notes and mortgage, was influenced by, and relied upon, the responsibility assumed by and of the defendant for their payment, and, had it not been for the clause in the deed to defendant, which, in terms, bound him to such payment, plaintiff would not have purchased the notes and mortgage, and that such purchase was consummated March 1, 1890. That, very soon after the deed in question was recorded, the defendant had knowledge thereof, and of its contents and recitals, and possessed such knowledge at the time of its execution, and for more than thirty days prior to the date of plaintiff's purchase of the notes and mortgage, and permitted it to remain of record without any effort to have the same annulled or reformed. There was a trial of the issues to the court and a jury, and, at the close of the testimony, the trial judge instructed the jury to return a verdict for defendant, which instruction was complied with by the jury, and, after motion for new trial heard and overruled, judgment was rendered; and the plaintiff brings the case here by petition in error.

Counsel for the parties in the briefs filed agree in the statement that the trial judge was moved to instruct the jury to return a verdict for the defendant by the following considerations: That the petition did not allege, and the evidence failed to show, that defendant's grantor was in any manner, or to any extent, connected with the mortgage debt, or liable or bound for the payment of it; that the rule of law applicable and governing in such cases is that a mortgage indebtedness assumption clause in a deed, or an agreement by the purchaser of lands to pay encumbrances existing against their lands, will not become operative, or is of no validity, and cannot be enforced by the mortgagee, unless it further appears that the grantor in the conveyance, or the person to whom the promise is made, was personally liable for the payment of the mortgage debt. In adopting this view of the law, we think the

learned judge who presided during the trial in the district court erred. It is undoubtedly supported by decisions—many of which are cited by counsel for defendant in their brief—of courts of last resort, the opinions of which, as authority, rank among the very highest, and are entitled to great weight; but we do not think best to follow them. It is an established rule of law that, where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, though the consideration does not move directly from him. *Shamp* v. *Meyer*, 20 Neb. 223; *Sample* v. *Hale*, 34 Neb. 220; *Barnett* v. *Pratt*, 37 Neb. 349; *Doll* v. *Crume*, 41 Neb. 655. And in *Reedle* v. *Flack*, 27 Neb. 836,—a case in which the right of a mortgagee to enforce such a promise as the one in the case at bar was in controversy,—the rule just quoted was applied, and held to be the basis of the mortgagee's right to recover. Where a party purchaser of lands agrees, as a part of the contract of purchase, to assume and pay a mortgage debt existing against the lands, the promise so to do is for the benefit of the owner and holder of the debt, and may be enforced by such party. The purchase price of the lands is the consideration moving between the purchaser and his grantor, and it is immaterial, and of no consequence, to the grantee, that his grantor may or may not be personally liable or bound for the payment of the mortgage debt; and, by such promise, the promisor becomes personally liable to the mortgagee or assigns for the mortgage debt, regardless of whether his grantor was so liable or not. *Merriman* v. *Moore*, 90 Pa. 78; *Dean* v. *Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Bay* v. *Williams*, 112 Ill. 91, 54 Am. Rep. 209.

There were some issues of fact in regard to which the evidence was conflicting, and which, if the view of the law with reference to the liability of a grantee who assumes and agrees to pay a mortgage debt which we have announced herein as the correct one had been taken, should, and doubtless would, have been submitted, under proper instructions, to the jury for their consideration and determination.

It follows that *the judgment of the District Court will be reversed*, and the cause remanded for further proceedings.

PAXTON & HERSHEY IRRIGATING CANAL & LAND CO., *Appt.*,
v.
FARMERS' & MERCHANTS' IRRIGATION & LAND CO.

(.....Neb.....)

***1. The provision of section 11, article 3 of the Constitution,** viz.: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title,"—is intended to prevent surreptitious legislation, and not to prohibit comprehensive titles.

2. The term "irrigation," as employed in the title of the Act of March 27, 1889, viz.: "An act to provide for water rights and irrigation, and to regulate the use of water for agricultural and manufacturing purposes," etc.,—is used in its popular sense, and implies the means of conducting water to the land to be supplied. The provision therein for the acquiring by irrigating companies of the right of way for canals and ditches—accordingly, *Held*, to be within said title, and not to conflict with section 11, article 3 of the Constitution.

3. To the legislature, and not to the courts, has been committed the power to determine when the exigencies of the public demand the taking of private property; the limit of judicial interference being the duty to declare void acts clearly in conflict with the constitution.

4. There is no arbitrary standard by which to determine whether the purpose to which property is appropriated possesses the element of public utility. "Public use," in a constitutional sense, may be confined to the inhabitants of a restricted locality or neighborhood, but the use must be common, and not to a particular individual.

5. The use of water for the purpose of irrigating, contemplated by the Act of March 27, 1889, known as the "Rayner Irrigating Law," is a "public use," within the meaning of the constitution.

6. Section 8 of article 2 of the Rayner Irrigating Law confers upon irrigating companies organized under the laws of this state power to acquire the right of way for necessary canals, reservoirs, etc., by condemnation.

7. The word "if," in the first line of the section last above mentioned, is evidently an interpolation, having no relation to the body of the section, without sensible meaning, and should accordingly be disregarded in giving effect to the provisions of the act.

8. The provision of section 3, article 1, of the Irrigation Law of 1889, viz.: "No tract of land shall be crossed by more than one ditch," etc.,—*Held*, to include lands owned by corporations as well as natural persons.

9. A proviso which would operate to limit the application of an enacting clause, general in its terms, will be strictly construed, and includes no case not within the letter of the exception.

10. The Irrigation Law of 1889 does not confer upon one irrigating company any right to connect with the ditches of another, or take water therefrom without the consent of the proprietor.

11. What is meant by the exception contained in section 3, article 1, of the Act above mentioned is that no tract of land shall, without the consent of the owner, be burdened with two or more ditches, for the watering of the same territory. The question is not whether the first ditch may be so enlarged or extended as to answer the purpose for which the second is designed,

*Headnotes by POST, J.

NOTE.—The general subject of public uses for which property may be taken by eminent domain is considered at some length in *notes* to Pittsburgh, W. & K. R. Co. v. Benwood Iron Works (W. Va.) 2 L. R. A. 680; Barre R. Co. v. Montpelier & W. R. Co. (Vt.) 4 L. R. A. 785; also in the case of Wisconsin Water Co. v. Winans (Wis.) 20 L. R. A. (6).

For flowage of lands as public use, see Turner v. Nye (Mass.) 4 L. R. A. 487, and *note*.

As to private roads, see Latah County v. Peterson (Idaho) 16 L. R. A. 81, and *note*.

but whether it may, as constructed, be made to supply the lands within reach of both.

(October 1, 1895.)

APPEAL by plaintiff from a decree of the District Court for Lincoln County in favor of defendant in an action brought to enjoin defendant from appropriating a right of way for an irrigating canal. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Frank T. Ransom** and **T. Fulton Gantt** for appellant.

Messrs. **T. C. Patterson** and **Grimes & Wilcox,** for appellee:

So far as the act declares irrigation to be a public use, and provides for the condemnation of right of way for canals that are projected and built, as the defendant's is, for the purpose of supplying water to the public for irrigation, it clearly comes within the constitutional power and duty of the legislature to legislate for the public welfare.

Re Madera Irrigation Dist. Bonds, 92 Cal. 296, 14 L. R. A. 755; *Cummings* v. *Peters,* 56 Cal. 593; *Lux* v. *Haggin,* 69 Cal. 255; *Lindsay Irrigation Co.* v. *Mehrtens,* 97 Cal. 677; *Talbot* v. *Hudson,* 16 Gray, 425; *Oury* v. *Goodwin* (Ariz.) 26 Pac. Rep. 376; *Barbier* v. *Connolly,* 113 U. S. 31, 28 L. ed. 924; *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 16, 28 L. ed. 892.

If the public interest can in any way be promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose.

2 Kent, Com. 340; *Stockton & V. R. Co.* v. *Stockton,* 41 Cal. 147; *Bankhead* v. *Brown,* 25 Iowa, 540.

To make the use public it need not be for the benefit of the whole public, or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be in common, not to a particular individual or estate.

Welton v. *Dickson,* 38 Neb. 767, 22 L. R. A. 496; *Coster* v. *Tide Water Co.* 18 N. J. Eq. 54; *Pocantico Water Works Co.* v. *Bird,* 130 N. Y. 249; Lewis, Em. Dom. chap. 7; *State* v. *Morris Aqueduct Proprs.* 46 N. J. L. 495; *Wayland* v. *Middlesex County Comrs.* 4 Gray, 500; *St. Helena Water Co.* v. *Forbes,* 62 Cal. 182, 45 Am. Rep. 659; *Re New Rochelle Water Co.s' Application,* 46 Hun, 525; *Stamford Water Co.* v. *Stanley,* 39 Hun, 424; 6 Am. & Eng. Encyclop. Law, 524; Cooley, Const. Lim. 4th ed. 672.

Section 3, article 1, of the Irrigation Act does not apply to cases between rival canal companies who may also be land owners, but is for the benefit of the land owners only.

San Luis Land, C. & I. Co. v. *Kenilworth Canal Co.* 3 Colo. App. 244.

Plaintiff's canal is completed. It does not extend beyond the lands owned by plaintiff, and does not run through any lands that can be watered from it except the plaintiff's own land. No public duty can be imposed upon it.

Downing v. *More,* 12 Colo. 316.

The true test of the appropriation of water is the successful application thereof to the beneficial use designated.

Thomas v. *Guiraud,* 6 Colo. 530; *Farmers' High Line Canal & Reservoir Co.* v. *Southworth,* 13 Colo. 111, 4 L. R. A. 767; *Dick* v. *Caldwell,* 14 Nev. 167; *Simpson* v. *Williams,* 18 Nev. 432; *Farmers' Independent Ditch Co.* v. *Agricultural Ditch Co.* 3 Colo. App. 255.

The North Platte canal was taxed to its full capacity to supply its customers to whom it was under contract to furnish water, and that being the case its customers would be entitled to an injunction to stop it from selling or contracting to sell water beyond its ability to deliver.

Clifford v. *Larrien* (Ariz.) 11 Pac. Rep. 397; *Wyatt* v. *Larimer & W. Irrig. Co.* 18 Colo. 298; *Cole* v. *Logan,* 24 Or. 304.

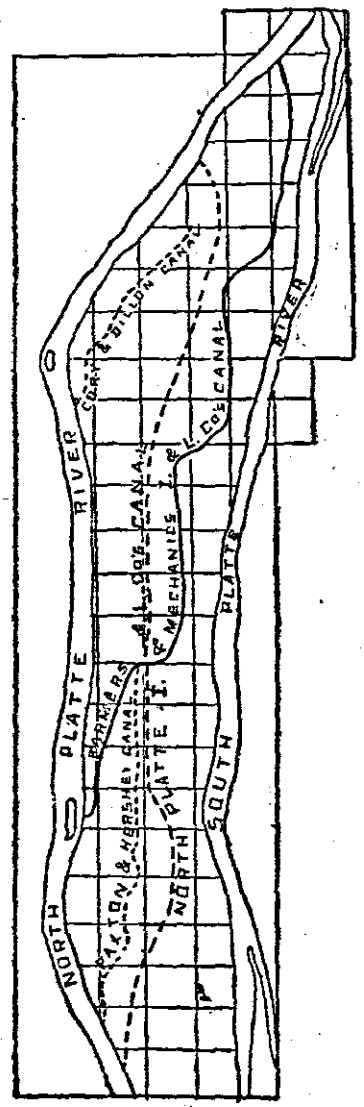
The finding as to the necessity of taking private property is conclusive, and not subject to be reviewed or questioned by another court.

Knoblauch v. *Minneapolis,* 56 Minn. 321; *Barrett* v. *Kemp* (Iowa) 59 N. W. Rep. 77; *Cherry* v. *Matthews,* 25 Or. 484; *Santa Ana* v. *Harlin,* 99 Cal. 538; *Waterloo Water Co.* v. *Hoxie,* 89 Iowa, 317

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

This is an appeal from a decree of the district court for Lincoln county dismissing the action of the plaintiff company whereby it seeks to prevent the appropriation by the defendant of a right of way through its lands for an irrigating canal. In the petition it is in substance alleged that the plaintiff company is the owner of 10,000 acres of land, bounded by the North Platte river, in Lincoln county, and also of an irrigating canal known as the "Paxton & Hershey Ditch," situated on its said lands and on the lands of other adjoining proprietors; that upon its said land, and nearly parallel with the ditch above mentioned, is an irrigating canal known as the "North Platte Irrigating & Land Company's Ditch," and herein referred to as the "North Platte Ditch;" and that in the vicinity of the plaintiff's lands sought to be watered by the defendant's proposed canal is an irrigating canal known as the "Cody & Dillon Ditch." The plaintiff, it is alleged, has constructed a large number of laterals from its said canal, which it is proposed by the defendant company to cross, thus necessitating the construction and maintaining of many bridges, flumes, and conduits, and otherwise needlessly harassing it in the use and enjoyment of its said property. The defendant company, which is organized for the purpose of building and maintaining ditches, canals, aqueducts, and reservoirs for the storage and conveyance of water, and of selling water to consumers for irrigating, power, and other useful purposes, prior to the commencement of this action, entered upon the plaintiff's said land, and located and staked out a ditch thereon 4½ miles in length, and is taking steps to condemn a right of way therefor, but that the three ditches above described afford ample facilities for the irrigation of all of the land sought to be supplied by the defendant company, and that water sufficient to supply the defendant's

wants can be furnished from the ditches already constructed, should connection be made therewith, at less expense than by the construction and maintaining of the proposed ditch through the plaintiff's land to the source of supply,—the North Platte river. The answer, so far as it is deemed necessary to notice it, consists of an allegation that the defendant is engaged in the construction of an irrigating canal some 20 miles in length, for the purpose of supplying with water from the North Platte river certain territory not within the reach of either of the canals already constructed; a denial that the plaintiff's canal is capable of supplying the lands which the defendant proposes to water; and an allegation that the water supplied by said canal is barely sufficient for the irrigation of the plaintiff's own land. Accompanying the pleadings is the following map, showing the



location of the proposed ditch, as well as those already completed, and which is essential to a perfect understanding of the questions at issue.

The district court, upon entering the decree complained of, submitted the following findings of fact and conclusions of law:

"First. The plaintiff is a corporation organized and existing under and by virtue of the laws of this state for the following purposes: To construct, own, operate, and maintain a canal or canals, ditch or ditches, for irrigation purposes; to purchase, acquire, own, sell, and convey all real estate that may be necessary for such purposes, and to acquire, own, sell, and convey real estate in connection with carrying on an irrigating business, and to acquire, own, sell, and convey real estate for other purposes deemed advisable or advantageous to the corporation and its interests, and to cultivate and improve such lands as shall be owned by the corporation; to furnish, sell or rent water for irrigation of lands which shall be owned by said corporation and within its area, and other lands within reach of any canal or canals which shall be owned, operated, or controlled by the corporation, owning live stock, and raising the same in connection with the land held or controlled by this corporation. Second. The plaintiff is the owner of about 7,000 acres of land located on and adjacent to the banks of the North Platte river, in Lincoln county, Neb., as alleged in its petition, and is the owner of an irrigating canal running across its said lands, and the lands of others for a distance of about 10 miles, which canal is finished and constructed for the purpose of irrigating the land under the said ditch, and for the purposes set forth in the articles of incorporation of the plaintiff. Third. The defendant is a corporation organized under the laws of this state for the following purposes, among others: The building and maintaining of canals, ditches, and aqueducts, and reservoirs for the storage and conveyance of water, and the selling of such water to consumers for irrigation, agricultural, power, and other useful purposes. Fourth. The plaintiff is the owner of the tract of land proposed to be crossed by the proposed canal of the defendant, and which lies under the plaintiff's ditch, and which is proposed to be crossed by defendant's ditch for a distance of 4½ miles. Fifth. All of the land of the plaintiff across which the defendant proposes to construct its canal for a distance of 4½ miles can be irrigated from and by plaintiff's canal, and it is not proposed by the defendant to water or irrigate any of plaintiff's said land within said 4½ miles. Sixth. That the defendant corporation is the owner of no land to be watered by its proposed ditch, but that the object of said corporation is for the purpose of constructing and operating a canal or ditch for irrigation purposes for the lands lying contiguous under said ditch for other parties to hire. Seventh. That, at the points where it is alleged that the defendant's ditch crosses the lands of the plaintiff, it is necessary for the defendant to run said ditch across said lands in order to get water out of the North Platte river, with

necessary fall in accordance with the surveyed route of its ditch; that, in the territory covered by the ditch of the plaintiff, it is not the object nor the purpose of the defendant's ditch to irrigate said land, but lands lying below and beyond the territory of the plaintiff's ditch. Eighth. There are about 40,000 acres of land between the North and South Platte rivers, and in this territory the evidence shows that the North Platte Ditch Company has a ditch about 20 miles long running through the middle portion of the peninsula formed by the two rivers. The plaintiff's ditch is also constructed in this peninsula, and is in length about 10 miles. The Cody & Dillon ditch is also in this peninsula, and is about 6 miles in length. A great amount of evidence has been taken to show the capacity of these several ditches for watering the land in the peninsula, including the land proposed to be watered by the defendant's ditch. The location of these several ditches in the peninsula, their dimensions, and their capacity appear from the evidence and the maps introduced in evidence; but the court does not find nor pass upon the evidence relating to the question as to whether or not this water could be supplied by the defendant's constructing their ditch up and to the plaintiff's ditch, and receiving water therefrom, for the reason that there is no provision in the act contemplating that it should be obligatory upon the defendant to so do. Ninth. The court further finds that the defendant's proposed ditch will cross the lands of the plaintiff through which plaintiff's ditch has already been built, which lands are also irrigated from plaintiff's ditch. Tenth. The court further finds that the plaintiff has not given its written consent to cross the lands owned by it proposed to be crossed by the defendant with its said proposed canal, and objects to its appropriation of its lands for the purpose of constructing the defendant's said ditch over the same.

"Conclusions of law: First. That section 2034, Consol. Stat. (Irrigation Law of 1889, § 3, art. 1), is not applicable to the facts in this case, for the reason that the defendant's contemplated ditch is not being constructed for the purpose of irrigating the lands crossed by the plaintiff's ditch, nor the lands lying under the plaintiff's ditch, but for the purpose of irrigating lands beyond and below the plaintiff's ditch. Second. That the defendant is entitled to cross the lands of the plaintiff for the purpose of constructing its said ditch on complying with the necessary requirements of law for said purpose."

It will be observed from the foregoing statement and opinion that the defendant's claim to a right of way for its canal through the plaintiff's land is founded upon the provisions of the Act of March 27, 1889, known as the "Rayner Irrigating Law," entitled "An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes, and to repeal sections 158 and 159 of chapter 16, Compiled Statutes of 1889, entitled *Corporations.*"

The first contention on this appeal is that the provision for the acquiring by corporations of the right of way for irrigating ditches in the exercise of the power of eminent domain is foreign to the title of the act mentioned, and accordingly violative of section 11, article 3, of the Constitution, viz.: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." The object of the foregoing provision has been declared, not to prohibit comprehensive titles, but to prevent surreptitious legislation, by advising representatives of the nature and purpose of the measures they are called upon to support or oppose. *Kansas City & O. R. Co.* v. *Frey*, 30 Neb. 790; *Re White*, 33 Neb. 813; *Trumble* v. *Trumble*, 37 Neb. 340; *South Omaha* v. *Taxpayers' League*, 42 Neb. 671. It is said in *White's Case, supra*, that the legislature has the right to choose the title to any act passed by it; and, although that chosen may not be the most appropriate, the act will not be held void unless clearly in conflict with the constitution. When tested by that rule, we cannot doubt that the provision assailed is germane to the title of the act, and within the evident purpose thereof, viz., the utilizing of the public waters in the further development of the agricultural resources of the state. The word "irrigation," as employed in the title of the act under consideration, is apparently used in its popular sense, and denotes the application of water to land for the production of crops. *Platte Water Co.* v. *Northern Colorado Irrigation Co.* 12 Colo. 525. The use of water for the purpose of irrigation clearly implies the means of conducting it to the land to which it is applied; and any plan such as contemplated by the Act of 1889, which omits provision for the enforced access by the public to the source of supply, is necessarily partial and ineffective.

2. The act, in so far as it makes provision for the acquiring of the right of way for irrigating canals by condemnation, is also vigorously assailed on the ground that it contemplates the taking of property for private use only, and is therefore in conflict with section 21 of the Bill of Rights, viz.: "The property of no one shall be taken or damaged for public use without just compensation therefor." This provision has been held to prohibit, by implication, the taking of private property for private use, of any character whatever, without the consent of the owner. *Jenal* v. *Green Island Draining Co.* 12 Neb. 163; *Welton* v. *Dickson*, 38 Neb. 767, 22 L. R. A. 496. In the last-mentioned case it was held, following *Coster* v. *Tide Water Co.*, 18 N. J. Eq. 54, that the want of power in the legislature to transfer to one person the property of another does not necessarily depend upon constitutional restrictions, but upon the fact that such authority is in no sense an incident to the powers conferred upon the lawmaking branch of the government. We are thus, for the first time, confronted with the question whether the use contemplated by the statute is a public one, in a constitutional sense, or whether it is a mere private use, and accordingly within the prohibition mentioned. In this connection it should be observed that to the legislature, and not to the courts, has been committed the

power to determine when the exigencies of the public demand the taking of property for public uses, the limit of judicial interference being the duty to declare void acts clearly violative of the fundamental law of the state. There is no arbitrary standard by which to determine whether the purpose to which property is appropriated possesses the elements of public utility. It has been said by an eminent jurist that "the use required need not be the use or benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be in common, and not to particular individuals or estates." See *Chancellor* Zabriskie in *Coster* v. *Tide Water Co. supra.* Again, it has been said that "the use is public when it promotes the interests of a considerable portion of the community, although it may not benefit the community at large." Kinney, Irrigation, 94. See also Black's Pom. Water Rights, § 174; *Lux* v. *Haggin*, 69 Cal. 304; *Lindsay Irrigation Co.* v. *Mehrtens*, 97 Cal. 676; *Oury* v *Goodwin* (Ariz.) 26 Pac. Rep. 376; *Umatilla Irrigation Co.* v. *Barnhart*, 22 Or. 389; *Foster* v. *Park Comrs.* 133 Mass. 321; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569; *Wurts* v. *Hoagland*, 114 U. S. 606, 29 L. ed. 229; *Pocantico Water Works Co.* v. *Bird*, 130 N. Y. 249. In the last-mentioned case we observe the following pertinent language: "The term 'public use,' as used in connection with the right of eminent domain, is not easily defined. . . . It is doubtless true that in order to make the use public, a duty must devolve upon the persons or corporation holding the property to furnish the public with the use intended. The term implies 'the use of many' or 'by the public,' but it may be limited to the inhabitants of a small or restricted locality, but the use must be common and not for a particular individual." It has been said that if, by any reasonable construction, a designated use may be held to be public in a constitutional sense, the will of the legislature should prevail over any mere doubt of the court (*Bankhead* v. *Brown*, 25 Iowa, 540; *Re Madera Irrigation Dist. Bonds*, 92 Cal. 309, 14 L. R. A. 755; *Coster* v. *Tide Water Co. supra*), which, however, is but the application of a fundamental principle of our system, viz., the independence of each department of the government within its own domain. It should be remembered, too, that the essential features of the Rayner irrigating law appear in the legislation of the several Pacific states, notably of California, whose constitutional provisions on the subject do not differ substantially from ours, and where it had long previous to its adoption by us received a definite construction adverse to the contention of the plaintiff herein. See *Lux* v. *Haggin, supra.* The legislature must therefore have intended to adopt, not the statute alone, but the construction placed upon it in the state of California. Such is the well-established rule. *Bohanan* v. *State*, 18 Neb. 57, 53 Am. Rep. 791. But any examination of this subject is necessarily incomplete which omits mention of the recent case of *Bradley* v. *Fallbrook Irrigation Dist.*, 68 Fed. Rep. 948, holding that assessments under the provisions of the district irrigation law of that state contemplate the taking of property for mere private purposes, and are accordingly within the prohibition of the United States Constitution. It is unnecessary, however, at this time, to examine the reasoning upon which that case rests, since it is therein declared inapplicable to the ordinary use of water for irrigating purposes in the arid regions of California, and therefore in harmony with *Lux* v. *Haggin* and later cases, in which the same doctrine is asserted by that court. The varying conditions of society are constantly presenting new subjects of "public utility," which is but another name for "public necessity;" hence the force of *Chancellor* Vroom's remark in *Scudder* v. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756, that what shall be deemed a public use depends somewhat on the situation and wants of the community for the time being. Nor were the conditions surrounding the people of the Pacific states when the foundation was laid for the body of their laws upon the subject materially different from those which to-day confront the western half of our own state. We behold what was but yesterday the public domain occupied to the western limit of the "Rain Belt," so called, and settlers eagerly seeking for homes in the semiarid region beyond. We behold thousands of acres of fertile land in the valleys of the Platte, the Loups, the Elkhorn, and the Republican rivers practically worthless under existing conditions for the purpose of agriculture, but which by application of the waters of those streams may be made most productive, thus not only supporting the rapidly increasing population of that region, but adding largely to the wealth and material prosperity of the state. That an undertaking so important can be successfully prosecuted alone through the agency of the state none can doubt. The reclamation of a region so vast, equal in extent to more than one state of the Union, is surely a legitimate function of government; and the exercise of the reserved power of the state in the promotion of an enterprise so beneficial is not even in the technical sense violative of the restrictive features of the constitution.

3. It is next argued that authority to appropriate land for right of way purposes is by the Law of 1889 conferred upon property owners only, and, it being admitted that the defendant company is not the owner of any of the lands lying under its ditch, it is not within the provisions of the act.

The purpose of sections 1–4 of article 2, to which we are referred in support of that contention, was apparently to confer upon individuals and corporations the right of way in certain cases through the premises of adjoining proprietors. It is, however, unnecessary to examine the provisions mentioned, since the plaintiff's argument is based upon an apparent misconception of the defendant's claim, which is under the provisions of sections 8 and 9 of article 2, viz.:

"Sec. 8. If any corporation organized under the laws of this state for the purpose of constructing and operating canals for irrigating or water-power purposes, or both,

may acquire a right of way over or upon any land for the necessary construction of such canal, including dams, reservoirs, and all necessary adjuncts to said canals in the same manner as provided for persons and companies in this act, and such persons, canal companies, and corporations shall have the same power to occupy state lands with their said canals as is given to railroad corporations by section 105, chapter 16, of the Compiled Statutes of 1887, and such corporations shall also have power to borrow money and to mortgage all their property and franchises in the same manner and for the same purposes as railroad companies.

"Sec. 9. Canals constructed for irrigating or water-power purposes, or both, are hereby declared to be works of internal improvement, and all laws applicable to works of internal improvement are hereby declared to be applicable to such canals."

The first word of section 8, as it appears above, is evidently an interpolation, having no relation to the body of the section, without sensible meaning, and should accordingly be disregarded in giving effect to the provisions of the act. *Stone* v. *Yeovil*, L. R. 1 C. P. Div. 701; *United States* v. *Stern*, 5 Blatchf. 512, Fed. Cas. No. 16,389; *State* v. *Beasley*, 5 Mo. 91; *State* v. *Acuff*, 6 Mo. 55. A careful reading of the two sections last named, with the word "if" eliminated from section 8, leaves no room to doubt that the defendant company is within the terms of the act, and that the plaintiff's claim to the contrary is without merit.

4. It is by the plaintiff further argued that it is within the exception contained in section 3, article 1, as follows: "No tract of land shall be crossed by more than one ditch, canal, or lateral without the written consent and agreement of the owner thereof, if the first ditch, canal, or lateral can be made to answer the purpose for which the second is desired or intended." The evidence relating to this branch of the case is quite voluminous, although the district court, as appears from its findings and conclusions of law, held the foregoing exception not applicable to the facts, without determining the question of the capacity of the ditches already constructed. On behalf of the defendant it is contended, in effect, that the exception of the statute applies to owners and proprietors other than irrigating companies, which corporations, it is argued, are not in terms or by implication included therein. The case of *San Luis Land, C. & I. Co.* v. *Kenilworth Canal Co.*, 3 Colo. App. 244, it is conceded, tends to sustain that contention. Referring to the Colorado statute, which provides that no tract or parcel of improved or occupied land shall be burdened with two or more ditches, etc., it is said in the case cited: "We are wholly unable to understand how it can be urged that the defendant company has any right under the provisions of these sections. They clearly and in unmistakable language apply to the right of the owner of the lands to assert that his property shall not be burdened with more than one irrigating ditch, provided that one ditch be of sufficient capacity to carry water for the purposes contemplated by the act." We are, however, unable to accept that case as an authoritative interpretation of our statute. The term "no tract of land," as employed, without qualifications, must be held to include the property of corporations as well as natural persons; and such would have been the construction had the statute read "the land of no person shall be crossed," etc. *Wales* v. *Muscatine*, 4 Iowa, 304; *Ricker* v. *American Loan & T. Co.* 140 Mass. 346; *Norris* v. *State*, 25 Ohio St. 217, 18 Am. Rep. 291. But we reach the same conclusion as the district court,—presumably by the same course of reasoning,—by which the sections are transposed; section 8 of article 2 being regarded as the enacting clause, and section 3 of article 1 as a proviso exempting the exceptional cases therein contemplated from the operation of the act. According to settled rules of construction, a proviso which would operate to limit the application of an enacting clause general in its terms will be strictly construed, and includes no case not within the letter of the exception. Endlich, Interpretation of Statutes, 186; *United States* v. *Dickson*, 40 U. S. 15 Pet. 165, 10 L. ed. 698; *Roberts* v. *Yarboro*, 41 Tex. 450; *Epps* v. *Epps*, 17 Ill. App. 196. Referring again to the proviso involved, we are first impressed with the fact that the primary object thereof is the protection of land owners, rather than the proprietors of irrigating ditches. True, both characters may, as in this instance, be united in one person or corporation, but such cases are exceptions, and apparently not within the contemplation of the legislature. It is, in the second place, noticeable that the act is silent respecting the terms and conditions upon which one irrigating company may make use of the canal or ditch of another; nor is the proprietor of such a ditch in terms required to supply water upon any terms to a rival corporation. It was at the consultation suggested that it is within the power of a court of equity to prescribe the conditions upon which one irrigating company may connect with the ditch of another; but that assertion rests, to say the least, upon doubtful grounds. Conceding irrigating companies, as quasi public corporations, to be subject to the strict obligations of common carriers, it does not follow that they may by the courts be compelled to enter into particular agreements, or assume particular relations, however just and equitable, towards each other. That subject has recently engaged the attention of the Supreme Court of the United States, by which the power to prescribe terms for the interchange of business by connecting carriers is declared to be legislative rather than judicial in character, notwithstanding the provisions of the interstate commerce act. *Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291; *Pullman's Palace Car Co.* v. *Missouri Pac. R. Co.* 115 U. S. 587, 29 L. ed. 499; *Express Cases*, 117 U. S. 1, 29 L. ed. 791; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. R. Co.* 41 Fed. Rep. 559, 2 Inters. Com. Rep. 763. See also Beach, Priv. Corp. 839; *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.* 37 Fed. Rep. 567, 2 L. R. A. 289, 2 Inters. Com. Rep. 351;

Shelbyville R. Co. v. *Louisville, C. & L. R. Co.* 82 Ky. 541.

The precise limits within which courts of equity will interfere in such cases in order to regulate or enforce the reciprocal obligations of corporations is a question foreign to the present controversy, although the authorities cited serve to illustrate the difficulties attending the interpretation placed upon the statute by counsel for plaintiff. We are, after a careful analysis of the language of the exception, unable to say that it contemplates the connecting of different canals, or that it imposes upon one irrigating company any duty to supply water for use by the patrons of another. What the statute implies is that no tract of land shall, without the consent of the owner, be burdened with two or more ditches for the watering of the same territory. The question is not whether the first ditch may be so enlarged or extended as to answer the purpose for which the second is designed, but whether it may as constructed be made to supply the lands within reach of both. That the purpose of the defendant is to water lands which cannot be accommodated by the plaintiff, but which, in the language of the district court, "lie below and beyond its ditch" as now constructed, is clearly established by the proofs, and apparent from an inspection of the foregoing map. Nor can the fact that the plaintiff concedes the defendant's right to connect with its ditch, and offers to supply the latter with water on terms confessedly reasonable, be regarded as material, since, as we have seen, the law imposes upon the plaintiff no such duty. It follows without further elaboration that *the decree of the District Court is right, and must be affirmed.*

MICHIGAN SUPREME COURT.

Rudolph MUNZER *et al.*
v.
Henry STERN, *Plff. in Err.*

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

1. **Fraud in the purchase of goods is waived** by the seller's entering into a compromise agreement with the purchaser by which the latter returns a portion of the goods and agrees to pay for the balance on terms satisfactory to the seller.
2. **Sellers of goods to one who purchased with intent to defraud,** who have been induced to leave a portion in possession of the buyer under a compromise agreement entered into by the latter with the intent to defraud, may rescind the agreement and retake the goods.
3. **A tender back of what he obtained by the compromise is not necessary** to justify its rescission, where one from whom goods were fraudulently purchased regained a portion of them under a compromise agreement which left the remainder in the buyer's possession, but which was entered into by the buyer with intent to defraud the seller of the property.
4. **Evidence of a conversation** which occurred in defendant's absence is not rendered admissible against him by the fact that it would tend to contradict statements made by defendant's counsel in his opening statement to the jury.

(May 22, 1895.)

ERROR to the Circuit Court for Kalamazoo County to review a judgment in favor of plaintiffs in an action brought to recover possession of certain cloaks which were alleged to have been procured from plaintiffs by fraud. *Reversed.*

Statement by **Grant, J.:**

A firm by the name of Livingston & Block was engaged in the dry goods and retail cloak business in the city of Kalamazoo. In the summer of 1893 plaintiffs sold to this firm cloaks of the value of $2,728.50 shipping the same in July or August. About August 29 the plaintiffs learned that Livingston & Block had purchased a much larger amount of goods than formerly, and that they had been shipping goods away. Munzer thereupon went to Kalamazoo, interviewed Livingston & Block, at first tried to obtain payment, although the purchase price was not due until January following, by informing Livingston & Block that they were in need of money and offering a large discount for cash payment, and failing in this charged them with shipping away goods, and demanded a return of at least a part of the goods which plaintiff had sold to them. Livingston & Block admitted to Munzer that they had shipped away goods, but none purchased of the plaintiffs, and there is no evidence that at that time they had done so. Livingston & Block refused to surrender any of the goods, and Munzer returned to Chicago, leaving the matter in charge of plaintiff's attorneys, Osborn and Mills. Mr. Mills shortly thereafter interviewed Livingston & Block, and testified that he informed them of plaintiff's claim, that they had purchased more goods than usual and had shipped goods away, and that Mr. Block denied having shipped away any goods. At the second interview Mr. Mills informed Livingston & Block that he was instructed to replevin the goods, and should do so at once unless a compromise was effected, whereupon a proposition was made which was submitted to plaintiffs by their attorneys, assented to by them, and, on September 2, 1893, incorporated into the following contract:

"Whereas, R. Munzer & Company, of Chicago, Illinois, has heretofore sold and shipped to Livingston & Block, of Kalamazoo, Michigan, two bills of cloaks, one amounting to $71 and one to $2,657.50, said bills being dated December 1, 1893, due in thirty days with 7 per cent discount if paid in ten days and six per cent discount if paid

NOTE.—In connection with the above case, see Sisson v. Hill (R. I.) 21 L. R. A. 206, and *note.*

in thirty days; and whereas a misunderstanding has arisen between the parties in regard to said bills of cloaks; and whereas, it is desired by all parties to settle said differences amicably: Now, therefore, it is hereby agreed between the parties that said Livingston & Block shall return to said R. Munzer & Co. $1,600 worth of said cloaks, and that the same shall be received by R. Munzer & Co. in payment of said bills to that amount, and that said Livingston & Block shall keep the balance of said cloaks and shall pay for the same upon the terms of the original sale; that is to say, they shall pay for the same on January 1, 1894, and by so doing said Livingston & Block have a discount of 6 per cent, and if said Livingston & Block so desire they may pay for said cloaks on December 10, 1893, less a discount of 7 per cent. The cloaks that are to be reshipped to R. Munzer & Co. are to be shipped this day, and in consideration of the foregoing said R. Munzer & Co. are not to bother said Livingston & Block in the possession of the cloaks retained by them, or to bring suit for the recovery thereof, until the bill for the same becomes due, as herein agreed."

Livingston & Block reshipped the goods according to this contract. On September 18, Livingston & Block executed a chattel mortgage on the entire stock to the defendant Stern as trustee, to secure certain alleged creditors, most of whom were relatives of either Livingston or Block. Between that date and the close of the month fifteen replevin suits were brought against Stern by the creditors of Livingston & Block to recover goods claimed to have been purchased fraudulently. Plaintiffs also brought this suit of replevin and recovered $849 worth of their goods out of $1,128.50. Verdict and judgment were for the plaintiffs.

Messrs. **Howard & Roos** and **Boudeman & Adams,** for plaintiff in error:

When no questions are asked, no false pretenses, no artifice resorted to, silence is not fraud.

Cobbey, Replevin, § 268; *Norwich Union F. Ins. Soc.* v. *Girton,* 124 Ind. 217; *Strobridge Lithographing Co.* v. *Randall,* 78 Mich. 195; *King* v. *Williams,* 71 Iowa, 74; *Morgan* v. *Joy,* 121 Mo. 677; *Ham* v. *Hamilton,* 29 Ga. 40; *Soule* v. *Holdridge,* 17 Ind. 236; *Adams* v. *Sage,* 28 N. Y. 103; *Home Ins. Co. of New York* v. *Howard,* 111 Ind. 544; *Cates* v. *Bales,* 78 Ind. 285.

A party cannot affirm and avoid a contract at the same time. If it is void for fraud, then it must be wholly void, and before plaintiffs can take the position that it is void they must deliver or tender back what they have received under it and place the other parties in the same position as they were before.

Town v. *Waldo,* 62 Vt. 118; *Hart* v. *Gould,* 62 Mich. 268; *Crippen* v. *Hope,* 38 Mich. 344; *Pangborn* v. *Continental Ins. Co.* 67 Mich. 683; *Home Ins. Co. of New York* v. *Howard,* and *Cates* v. *Bales, supra; Merrill* v. *Wilson,* 66 Mich. 243; *Wilbur* v. *Flood,* 16 Mich. 40, 93 Am. Dec. 203; *Dunks* v. *Fuller,* 32 Mich. 242; *Wylie* v. *Gamble,* 95 Mich. 564.

Messrs. **Osborn, Mills & Master,** for defendants in error:

The plaintiffs were not required to tender back to the defendant or Livingston & Block the goods they had received from Livingston & Block before commencing this suit.

Stevens v. *Austin,* 1 Met. 557; *Pearse* v. *Pettis,* 47 Barb. 276; *Frost* v. *Lowry,* 15 Ohio, 200.

Impossible and unreasonable things which do not tend to the accomplishment of equity in the particular transaction are not required, and when it appears that the value of the goods replevined does not exceed the goods to which the plaintiffs are entitled, no tender back before suit is essential.

Sloane v. *Shiffer,* 156 Pa. 59; *Schofield* v. *Shiffer,* Id. 65.

In cases in which the judgment sought will substantially restore the party to the situation he was in when the agreement was made, no tender back before suit is required.

Springfield Fire & Marine Ins. Co. v. *Hull,* 51 Ohio St. 270, 25 L. R. A. 37; 1 Bigelow, Fr. 426; *Smith* v. *Salomon,* 7 Daly, 216; *Pearse* v. *Pettis, supra.*

Exceptional circumstances excuse a tender back upon rescission.

Smith v. *Holyoke,* 112 Mass. 517; *Clough* v. *London & N. W. R. Co.* L. R. 7 Exch. 26; *Smith* v. *Salomon, supra; Montgomery* v. *Pickering,* 116 Mass. 227.

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

1. The defendant requested the court to direct a verdict for the defendant, for the reason that under the evidence the plaintiffs were fully advised of the circumstances and conditions surrounding the case, and entered into the compromise agreement with full knowledge of the facts. The court instructed the jury that the plaintiffs by this agreement waived every right to bring suit in replevin because of any claim on their part that the goods were fraudulently purchased, and that they could not repudiate the agreement unless they had shown that the plaintiffs or their agents were misled into making such agreement by reason of some fraud practiced by Livingston & Block; and that they must show that some active fraud was perpetrated to induce them to enter into said agreement.

We think the instruction was correct. If the jury believed the evidence on the part of the plaintiffs, which of course they did, they were justified in reaching the conclusion that this compromise agreement was not entered into in good faith by Livingston & Block; that they were then hopelessly insolvent; that they had purchased at a time when business was depressed, nearly five times the usual amount of their purchases; that they did this without intending to pay for them; that they themselves, without the knowledge of their clerks, secretly packed and shipped a large amount of goods to fictitious consignees, and that they sold goods at cost less a discount of from 10 to 18 per cent, and that some were shipped in the original packages. There was other evidence upon this point which it is unnecessary to state. These things were done within a few days

after the receipt of the goods. Plaintiffs had the right to assume that this agreement was made with a view to the continuance of their business, whereas the evidence on plaintiff's part tends strongly to show that they had no such intention. There was evidence to sustain the finding, not only that they purchased these goods and others with intent to defraud, but also that they entered into this agreement with intent to retain the goods mentioned therein for the like purpose. In such case the plaintiffs were justified in rescinding the contract and re-taking the goods.

2. It was not necessary for the plaintiffs to offer to return the goods obtained by the agreement before bringing replevin for the remainder. Such action would be an idle ceremony not required by the law. Neither does the law require a party to tender back or surrender that to which he is entitled. Defendants had paid nothing. Their purchase was fraudulent. Both the original purchase and the compromise agreement were tainted with fraud. By retaking the remainder of the goods the plaintiffs placed themselves in the situation in which they were before the perpetration of the fraud, and this was their clear legal right.

The general rule requiring the surrender, or offer to surrender, what has been received, upon the rescission of a contract voidable for fraud, is not one of universal application, and has many exceptions. It does not require unreasonable or impossible things to be done. *Sloane* v. *Shiffer*, 156 Pa. 59-65; *Springfield Fire & Marine Ins. Co.* v. *Hull*, 51 Ohio St. 270, 25 L. R. A. 37; *Pearse* v. *Pettis*, 47 Barb. 276; *Smith* v. *Salomon*, 7 Daly, 216; *Montgomery* v. *Pickering*, 116 Mass. 227.

The rule has no application to the present case.

3. The only remaining question arises upon the admissibility of evidence. Mr. Mills was permitted to testify to a conversation between himself, Mr. Munzer, and one Einstein, who represented a New York firm who had sold goods to Livingston & Block. Livingston & Block were not present, and, among other things, Mr. Mills testified to a statement made by Einstein of a conversation he had with a gentleman, whose name was not given, upon a street-car in New York, that he had sold Livingston & Block a large bill of goods, and that Mr. Einstein further said that he ascertained that they had purchased several thousand dollars more than they had gotten of him. It is attempted to support its admission upon the opening statement to the jury of counsel for defendant that they would show that Mr. Munzer was the sole cause of all the difficulty in which Livingston & Block were involved, and that he had written to various creditors for the express purpose of breaking up their business. It was furthermore insisted that this conversation was substantially told to Livingston & Block by Mr. Mills. The admission of the testimony cannot be justified under any rule of evidence. The opening statement of counsel did not make it competent. It was hearsay. Testimony is not admissible to rebut a statement made by counsel which there is no evidence to sustain. We do not find that the most damaging statements in this conversation were repeated to Livingston & Block by Mr. Mills. The record states that the defendant introduced evidence tending to controvert that given by the plaintiffs. We do not, therefore, feel at liberty to hold that this was error without prejudice.

For this reason *judgment must be reversed*, and a new trial ordered.

Hooker, *J.*, did not sit.
The other Justices concurred.

SOUTH DAKOTA SUPREME COURT.

Town of DELL RAPIDS, *Appt.*,
v.
Margaret IRVING, *Respt.*

(.....S. Dak.....)

***1. The provisions of section 1302, Comp. Laws,** imposing upon township supervisors the duty of assessing the damages sustained by the owner of land by reason of the laying out, altering, or discontinuing of any road,—the right to an appeal and a jury trial being given to the party who feels aggrieved by any such determination or award of damages made by such supervisors (Comp. Laws, § 1324),—are not in conflict with the provisions of section 13, article 6, of the state Constitution, which reads as follows: "Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained and before possession is taken."

2. The purpose of the provisions of the constitution evidently is to secure to a party whose property is taken or damaged for public use the right to a jury trial upon the question of damages, and that right is secured by giving to the party whose land is so taken or damaged the right to an appeal to a court in which such a jury trial may be had.

3. The term "municipal corporation," as used in chapter 94, Laws 1891, does not include townships organized under the laws of this state.

4. The term "other corporations" does not include townships organized under the laws of this state.

5. Chapter 94, Laws 1891, was designed to affect "municipal" and "other corporations" referred to in section 18, article 17, of the Constitution only, and has no application to quasi corporations organized under the laws

*Headnotes by CORSON, *P. J.*

NOTE.—In connection with the above case on the question as to the nature of a town as a municipal corporation, see also Floyd v. Perrin (S. C.) 2 L. R. A. 242, and Brownell v. Greenwich (N. Y.) 4 L. R. A. 685.

of this state for political and governmental purposes.

(August 3, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Minnehaha County allowing damages to defendant in a proceeding to lay out a road over her property. *Reversed.*

The facts are stated in the opinion.

Messrs. **Henry Robertson** and **Palmer, Preston & Rogde,** for appellant:

If the provisions of chapter 112, Laws of 1883, were repealed by chapter 94 of Laws of 1891, then the circuit court was without jurisdiction, and could only dismiss the appeal, but could not render a judgment.

The provisions of chapter 94, Laws of 1891, were not intended to, and do not, apply to actions of township boards. Nor is any provision of the constitution in the way of township supervisors proceeding under chapter 112, Laws of 1883.

The judgment is against law.

Civil townships (quasi corporations only) are not embraced within any of the classes enumerated in section 1 of the Laws of 1891.

Messrs. **R. W. Hobart** and **Bailey & Voorhees,** for respondent:

The provisions of the territorial statute in regard to the awarding of damages by boards of supervisors is in conflict with the provisions of the constitution, and, even if they had been constitutional, they were repealed by the enactment of chapter 94, Laws of 1891.

Corson, *P. J.*, delivered the opinion of the court:

This is an appeal by the plaintiff from a judgment rendered by the circuit court in favor of the defendant upon an appeal from an order of the board of town supervisors of the town of Dell Rapids, laying out a highway over the land of the defendant. The appeal from the order to the circuit court seems to have been taken upon the ground that said board refused to assess any damages in favor of the defendant, and in her notice of appeal she claims $300 damages.

The appellant contends that the judgment of the circuit court is erroneous, in that it reverses and sets aside the proceedings of the board of supervisors when, under the theory of the case adopted by the court, a judgment dismissing the appeal, only, should have been entered; but as both parties seem to desire a decision upon the more important questions presented, namely, whether or not the provisions of the compiled laws relating to the subject of assessing damages in laying out town roads are in conflict with the state constitution, or have been repealed by chapter 94, Laws 1891, we express no opinion as to the form of the judgment.

When the case was called for trial in the circuit court the counsel for the defendant objected to the introduction of any evidence, "for the reason that the statute under which the proceedings in this action have been attempted to be had is in violation of the provisions of the constitution of the state of South Dakota, and especially in violation of the provisions of the bill of rights, and also in that the statute has been repealed by chapter 94 of the Laws of South Dakota of 1891." The motion was granted, and the court directed a verdict for the defendant.

Two questions are presented by the record for our determination: First. Are the provisions of the compiled laws relating to the assessment of damages in proceedings for laying out town roads in conflict with section 13, article 6, of the state Constitution? Second. Are the provisions relating to the assessment of damages contained in the compiled laws repealed by the provisions of chapter 94, Laws 1891?

Section 13, article 6, of the Constitution reads as follows: "Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained and before possession is taken. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken." It is contended by the respondent, in support of the judgment of the circuit court, that by the terms of that section damages can only be assessed by a jury, and that the provisions of section 1302, Comp. Laws, providing for assessing damages, is in conflict with said section of the constitution. But we are of the opinion that there is no conflict between the provisions of the compiled laws and the provision of the constitution. The object of the constitutional provision evidently is to secure to parties whose property is taken for public use the right to a jury trial upon the question of damages. This we think is secured to them by providing for an appeal to the proper court in which a jury trial can be had. Comp. Laws, § 1324. If the parties agree upon the amount of damages to be awarded, or the party is satisfied with the amount awarded by the town supervisors, there would be no necessity for a jury trial. If, however, the parties cannot agree, or the party is dissatisfied with the award made by the supervisors, he can by an appeal secure a trial by a jury upon the question of damages. This right of an appeal and a jury trial carries into effect the constitutional provision. Hence we discover no conflict between the provisions of the statutes and the constitution.

We cannot agree with counsel for respondent that the damages must in all cases be assessed by a jury, and that no highway can be laid out over the land of a private party until the damages are assessed, notwithstanding the party may be satisfied with the amount awarded by the town board of supervisors, or be satisfied with the amount that the board may be willing to allow. To so hold would require a very strict construction of the constitutional provision, and would not, in our opinion, carry out the evident intention of the framers of that instrument, which seems to have been to secure to the party such right if he desired to avail himself of it. That such was the design of the

constitution is quite evident from the subsequent section upon this subject under the title of "Corporations." Section 18, article 17, reads as follows: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction. The legislature is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise, and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases." It will be observed that this section clearly contemplates that damages in the first instance may be assessed by "viewers or otherwise," as the legislature is "prohibited from depriving any person of an appeal from any preliminary assessment by viewers or otherwise." A constitution, like a statute, is to be read as one instrument, and all its provisions may be considered in ascertaining the intention of its framers as to any provisions it contains.

It is further contended by the respondent that, assuming the provisions of the compiled laws relating to the assessment of damages are constitutional, the provisions of chapter 94, Laws 1891, have in effect repealed the provisions relating to damages, and that all proceedings to assess the amount of damages must be had under the provisions of the latter act. But we are unable to agree with the counsel in this contention. The Act of 1891 seems to have been intended to carry into effect the provision of section 18, article 17, heretofore given. The first section of the Act of 1891, chapter 94, reads as follows: "In all cases when municipal or other corporations, or individuals, invested with the privilege of taking private property for public use or damaging the same in making, constructing, or repairing any work or improvement allowed by law, shall determine to exercise such privilege, it shall be the duty of such corporation or individual to file a petition in the circuit court of the county in which the property to be taken or damaged is situated, praying that the just compensation to be made for such property may be ascertained by a jury." As has before been stated, this section of the constitution is found in the article entitled "Corporations," and, as will be observed, it only applies to "municipal or other corporations" and individuals invested with the privilege of taking property for public use. Unless, therefore, towns organized under the laws of this state are included within the terms "municipal or other corporations," the Law of 1891 does not apply to them. *Judge* Dillon, in his work on Municipal Corporations, defines a municipal corporation as follows: "The incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them, in their corporate capacity, to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. The power of local government is the distinguishing feature of municipal corporations proper, and is used with us in the strict and proper sense just mentioned." Dill. Mun. Corp. § 20. In the American & English Encyclopædia of Law a municipal corporation proper is thus defined: "A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality of its people. The primary idea is an agency to regulate and administer the internal concerns of the locality in matters peculiar to the place incorporated and not common to the state or people at large. Cities and incorporated villages, either created by special charter or organized under a general act, are the principal examples of municipal corporations proper." Quasi corporations are thus defined: "Involuntary quasi corporations, such as counties, towns, and school districts, are created almost exclusively with a view to the policy of the state at large for the purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transportation, and for the general administration of justice. They are not bodies corporate and politic with the general power of corporations, but are mere political subdivisions of the state, having the powers expressly granted to them, and such implied powers as are necessary to enable them to perform their duties, and no more. They are denominated in the books, and known to the law, as quasi corporations rather than as corporations proper. They possess some corporate functions and attributes, but are primarily political subdivisions—agencies in the administration of civil government—and their corporate functions are granted to enable them more readily to perform their public duties." 15 Am. & Eng. Encyclop. Law, pp. 954, 955. From the numerous cases cited we select the following in which the subject is very fully discussed: *Hamilton County Comrs.* v. *Mighels*, 7 Ohio St. 109; *Riddle* v. *Proprietors of Locks & Canals*, 7 Mass. 169, 5 Am. Dec. 35; *Fourth School-Dist.* v. *Wood*, 13 Mass. 193; *Beach* v. *Leahy*, 11 Kan. 23; *Mower* v. *Leicester*, 9 Mass. 247, 6 Am. Dec. 63; *Eastman* v. *Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Bailey* v. *Lawrence County* (S. Dak.) 59 N. W. Rep. 219; *Heller* v. *Stremmel*, 52 Mo. 309; *State* v. *Leffingwell*, 54 Mo. 458.

We are of the opinion that the framers of our constitution intended, by the term "municipal corporations," to use it in its restricted sense, as applicable only to incorporated cities, towns, or villages invested with the power of local legislation. This is quite apparent from other sections of the constitution. Article 9, entitled "County and Township Organizations," requires the legislature to provide by general law for organizing the counties into townships but nowhere in that article are townships designated as municipal corporations. Article 10 is entitled "Municipal Corporations," and requires the legislature to pro-

vide by general law for the organization and classification of municipal corporations, and provides that such classes shall not exceed four. This article seems to be limited to municipal corporations proper. In article 13 it is provided that "neither the state nor any county, township, or municipality shall loan or give its credit," etc. It will be observed that the term "township" is here used in connection with the term "municipality," thus clearly indicating that, in the minds of the framers of the constitution, "municipality did not include a township. The term "town" seems to be sometimes used in the constitution in a somewhat different sense, but, when so used, clearly indicates that the town referred to is an incorporated town. Thus, section 23, article 5, contains the following clause: "The legislature shall have power to provide for creating such police magistrates for cities and towns as may be deemed from time to time necessary, who shall have jurisdiction of all cases arising under the ordinances of such cities or towns." The use of the term "ordinances" clearly indicates a regularly incorporated town, as townships as organized under the laws of this state are not authorized to adopt ordinances. Section 773, Comp. Laws, provides that "whenever any incorporated village or town which is laid out into streets is included within the limits of any organized township," etc. It will be noticed that the legislature here makes a distinction between an incorporated town and an organized township, clearly indicating that a distinction is made by the legislature between an incorporated town and an organized township. At an early day the territorial legislature passed a law providing for the incorporation of towns. Comp. Laws, §§ 1022-1188, inclusive. By these provisions a board of trustees with power to enact ordinances was provided for. This law being in force when the constitution was adopted, we may fairly presume that when the framers of the constitution speak of towns, ordinances, etc., in connection with the term "incorporated towns, cities, and villages," they have reference to towns incorporated under the provisions of this law which are municipalities, and when they speak of organized towns or townships they refer to those towns which embrace a portion of the state organized into townships for political and governmental purposes. In *Bailey* v. *Lawrence County* (S. Dak.) 59 N. W. Rep. 219, the distinction between quasi corporations and municipal corporations was fully considered. In the case of *Norton* v. *Peck*, 3 Wis. 714, in construing a similar provision in the constitution of that state, the court held that, although towns were bodies corporate, they were not included in the term "municipal corporations." This decision was cited with approval by the same court in *Eaton* v. *Manitowoc County Supvrs.* 44 Wis. 489. In that case the court says: "Whether towns are 'municipal corporations,' in a strict legal sense, is a question which the lamented *Chief Justice* Whiton, in *Norton* v. *Peck*, 3 Wis. 714, says 'is not of easy solution;' but, in construing the meaning of this designation in the statute considered in that case, it was held that 'municipal corporations,' as used in the constitution of this state, do not embrace towns. Towns are often called, in common parlance, and sometimes unguardedly in statutes, 'municipal corporations,' in connection with counties, cities, and villages; but, when so called, it is in the sense of mere corporations or quasi corporations, or of corporations *sub modo*, only, and not in the sense of municipalities proper. These words, when used in our own statutes, must be received in their strict and constitutional sense, unless it was clearly the intention of the legislature, in a given statute, that they should have a more extended signification. No such intention seems to be apparent in the proviso of section 1, chapter 112, Laws 1867, in the use of the words 'counties or municipal corporations;' and this language should not be construed to 'embrace towns and school districts, but rather to exclude them." *Van Antwerp* v. *Dell Rapids Twp.* 3 S. Dak. 305; same case on rehearing, 59 N. W. Rep. 209. It will also be observed that section 1 of chapter 94 of the Laws of 1891, while it follows quite closely the language of the first clause of section 18, article 17, of the Constitution, has omitted the term "highways." This omission is significant, and seems to indicate an intention on the part of the legislature to exclude township highway proceedings from the provisions of the act. It will hardly be contended that, if towns are not included within the term "municipal corporations," they are included within the term "other corporations," as they are not strictly corporations in any sense but quasi corporations. There being nothing in the provisions of the Laws of 1891 requiring us to give an extended or enlarged meaning to the term "municipal corporation," we feel at liberty to give to it its restricted construction, and as applicable only to incorporated towns, cities, or villages invested with legislative powers for the benefit of its inhabitants. Giving to the term "municipal corporations" this construction, there would seem to be no conflict between the provisions of the compiled laws relating to the assessment of damages and the Laws of 1891. The court, in holding that the Laws of 1891 repealed the statutory provisions then existing upon the subject of laying out township highways and assessing damages for the property taken, was in error. As the proceedings, so far as the record discloses, seem to have been regular, and the appeal properly taken, the evidence relating to damages should have been admitted.

The judgment of the court below is therefore reversed, and a new trial ordered.

END OF CASES IN BOOK 29.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the First Quarter of the Judicial Year Beginning with October 1, 1895, Classified as Follows:

I. Public, Official, and Statutory Matters.
II. Contractual and Commercial Relations.
III. Corporations and Associations.
IV. Domestic Relations.
V. Fiduciaries.
VI. Torts; Negligence; Injuries
VII. Property Rights.
VIII. Civil Remedies; Rules and Principles.
IX. Criminal Law and Practice.

I. Public, Official, and Statutory Matters.

The constitutional right to acquire and possess property is held to preclude a statute imposing liability on a person for acts of others over whom he has no control, and this is applied to the Pennsylvania statute attempting to make a mine owner liable for negligence of a certified foreman whom the statute compels him to employ without the right to control him. (Pa.) 807.

Constitutional rights of persons are held to be infringed by a statute prohibiting the employment of females in factories or workshops more than eight hours per day or forty-eight hours per week. (Ill.) 79.

The statutory attempts to restrict contracts between master and servant are increased by a Missouri statute making it unlawful to impose, as a condition of employment, that employés should not belong to labor unions. (Mo.) 257.

A statute allowing attorneys' fees in an action for wages, if not paid within three days after demand in writing, is condemned as an unconstitutional denial of the equal protection of the laws to the class of citizens who would be defendants in such cases. (Ohio) 386.

Health.

A resolution of a state board of health that no pigpen shall be built within 100 feet of any street or inhabited house is held unreasonable and invalid. (Vt.) 573.

Destruction of bedding used by a person who had scarlet fever is held to be within the lawful authority of sanitary inspectors, and to give the owner no right to compensation. (Ga.) 303.

Vaccination.

The constitutionality of a statute requiring vaccination of pupils as a condition of attendance on public schools is sustained in a Connecticut case. (Conn.) 251.

Eminent domain.

Condemnation of land for irrigating ditches is held to be for a public purpose. (Neb.) 853.

Interstate commerce.

The validity of a statute requiring fire screens on vessels burning wood is sustained against the objections that it interferes with interstate commerce and imposes an unreasonable burden. (Mich.) 463.

See also *Licenses; Taxation, infra.*

Licenses.

A state statute requiring a license to sell patent rights is held to be a clear infringement of the rights of the patentee under federal law. (Ky.) 786.

Requiring a license fee of transient merchants is held not to discriminate against nonresidents, but a charge of $250 per month, or $25 per day for shorter periods, is held to be excessive, amounting to a tax rather than an exercise of police power. (Iowa) 734.

An attempt to impose a municipal license tax on the right to operate a branch railroad in a city, where such road was part of an interstate line, is held to be a tax on interstate commerce as much as if the main line, and not the branch, was in question. (Cal.) 327.

An ordinance requiring a license to hawk and peddle is sustained in case of one selling and delivering chairs from house to house, although the chairs had been imported into the state and the title remained in the nonresident owner on conditional sales by the peddler. (Ind.) 531.

A license fee imposed by a city on street cars is held enforceable by penalty. (Colo.) 608.

Taxation.

A school is denied to be a purely public charity, so as to be free from taxation, where tuition is paid for all pupils, and the manager conducts it as a business enterprise, paying one eighth of the gross receipts from tuition for the use of the property, although the corporation out of other funds pays the tuition for a few pupils. (Pa.) 600.

Exemption of public property does not extend to private property leased for a public market. (Minn.) 777.

The exemption of property from taxation is held to be beyond the power of a town in the absence of constitutional legislative authority, but an omission of property by mistake of law is held not to defeat the assessment. (R. I.) 526.

The power of a city to tax the franchise of a bridge company whose bridge spans a river between states is sustained, although the company has privileges granted it by the adjoining state and by congress; and such a tax does not interfere with interstate commerce. (Ky.) 73.

Taxation in the town in which the land lies, of land under water of a dam, is sustained according to the enhanced value for furnishing power, although the power is used in another town. (N. H.) 57.

The meaning of the word "railroad" is held to extend to a street railroad, as used in a Florida statute providing for sales of railroad property for taxes. The question is regarded as one depending entirely on the text and general intent of the statute. (Fla.) 507.

The doctrine that debts due from a foreign corporation cannot be deducted from the amount of its investments to be taxed is limited in a New York case by holding that the unpaid part of the purchase money for property bought in the state is to be deducted in determining the sums invested there. (N. Y.) 393.

A railroad bridge used exclusively for railroad purposes, and leased forever to a railroad company, subject to the termination of the lease for default, is not assessable as railroad property when owned by a bridge company. (Ill.) 69.

Real estate of a partner is held subject to the lien of a tax on the personal property of the partnership. (Iowa) 278.

Local assessments.

A sale of a railroad freight-house and a portion of its track and right of way, although at the terminus, is held to be invalid as a mode of collecting a local assessment. (Mich.) 195.

Officers.

The certificate of eligibility to the office of county court clerk, required by the Kentucky constitution, is held to be sufficient when obtained after election but before the term of office begins. (Ky.) 703.

The contention that appointment to office is a function essentially executive is held to be contrary to the positive terms of the Indiana constitution giving the legislative assembly control of the appointment of some officers; and the joining of state auditor, secretary of state, treasurer, and attorney-general with the governor as a board to choose prison directors, is held valid under a provision making the executive department include the administrative. (Ind.) 113.

Elections.

The constitutionality of a statute requiring official ballots is sustained in Massachusetts, although it makes such ballots compulsory in city elections, but optional in town elections. (Mass.) 668.

The Michigan ballot law, allowing a candidate to have his name appear on the official ballot but once, although he may be nominated on different party tickets, is held constitutional notwithstanding the fact that voters of one party, unlike those of another, may be compelled to mark the ballot more than once in order to vote for all their candidates, and be unable to have all their candidates on their own ticket. (Mich.) 330.

A blurred spot or erasure on a ballot, innocently made with intent to correct a mistake, is held not to defeat the vote, but it is otherwise with a blurred spot made for the purpose of identifying the ballot. (Nev.) 731.

Various marks to distinguish ballots are considered in a California case, which also holds that the election is invalidated by the violation of the statute in respect to the time of opening the polls and the removal of the ballot box from them. (Cal.) 673.

Lack of an official stamp upon ballots, or lack of an initial which an election officer should have placed upon them, is held not to defeat the counting of such ballots after they have been cast in good faith. (Wash.) 670.

Counties.

The relation of counties to municipalities therein in respect to the use of county funds is touched upon in a Florida case, which holds that a statute providing that one half the funds raised by county taxes for highways and bridges shall be turned over to municipal authorities for city streets is not unconstitutional as diverting the funds from county purposes. (Fla.) 416.

Municipalities.

The right to contest the validity of annexation to a city is denied in a suit for injunction against taxes, on the ground of acquiescence, as well as the inability to raise that question in a private action. (Wash.) 445.

The attempt of the mayor to adjourn one of the branches of the general council of the city when they cannot agree on an adjournment is held invalid. (Ky.) 110.

The attempt by an ordinance to limit the price of gas to private consumers is held invalid in the absence of legislative authority,—at least where this was not imposed as a condition of consent to the use of streets. (Kan.) 398.

The right of a city to shut off water from a consumer to coerce payment of an old claim is denied after the acceptance of rates and the furnishing of water for a later period. (Me.) 376.

The invalidity of a contract between a city and a corporation in which any city officer is interested is held not to defeat the liability of the city for gas furnished by a company of which the mayor was president, where this was not done under a contract, but the company was compelled by law to furnish it. (Cal.) 463.

The constitutional prohibition against donations by municipal corporations to private corporations is applied to defeat a statute giving to certain charities a portion of the fees received from licenses. (Ill.) 798.

The right of a municipality to make its bonds payable in gold coin of the present standard of weight and fineness is denied under a statute providing for payment in gold coin or lawful money of the United States. (Cal.) 512.

Highways.

A very clear statement of the law respecting the proper use of streets and rights of abutting owners is found in an Oregon case, which denies that an approach to a bridge of a private corporation can be made, to the damage of an

abutting owner, without compensation. (Or.) 88.

Vacating a portion of a city thoroughfare across railroad tracks, and erecting a viaduct on one side of the location so as to shut off land cornering on the vacated portion from access, so far as to destroy its former availability for business purposes, are held to give the owner a right to damages. (Ill.) 568.

A city ordinance exacting rent from a telegraph company for the use of the streets for poles and wires is held invalid where the statutes authorized telegraph lines without any provision for making compensation to cities. (Miss.) 770.

A novel statute making the driver of live stock over a highway on a hillside liable for damage to the banks or by rolling rocks into the highway is upheld as constitutional. (Utah) 97.

A constitutional provision against poll taxes is held in Maryland not to apply to compulsory work in repairing highways, with a privilege of commuting or furnishing a substitute. (Md.) 404.

The use of a bicycle on a sidewalk along a turnpike is held to be subject to the penalty of the Pennsylvania act against riding or driving a horse or other animal on a sidewalk, when construed with the Act of April 23, 1889, extending the same privileges and restrictions to the use of the bicycle as are prescribed for persons using carriages drawn by horses. (Pa.) 365.

Railway crossings.

A street railway track in a highway, which is laid across a railroad crossing, is held to be a part of the public use of the street for which the railroad company cannot claim compensation. (Ill.) 485.

The right to make a grade crossing at the intersection of a street railway and a steam railroad is sustained under a special statute, notwithstanding general statutes to a different effect. (Conn.) 367.

State boundary.

A shallow lake having no current at ordinary stages of the water, but connected with the Mississippi river, is held not to be a part of the boundary of Iowa so as to be excluded from the operation of the state against the use of seines in the waters of the state. (Iowa) 390.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

The fact that a contract made by letters and telegrams was intended to be put into a formal writing is held not to prevent the contract from being completed without such writing. (N. Y.) 431.

A city is held liable for the paving of a street when assessments prove invalid, although the paving was done under a contract which required the contractor to accept the assessments in payment, whether they were collectible or not. (C. C. App. 3d C.) 401.

Validity of contracts.

A contract for the purchase of property, made by a city through an officer who receives a commission from the other party, is held invalid and subject to repudiation by the city on discovering the facts. (C. C. App. 6th C.) 188.

See also *supra*, I., *Municipalities*, and *infra*, III.

A stipulation against liability for negligence is sustained in a lease by a railroad company providing that the lessor shall not be liable for any damages caused by fire. Such an agreement is held not to be void as against public policy. (Cal.) 751.

A similar provision in such a lease is held in another case to be ineffectual as against an agent of the lessee whose property was on the premises, where he was a stranger to the lease. (Cal.) 755.

Failure to obtain a license is held not to prevent a broker from recovering commissions, where the ordinance requiring a license imposes a penalty for such failure, and the object of it is simply to enforce payment of a tax. (S. C.) 215.

A contract by the owners of mines, furnaces, and a railroad therefrom, to give all their traffic to a connecting railroad which had aided in developing the business, is sustained in a Pennsylvania case, against the contention that it was in violation of the constitution of the state, and that it was *ultra vires*. (Pa.) 423.

The invalidity of an agreement for a divorce is held not to defeat the recovery by the wife of the consideration of a contract for release of her dower rights, which she has performed, and after which she has resumed marital relations with her husband, although the agreements were contemporaneous. (Pa.) 292.

Negotiable paper.

Corporate bonds secured by mortgage payable to bearer are held to be negotiable so far as to sustain an action by the holder in his own name, although the statute as to negotiable paper applies in terms only to promissory notes. (R. I.) 103.

Refusing to adopt the doctrine of other courts, the court of appeals of Kentucky adheres to the doctrine that a subsequent promise without consideration will not prevent the release of the indorser for lack of notice. (Ky.) 305.

A payee's guaranty of attorneys' fees if the note has to be collected by law is sustained so as to bind him for such fees in case of the dishonor of the note and the expenditure of the fees. (Ga.) 616.

Writing one's name on the back of a note to which he is not a party is held in Minnesota to be open to explanation by parol evidence, but, when done in accordance with a parol contract of guaranty, to be sufficient to justify writing a guaranty over the name, and thus satisfy the statute of frauds. (Minn.) 612.

Bona fide holders of a negotiable note are held unaffected by usury in the note, where the statute declares that usurious contracts shall be deemed to "be for an illegal consideration." (Va.) 827.

Taking interest in advance on a negotiable

note at the highest rate allowed by the constitution is held not to constitute usury, although the note is running for one year. (Ark.) 761.

Banks.

The doctrine that a bank to which paper is sent by another bank, with which it is deposited for collection, will be regarded as the agent of the owner, and not of the sending bank, is applied to a case in which worthless drafts were received and credited as proceeds of the collection before knowledge of the insolvency of the drawer of them. This was held to leave the depositor still liable for the loss. (Ill.) 794.

Insurance.

Insurance on a butcher shop and contents, and a smoke-house and contents, is held to cover smoked meats in a storage room to which they are taken from the smoke-house as fast as cured. (Pa.) 55.

Insurance on a building with personal property therein is held not to be forfeited as to personal property by lack of title to the real property, which defeats the insurance as to that. (Tex.) 706.

Carriers.

A ticket bearing a prior date is not invalid on the day of sale because it states that it is good only within one day of date of sale. (Iowa) 173.

The relation of carrier and passenger is held not to exist between a street railway company and a person struck by the sudden switching of a street car which he had signaled and was waiting for. (Conn.) 297.

Assuming mortgage.

Personal liability of a purchaser of land for a mortgage upon it which he assumes and agrees to pay is sustained in a Nebraska case, although the grantor may not have been liable on the mortgage. (Neb.) 851.

Hotel.

The responsibility of a hotel keeper to a regular boarder, as distinguished from a transient guest, is shown in a decision denying liability for the theft by a night clerk of money from the hotel safe. (Mich.) 92.

III. CORPORATIONS AND ASSOCIATIONS.

Forfeiture of the charter of a waterworks company is enforced on account of its failure to supply to a city pure, wholesome, deep-well water in accordance with the requirements of its charter. (Ala.) 743.

The duty of a railroad company to operate a ferry which has become unprofitable, but which constitutes an extension of its road, is held to be enforceable by suit in court. (Mass.) 169.

Officers of a corporation are compelled to account for salaries voted and paid, where it was done largely for the purpose of depriving the stockholders of the results of litigation brought by them if successful, although it was nominally and partly to pay for services rendered. (R. I.) 100.

Preferences to directors of a corporation are sustained in a Missouri case, when their debts were honestly and justly due. As to this see *note*, 22 L. R. A. 802. (Mo.) 830.

An agreement between corporations to cooperate in furnishing water to a city is sustained, although they appointed an officer of each as trustee to carry on the business. (Cal.) 839.

See also *supra*, II., *Validity of contracts.*

Promoters.

Promoters of a corporation are discussed at much length in a case which denies the enforcement of a mortgage received by them on the property of a corporation. (Md.) 262.

Fraud of promoters in inducing a person to subscribe to a corporation, where he has carried out his contract and united with others in forming the corporation, is held to be no defense to an assessment on the stock, but to give a remedy only against the wrongdoers. (Mich.) 63.

Proxies.

A by-law restricting proxies to stockholders is held invalid where a statute provides generally for proxies. (Cal.) 844.

De facto.

Failure to comply with the statutory requirement expressly made a condition of corporate existence is held to prevent a company from being a *de facto* corporation, but it leaves it the privileges as well as liabilities of a partnership. (Colo.) 143.

Foreign company.

Contrary to many other authorities, it is held in Arkansas that an unauthorized foreign insurance company, though guilty of a misdemeanor in issuing a policy and subject to a penalty therefor, may enforce its claim for a premium due under the contract. (Ark.) 712.

Public corporations.

A state university is held to be a corporation subject to quo warranto, and an invalid attempt to charge a library fee for the use of the library by students is defeated by such writ. (Kan.) 378.

The claim that a state agricultural society was a public corporation, such that it could not be held liable for negligence in the management of a horse race whereby a person was injured, is denied, although it was required to report to the state and received state aid. (Minn.) 708.

Building and loan associations.

The powers of a building and loan association under the Indiana statutes are held to include assessments to equalize the members at the winding up of the association. (Ind.) 177.

A forfeiture of the stock of a member of a building and loan association is held lawful, although it leaves a mortgage given by him in force for the full amount of principal and interest, without deduction of any payments made by him on his stock. (Ala.) 120.

But the claim that membership in a building and loan association and the loan to a member are distinct contracts, and that the stock of a member and payments made thereon may be forfeited without applying any previous payment on the mortgage when that is foreclosed, is denied in a case which holds that a rigid provision of the contract allowing for-

feiture of stock on default will not be given this effect. (Neb.) 133.

Monthly payments of shares of stock in a building and loan association are held in a South Carolina case to be applicable to a mortgage given for a loan, where the shares were pledged as collateral and the interest and dues consolidated. (S. C.) 127.

A mortgage given to a building association, containing a stipulation for payment of assessments on the members, is held to cover assessments for shortages in the assets after the appointment of a receiver. (Ohio) 184.

Labor union.

A statute protecting a labor union in the use of its labels is sustained in case of a label on cigars. (Mo.) 200.

Church.

The constitutional law of a church organization is extensively discussed in a case which involves the split of the Evangelical Association. It is held, among other things, that the secession of the majority leaves the minority as the rightful church, but that less than a quorum of an annual conference cannot take any action which will be binding on the absent majority, even after subsequent ratification by the highest tribunal of the denomination. (Pa.) 476.

Partnership.

The assumption of individual debts by a partnership is held to convert them into firm debts, which may share equally with other firm debts in case of dissolution. (Mo.) 681.

An agreement by one member of a law firm in a private transaction to collect a chose in action without charge is held not binding on his partner so as to make the property of the latter liable to attachment for the failure of the other to pay over the money collected. (Ga.) 496.

IV. DOMESTIC RELATIONS.

A divorced wife is denied the right to recover from her former husband for necessaries furnished their children in her custody under the divorce decree, which made no order for their maintenance. (Or.) 678.

The right of action for alienation of a husband's affections and depriving the wife of his society is sustained in Iowa. (Iowa) 150.

V. FIDUCIARIES.

Compound interest is charged upon an executor for money of the estate which he had used, in a case which extensively reviews the question. (Mont.) 622.

VI. TORTS; NEGLIGENCE; INJURIES.

Fraud.

The rule that a misrepresentation honestly made with reason to believe it true will not create a liability for fraud is applied to a case in which the president of the corporation omits from a statement of its assets and liabilities any mention of a claim then in litigation, which he did not believe to be valid. (N. Y.) 360.

Libel.

Falsely publishing that a person would be an anarchist if he thought it would pay is held to be libelous. (Md.) 59.

A pleading is held libelous when defamatory allegations therein are wholly irrelevant, gratuitous, and immaterial. (Minn.) 153.

Wrongs to or by passengers.

An accidental blow by a railroad employé, received by a passenger but which was aimed in play at another employé, is held not to make the railroad company liable, as it was not within the line of employment. (Ala.) 729.

Theft by a sleeping-car employé of the property of a passenger in a sleeping car, including such money as she had a right to carry, is held to make the sleeping-car company liable. (Ga.) 498.

The liability of a carrier for illegal arrest of a passenger, which a conductor causes to be made, is sustained where the arrest was made without a warrant while the passenger was quietly seated in a car. (Kan.) 465.

Profanity of a passenger on a street car is held to justify his ejection therefrom. (Me.) 530.

Negligence.

Licensees walking on a path upon a railroad right of way are denied a remedy against the railroad company for injuries caused by the sliding of the bank on which the path ran, in consequence of the removal of a boulder which was in danger of falling upon the track. (Va.) 825.

The negligence of a child nine years old in climbing over the coupling of a car when a train is standing at a crossing is held to be a question for the jury, together with the question of negligence on the part of the trainmen in starting the train. (Ohio) 757.

Negligence of a bandman walking close to an electric railway track while playing his instrument is held to be a question for the jury, like the question of the motorman's negligence when the bandman is struck by a car. (Mich.) 287.

The duty of a railroad company to signal the approach of a train at a crossing is held not to extend to a private crossing, or to persons driving parallel to the railroad without using or intending to use a crossing. (C. C. App. 8th C.) 695.

Negligence of master or servant.

A railroad company which requires employés to be engaged on duty nineteen hours per day

without time for food is held responsible for an accident by the backing of a train insufficiently manned while part of the crew were temporarily absent for food. (Ind.) 104.

The law of fellow servants is discussed at length in a case which denies that a foreman or boss of a railroad gang is an *alter ego* whether he has authority to discharge the men or not. (Mich.) 321.

The doctrine of fellow servants is discussed in a Nebraska case, which holds that consociation in the same department or line of employment is necessary to that relation. (Neb.) 137.

A cable street railway is held not to be a railroad within the meaning of a statute abolishing the fellow-servant doctrine in case of railroads. (Minn.) 208.

Explosion of gas.

Liability for an explosion of natural gas during transportation is held under the Ohio statute to be independent of the question of negligence. (Ohio) 337.

Negligence in conducting natural gas through leaking pipes on the surface of the ground and across a highway is found in a case where the chief contention was as to contributory negligence. (Ind.) 342.

VII. PROPERTY RIGHTS.

See also *supra*, I., *Health; Highways*.

The value of permanent improvements and repairs made by a coparcener, although he cannot compel contribution therefor, may be allowed him out of the proceeds of the property when sold for a division of interests because it was unsusceptible of partition. (W. Va.) 449.

Permitting another person to have his name and occupation painted on a wagon in his possession is held to estop the owner to assert title as against an innocent purchaser from the possessor. (Pa.) 607.

Assigning forged copy of mortgage.

An assignee of a mortgage and indorsee of forged copies of notes secured thereby is held not to have so good a title to the mortgage as a subsequent assignee of a forged copy of the mortgage who was a bona fide purchaser of the genuine notes before their maturity. (Ohio) 317.

Records.

Failure to index a mortgage on the records is held not to be fatal to its validity, in the absence of any statute making the indexing a part of the recording. (S. C.) 772.

Quitclaim deed; notice.

The effect of possession as notice is involved in some degree in a case where a woman in possession under an unrecorded deed giving her only a life estate concealed and afterwards destroyed the deed, and gave her vendee a later quitclaim deed from the person holding the record title. The latter is held to be protected by the records. (Mo.) 39.

The effect of a quitclaim deed to sustain the claim of a bona fide purchaser is discussed in differing opinions in a case in which the grantee was charged with notice by reason of his relations to the grantor, who had acted as his agent. (S. Dak.) 33.

Inheritance.

Descent of property to an heir who killed his ancestor to obtain the inheritance is permitted in Pennsylvania. One consideration is the constitutional provision against attainder. (Pa.) 145.

That half-blood brothers and sisters are included in the general words "brothers and sisters" is held in an Indiana case, which also supports the right of descendants of such of them as are deceased to take by representation. (Ind.) 541.

Trust.

Funds in the hands of a receiver of a consignee are held not chargeable with a trust on account of goods, where the consignee dissipated the proceeds of the goods sent in paying current expenses of the business. (Or.) 664.

Tenancy.

The occupancy of part of a schoolhouse by a teacher is held to be that of an employé rather than a tenant, but his holding over without right is held to make him a tenant at sufferance. (Mich.) 576.

Easement.

An implied easement of light is held not to arise on the purchase of a strip of land 40 feet wide on which a building stands 11 feet from the boundary. (Conn.) 582.

An unusual instance of an easement by prescription is found in a Massachusetts case, which holds that the liability of a servient estate to pay a portion of the expense of repairs to a dam which supplies its water power is established by long-continued and regular payment of such contributions. (Mass.) 500.

Lien.

Funds in the hands of a receiver of a bank are held not to be chargeable with an equitable lien in favor of a depositor of money for a special purpose, where the bank was permitted to use the money in the course of regular business. (Or.) 667.

The lien of a judgment for damages under the Illinois dramshop act is held inferior to that of a pre-existing mortgage on the premises. (Ill.) 571.

The lien of a judgment against a railroad company is held to be unaffected by foreclosure to which the judgment creditor is not made a party, but when judgments were obtained pending foreclosure they are held to be subject thereto on the ground that the pendency of the suit is constructive notice. (Ohio) 438.

Tradename.

The use of the letters "U. S." on the windows of a dental office, in connection with the words "dental rooms," is held to be unlawful, when another person has adopted them as a tradename, and the attempt is to mislead the public. (R. I.) 524.

Boundary.

The low-water mark bounding land on a navigable lake is held to be the ordinary low-

water mark, and not the point to which the water recedes in an exceptionally dry season. (Vt.) 539.

See also *supra*, I., *State boundary*.

The boundary of premises described by metes and bounds, which is identical with the line of navigability of water on which they front, is held to extend to the middle of the stream where the grantor was the owner to that extent. (Ohio) 52.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.

An order to restore and operate a passenger train that had been discontinued, made by the Kansas railroad commissioners, is held not final or conclusive, and mandamus to enforce it is denied. (Kan.) 444.

Jury.

An appeal with a right to a jury trial in the proper court is held to be a sufficient compliance with the constitutional right to a jury in a condemnation proceeding. (S. Dak.) 861.

Injunction.

An injunction against slander of title to property is denied in a Florida case, which declares it to be well settled that such relief cannot be granted; but see 16 L. R. A. 243, *note*. (Fla.) 66.

Choice of remedy.

Enforcement of a chattel mortgage upon exempt property is held not to be defeated by a prior judgment for the mortgage debt, with an attempt to enforce it by levy upon the exempt property. (Ill.) 803.

Action by shipper.

A shipper of goods subject to payment of a draft against the bill of lading, who guarantees payment of freight, is held entitled to sue the carrier for damages to the goods, although when first notified of the injury he refused to give directions as to their disposition on the ground that he no longer had title, where the carrier had not been prejudiced thereby. (Va.) 578.

Action for nuisance.

The doctrine that a private action cannot be maintained for a purely public nuisance is limited, in case of the obstruction of navigation, by a decision that a grievance which is not common to the whole public may sustain such an action, although it is a common misfortune of a number or even of a class of persons. (N. C.) 700.

Rescission.

Tendering back what was obtained on a compromise where goods had been purchased by fraud is held not necessary to justify a rescission of the compromise and a retaking of the goods. (Mich.) 859.

Nonresidents.

The right of nonresidents to enforce their claims is held the same as that of citizens of the state, under the Tennessee statutes, provided that the nonresidents have exhausted their remedies in their own state. (Tenn.) 164.

A nonresident's shares of stock in a foreign corporation are held not subject to attachment, although the corporation does business and has officers in the state. (R. I.) 429.

Judgment.

A distinction between the effect of a judgment for a special assessment as against the property, and as against the owner, is sharply made in a case holding that such judgment does not preclude the owner, who did not appear or defend, from bringing an action for damages to the property in making the improvement on which the assessment was based. (Minn.) 778.

A judgment of another state, made payable in United States gold coin, is enforced as for the nominal amount in lawful money, in a case in which it is declared upon without describing the clause as to payment in coin. Such a judgment is held to be an obligation to pay in money, or an amount of gold ascertainable by count of coins. (Ill.) 593.

As to attorneys' liens and right to set off judgments, it is held, reviewing conflicting decisions, that the more equitable rule is to make the set-off of independent judgments subject to such liens. (Tenn.) 705.

Levy on railroad.

The enforcement of a judgment against a railroad company by levy on a portion only of its property is denied in a Minnesota case as against mortgagees of the whole property, on the ground that the remedy of creditors must be by proceeding against the property as an entirety. (Minn.) 212.

Priority of state.

A state or municipality is denied any right to priority or preference in payment from an insolvent's estate after a general assignment for creditors passing title to the property. (Wyo.) 226.

Notice by mail.

The constitutional guaranty of due process of law is held to be complied with in a *scire facias* to revive a judgment by notice to a resident of the state, who cannot be found, served by mail as well as by publication. (Ill.) 782.

Limitation of actions.

Garnishment of funds in the hands of a resident to enforce the claim of one nonresident against another is held within a provision that the statute of limitations shall not aid a person absent from the state when the cause of action accrues, so long as the absence continues. (Md.) 273.

Pleading.

The sufficiency of a pleading charging negligence in allowing natural gas to escape, from which an explosion resulted, is denied, where no agency causing the explosion is alleged on the part of the defendant. (Ind.) 355.

Evidence.

A receipt is held to be only a hearsay declaration and inadmissible as against strangers, on the question of the payment of money. (Neb.) 737.

Presumptions.

Setting a house on fire by sparks from a fire-

pot placed on the roof by workmen raises a presumption of their negligence. (Pa.) 254.

The maxim *res ipsa loquitur* is denied application against the person conducting a public exhibition of horse racing, in case of an injury to a spectator by a runaway horse. (Ill.) 492.

A presumption of negligence is held to arise from an unexplained explosion in a nitro-glycerine factory, and the subject of presumptions as to accidents is fully reviewed in the case. (Cal.) 718.

IX. CRIMINAL LAW AND PRACTICE.

The nature of *ex post facto* laws is examined very fully in a case which holds that a statute is not *ex post facto* because it abrogates a provision for change of magistrate or place of examination on account of the prejudice of the magistrate. (Wyo.) 834.

The constitutional provisions against making one a witness against himself in a criminal action, and against searches and seizures, are held not applicable to an examination of a person to compel discovery of assets of a decedent's estate. (Cal.) 811.

The right to place a gun where it will be discharged and kill any person attempting to force open the door of a building is held, on a review of the conflicting doctrines, to be a question for the jury. (Wash.) 154.

Without denying the doctrine that grossly obscene publications may be omitted from an indictment, it is held that where only parts of a book are indecent these must be so described as to be capable of identification, unless they are set out according to their tenor. (Mass.) 61.

After suspension of sentence, the power of the court over the accused is not lost by ordering him to pay costs or committing him for refusal to do so, since the requirement to pay costs is not part of his sentence. (N. C.) 260.

Proof of guilty knowledge is held necessary to convict a person for having cigars for sale with counterfeit trade union labels on them. (Mo.) 200.

A common carrier receiving twelve barrels of lobsters for shipment is held not punishable for having short lobsters in possession, where there was no intent to violate the statute. (Me.) 714.

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APPEAL AND ERROR.

1. A general exception "to these findings of fact and conclusions of law, and to each of them," is not sufficient to raise any question for review by the supreme court in Washington. *Moyer* v. *Van de Vanter* (Wash.) 670

2. A bill of exceptions, embodying the charge, and, immediately following it, stating that one of the counsel said, "The defendant excepts," with the ground of exception, including a refusal to charge as requested and exceptions to the charge as delivered,—sufficiently shows that exceptions to the charge were seasonably taken. *Findlay* v. *Pertz* (C. C. App. 6th C.) 188

3. Forty days after the expiration of the trial term may be allowed by the court at such term for filing a bill of exceptions. *Id.*

4. A deposition attached to a bill of exceptions only by placing it between the pasteboard back and the stenographer's report, although held with sufficient tenacity to retain its place, but not marked as an exhibit or identified by the trial judge or the stenographer or any one else, will not be treated as part of the bill of exceptions. *Lake Erie & W. R. Co.* v. *Mackey* (Ohio) 757

5. Nothing but the amount is in question, on appeal, where the plaintiffs asked permission to pay the amount due, and the defendants asked that they be required to pay the amount due. *Randall* v. *National Bldg. Loan & P. Union* (Neb.) 133

6. Only errors of which the appellant complains can be considered on appeal. *Dennis* v. *Caughlin* (Nev.) 731

7. The question of the rate at which executor's commissions should be computed cannot be raised for the first time on appeal. *Re Ricker's Estate* (Mont.) 622

8. The New York court of appeals will not reverse a determination of a matter of fact which is supported by some evidence, in case of a certiorari to review an assessment for taxes. *People, Hecker-Jones-Jewell Mill. Co.* v. *Barker* (N. Y.) 893

9. A general verdict in a case where there are several material issues tried cannot be upheld if the jury are given an erroneous charge upon any one of them. *Funk* v. *St. Paul City R. Co.* (Minn.) 208

10. Comment upon the testimony by the court, to the effect that there is nothing to show that lumber was set on fire by sparks from a boat, when there is no attempt to prove any other cause of the fire and several witnesses have sworn to seeing sparks from the boat falling upon the lumber, although the court allowed the case to go to the jury,—requires reversal of a judgment on a verdict for the defendant. *Burrows* v. *Delta Transp. Co.* (Mich.) 468

11. Sustaining a demurrer to one paragraph of an answer is not cause for reversal, if the appellant could avail himself of the same defense under the paragraph remaining. *Wohlford* v. *Citizens' Bldg. L. & Sav. Asso.* (Ind.) 177

12. A decision will not be reversed merely because a seemingly pertinent question was excluded, if it is not shown what the party proposed to prove. *Hickman* v. *Green* (Mo.) 39

13. A judgment upon a verdict for a lump sum of damages and interest will not be modified to exclude the interest, which is found to be erroneous, but a reversal is necessary. *King* v. *Southern P. Co.* (Cal.) 755

14. Any clerical mistake in the amount for which a judgment is entered in the Illinois appellate court may be corrected in the supreme court, where there is sufficient in the record and on the face of the judgment itself to show the correct amount. *Belford* v. *Woodward* (Ill.) 593

15. Variance in a suit upon a judgment alleged to be simply for a sum of money, in that the judgment proved is payable in gold coin, does not constitute cause for reversal, where the judgment recovered thereon contains no direction for payment in any particular kind of money. *Belford* v. *Woodward* (Ill.) 593.

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1. Factory inspectors provided for in Ill. Act June 17, 1893, are state officers or officers of the government, within the provision of Ill. Const. art. 4, § 16, providing that bills making appropriations for the pay of members and officers of the general assembly and for the salaries of the officers of the government shall contain no provisions on any other subject. *Ritchie* v. *People* (Ill.) 79

2. A statute regulating factories and providing for the appointment of factory inspectors is not invalidated by the inclusion within it of an appropriation for the salaries of such inspectors, under Ill. Const. art. 4, § 16, declaring that appropriation bills for the salaries of government officers shall contain no provision on any other subject, as such appropriation is merely subordinate to the main purpose of regulating factories. *Id.*

ARREST. See CARRIERS, 8.

ASSAULT. See CARRIERS, 7.

ASSESSMENT. See BUILDING AND LOAN ASSOCIATIONS, 3–6; JUDGMENT, 6; JUDICIAL SALE, 1.

ATTACHMENT. See also CONFLICT OF LAWS, 1, 2.

1. That a nonresident creditor has exhausted his remedy against his debtor in the state of his residence, so as to be enabled to take advantage of Mill. & V. (Tenn.) Code, § 5040, permitting him to subject property in Tennessee to the payment of his claim, is shown by the fact that the property of the debtor in the state of his residence has been placed in the possession of a receiver under a statute forbidding interference with it. *Commercial Nat. Bank* v. *Matherwell Iron & S. Co.* (Tenn.) 164

2. A nonresident's shares of stock in a foreign corporation cannot be reached by attachment in a state where the corporation is doing business, although its officers are also in such state. *Ireland* v. *Globe Milling & R. Co.* (R. I.) 429

3. Property of one partner in a law firm cannot be attached for failure of his copartner to account for money collected under contract made by the latter in the firm name, but in his own purely personal transaction and without the knowledge of the other partner that the firm would make such collection free of charge. *Davis* v. *Dodson* (Ga.) 496

ATTAINDER. See DESCENT AND DISTRIBUTION, 1.

ATTORNEY GENERAL. See QUO WARRANTO, 3.

ATTORNEYS. See also ATTACHMENT, 3; SET-OFF AND COUNTERCLAIM.

1. It is not within the scope of the business of a law partnership to collect choses in action without charging for services rendered in so doing,—especially by virtue of an agreement made by one member as part of an individual transaction for his own benefit only. *Davis* v. *Dodson* (Ga.) 496

2. The substitution of an attorney for a corporation, in a proceeding to restrain a receiver, cannot be prevented by the prior attorney on the ground of disqualification by reason of his relations to the receiver, so long as the parties do not object. *People's Home Sav. Bank* v. *San Francisco Super. Ct.* (Cal.) 844

ATTORNEYS' FEES. See BILLS AND NOTES, 3; CONSTITUTIONAL LAW, 23.

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BAILMENT. See CARRIERS; INNKEEPERS.

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Bailment; conversion of coin by bailee, see CONTRACTS.

Liability of bailee for wrongful appropriation of thing bailed:—in general; where servant has no duty in respect to thing bailed; where servant's duties give him some control of thing bailed; goods not in possession of master; effect of statute; ratification; special contract. 92

BANKS.

1. A bank with which a draft is deposited for collection discharges its duty by transmitting it in due season to a suitable agent at the residence of the drawee, with necessary instructions, and is not liable for loss occasioned by the negligence or default of the latter, as such collecting agent becomes the agent of the holder of the draft, and not of the bank with which it is deposited for collection. *Waterloo Milling Co.* v. *Kuenster* (Ill.) 794

2. Worthless drafts received by a bank with which paper was deposited for collection, from a collecting bank to which the paper was sent, and thereupon credited to the depositor, without knowledge of the insolvency of the collecting agent, do not change the rule that the depositor must bear the loss, since the rights of the parties are the same as if the worthless drafts had been deposited by him. *Id.*

3. The retention of worthless drafts after knowledge of the insolvency of the drawer, by a bank which has received them as proceeds

of paper forwarded for collection and credited to the depositor before learning of such insolvency, and the subsequent proof of a claim on the drafts by the bank in its own name, and the receipt of a dividend thereon from the receiver of the drawer,—do not relieve the depositor from liability to the bank for the loss sustained on the balance of the drafts. *Id.*

4. No equitable lien exists upon funds of a bank in the hands of a receiver, in favor of one who deposited money in the bank for a special purpose, if the bank was permitted to use the money in the course of its regular business, so that no part of it can be identified in the receiver's hands. *Muhlenberg* v. *Northwest Loan & T. Co.* (Or.) 667

5. Public moneys placed by general deposit in a bank do not establish a trust in the estate of the banker on his insolvency, except so far as they can be traced into some specific fund or property. *State* v. *Foster* (Wyo.) 226

6. Money remaining in the vaults of a bank and on deposit by it in other banks when the banker becomes insolvent will be held to constitute part of a trust fund of greater amount, which had been received by the banker; but it is otherwise with commercial paper representing loans made by him before assignment. *Id.*

NOTES AND BRIEFS.

Banks; liability as to collections. 795

BICYCLES. See also INFORMERS.

1. One riding a bicycle on a sidewalk or footway incurs the penalty provided by Pa. Act May 7, 1889, against driving any horse or any other animal upon such walk, by virtue of the Act of April 23, 1889, declaring that bicycles and persons using them are entitled to the same rights and subject to the same restrictions as are prescribed in case of persons using carriages drawn by horses. *Com.* v. *Forrest* (Pa.) 365

2. The fact that a sidewalk was on land appropriated by a turnpike company, and had been constructed and kept up by the turnpike company, aided by contributions from village residents, does not exempt it from the provisions of Pa. Act 1889 prohibiting the use of such walks by persons riding bicycles. *Id.*

3. The consent of a turnpike company to the use by bicyclers of a sidewalk established alongside the highway and on land appropriated by the company cannot make such use lawful under Pa. Act 1889 prohibiting the use of bicycles on sidewalks. *Id.*

4. The unlawful use of a sidewalk by bicyclers for a time without complaint cannot avail as a defense to the prosecution of a person for such offense. *Id.*

NOTES AND BRIEFS.

Bicycles; as carriages; riding on sidewalk. 365

BILLS AND NOTES. See also BONDS, 3; CONTRACTS, 2, 3, 9; MORTGAGE, 1, 2; PLEADING, 4; USURY, 1.

1.* A subsequent promise to pay will not bind an indorser who has been released by lack of notice, unless supported by a consideration. *Sebree Deposit Bank* v. *Moreland* (Ky.) 305

2. A failure of the holder of a promissory note to present for payment, or to give notice of nonpayment, discharges the indorser from liability. *Patillo* v. *Alexander* (Ga.) 616

3. A guaranty of attorneys' fees "up to 10 per cent, if this note has to be collected by law, on its prompt payment," without other indorsement, made for the purpose and in the course of negotiation, makes the payee liable as an indorser with a superadded liability for such reasonable sums, not exceeding 10 per cent, as might be expended for attorney's fees by the holder in the collection of the note. *Id.*

BONA FIDE PURCHASER. See VENDOR AND PURCHASER, 1.

BONDS. See also INTEREST, 2; MORTGAGE, 3, 4.

1. Corporate bonds secured by mortgage and payable to bearer are so far negotiable that the holder may maintain an action thereon in his own name. *American Nat. Bank* v. *American Wood Paper Co.* (R. I.) 103

2. That a statute giving a title by delivery and a right of action to the holder of negotiable paper in terms applied only to promissory notes will not prevent the courts from recognizing corporate bonds as negotiable. *Id.*

3. That a bond is payable ten years after date or sooner after five years does not destroy its negotiability. *Id.*

4. A holder of corporate bonds secured by mortgage is not given a present right of action for the principal of the bonds upon default in payment of interest, by the fact that the mortgage provides that upon default the holder of one third of the amount of bonds may require a sale of the property, and the "bonds shall forthwith become due and payable." *Id.*

5. Municipal bonds cannot be made payable "in gold coin of the United States of America of the present standard of weight and fineness," where a statute provides that such bonds shall be payable "in gold coin or lawful money of the United States." *Skinner* v. *Santa Rosa* (Cal.) 512

6. The terms and conditions of municipal bonds, which the statute requires to be stated in a notice of election, including those as to rate of interest and the tax levy required for payment thereof, must substantially follow those stated in such notice. *Id.*

BOUNDARIES.

1. A body of water having well-defined shores and no current, lying entirely in the state of Iowa ¼ of a mile from the main channel of the Mississippi river, and forming no part of that river for the purposes of navigation, is within the provisions of Iowa Acts 23 Gen. Assem. chap. 34, against the use of seines in the waters of that state, and is not within the exception of boundary waters, over which the state has not exclusive jurisdiction. *State* v. *Haug* (Iowa) 290

2. A conveyance of land situated upon a navigable stream, the description being by

courses and distances from a fixed monument, and establishing a boundary line coincident with the line of navigation, conveys the grantor's title as far as the thread of the stream. *Lake Shore & M. S. R. Co.* v. *Platt* (Ohio) 52

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On navigable waters. 52

BRIDGES. See EMINENT DOMAIN, 8; TAXES, 7, 11, 12; NOTES AND BRIEFS.

BROKERS. See also EVIDENCE, 23.

1. The right of a broker to commissions on a contract the signature of which he has procured is not affected by the fact that, as agent for the buyer, he subsequently seeks to procure from the seller some modification of the terms of sale. *Fairly* v. *Wappoo Mills* (S. C.) 215

2. The recovery of commissions by a broker is not prevented by failure to procure a license under an ordinance imposing a penalty for such failure, where the object of the ordinance is simply to enforce payment of a tax. *Id.*

BUILDING AND LOAN ASSOCIATIONS. See also RECEIVERS, 2.

1. The members of a building association, both borrowers and nonborrowers, must assist in bearing its losses. *Eversmann* v. *Schmitt* (Ohio) 184

2. A borrowing member of a building association is not entitled to cancelation of the mortgage given to secure the loan, until the dues paid and the dividends declared and not paid equal the par value of his shares. *Id.*

3. A borrowing member of a building association whose mortgage stipulates for the payment of such "assessments" as may be levied on him as a member is liable for a *pro rata* assessment on the members, made by a receiver in insolvency of the association. *Id.*

4. An assessment on stock in a building and loan association, for the purpose of covering losses and equalizing the members, so that they may all go out at the final close on an equal footing, is within the liabilities of a member upon a note and mortgage which include a provision for the payment, not only of installments of dues, but of any fees or assessments. *Wohlford* v. *Citizens' Bldg. L. & Sav. Asso.* (Ind.) 177

5. An assessment to cover losses and equalize members is properly made by the board of directors of a building and loan association, instead of by the association as a whole, under a statutory provision that the business of the association shall be managed by a board of directors. *Id.*

6. A formal acceptance in writing of the provisions of Ind. Act 1885, which expressly grants to building and loan associations power to make assessments or stock calls to cover losses, is not necessary in order that such an association may exercise the enlarged powers granted by that statute, including the power to make an assessment to cover losses and thereby equalize members, so that all at the close may go out on an equal footing. *Id.*

7. Forfeiture of stock in a building and loan association for failure to make required payments, if it is authorized by the contract of the parties, the rules and regulations and by-laws of the association, and the statute under which it is created, cannot be relieved against; and the mortgage given by such member may be foreclosed for the full amount of his original loan, with interest, without any abatement for the value of the stock or for payments made by him thereon. *Southern Bldg. & L. Asso.* v. *Anniston Loan & T. Co.* (Ala.) 120
But see contra below.

8. The application upon a mortgage to a building and loan association, of payments made by the mortgagor upon his shares of stock in the association, which were declared forfeited after default, must be allowed on foreclosure of the mortgage, notwithstanding a rigid provision in his contract that his membership and all sums theretofore paid should be forfeited in case of default; and a claim that the loan and membership are separate and distinct contracts cannot be sustained after the termination of the membership and the maturity of the loan by an election to foreclose. *Randall* v. *National Bldg. L. & P. Union* (Neb.) 133

9. The monthly payments for subscriptions to the shares of a building and loan association, which have been pledged as collateral security for a loan secured by mortgage, in which interest and dues are consolidated, should be applied upon the mortgage in determining whether that has been paid, when the association is in the hands of a receiver. *Buist* v. *Bryan* (S. C.) 127

10. Stock payments by a borrowing member of a building and loan association are not *ipso facto* credits upon his indebtedness, so as to reduce *pro tanto* the amount due on his mortgage, but a borrower may elect to have payments on account of stock applied upon his indebtedness to the association. *Randall* v. *National Bldg. L. & P. Union* (Neb.) 133

11. The appointment of a receiver for a building and loan association terminates the contract of a shareholder who is also a borrower and has given a mortgage to secure the loan, so that he is not liable for the monthly dues accruing after such appointment. *Buist* v. *Bryan* (S. C.) 127

NOTES AND BRIEFS.

Building and loan associations; right to apply payments made on stock in a building and loan association upon a mortgage given for a loan by the same member:—associations not protected by law; payments not *ipso facto* a reduction of the mortgage; right of third persons to require the application; (*a*) surety for borrower; (*b*) purchaser at sheriff's sale; (*c*) creditors or assignees; (*d*) second mortgagees; associations on the terminating plan; rule under changed conception of loan association; right to a credit of profits; forfeiture; insolvency or abandonment of scheme; change of rules; right of third person to resist application; effect of special agreement 120

Liability of advanced member of building and loan association to assessment for losses:—decisions proceeding on the partnership theory; the original loan association theory; effect of rules or provisions in mortgage; change of rules; liability as members after release of mortgage; statutory provisions. 177

BURDEN OF PROOF. See EVIDENCE.

BURGLARY. See HOMICIDE.

BY-LAWS. See CORPORATIONS, 9, 10.

CARRIERS. See also CASE; CONTRACTS, 4; DAMAGES, 1, 2; EVIDENCE, 13; FERRIES, 1.

1. The relation of carrier and passenger does not exist between a street-railway company and a person who has given a signal, which is seen and responded to, for a car to stop, but who is struck by the unexpected swinging of the car from its proper track on to a switch track. *Donovan* v. *Hartford Street R. Co.* (Conn.) 297

2. The use of indecent or profane language in a street car, which constitutes a breach of the peace for which a person may be punished by fine or imprisonment, justifies the conductor in putting the offender off the car. *Robinson* v. *Rockland, T. & C. Street R. Co.* (Me.) 530

3. A passenger in a crowded street car in which there are many ladies, who on being requested by the conductor to stop swearing denies his guilt, and when told that he has been profane calls the conductor "a damned liar," says that he would swear as much as he "damned pleased," and that he "would be God damned if he would put him off the car," —should be ejected from the car even if the conductor was at first in error in charging him with profanity. *Id.*

4. Failure to pay for a ticket when purchased because of haste to catch a train, and the acceptance of a promise to pay on return, will not defeat the right of the passenger to recover damages for ejection because the ticket bears a prior date. *Ellsworth* v. *Chicago, B. & Q. R. Co.* (Iowa) 173

5. The clause "continuous passage within one day of date of sale" on a railroad ticket does not make the ticket invalid on the day of sale because it bears a prior date. *Id.*

6. A railroad company is not liable for injuries received by a passenger from an accidental blow by one of its employés while making a playful attempt to strike another employé, as the act is not within the line of his employment. *Goodloe* v. *Memphis & C. R. Co.* (Ala.) 729

7. An unjustifiable assault upon a passenger by a railroad employé who owes him the duty of protection renders the carrier responsible for the injuries caused thereby. *Atchison, T. & S. F. R. Co.* v. *Henry* (Kan.) 465

8. Illegal arrest without a warrant, and false imprisonment of a passenger, caused by a conductor in charge of the train on which he was riding, while acting in the line of his employment, render the carrier liable. *Id.*

9. For such a sum of money and such articles as a passenger might for her personal convenience and adornment appropriately carry with her in a sleeping car, if stolen by an employé while the passenger was under his protection, the sleeping-car company is liable. *Pullman's Palace Car Co.* v. *Martin* (Ga.) 493

10. A common carrier who does not know, or have good reason to know, that barrels received by him for shipment contain short lobsters, is not liable for receiving them, under Me. Laws 1889, chap. 292, § 2, making it unlawful to catch or "possess for any purpose" between specified dates any lobster less than 10½ inches long. *State* v. *Swett* (Me.) 714

11. A contract to give all the traffic of certain mines and furnaces and of a railroad therefrom at reasonable rates to another and connecting railroad, which furnishes aid to develop the business, is not *ultra vires* or in violation of Pa. Const. art. 17, §§ 1, 3, 4, requiring railroads to carry each other's traffic without discrimination, and prohibiting discrimination in transportation for individuals, and prohibiting the consolidation of parallel and competing roads. *Bald Eagle Valley R. Co.* v. *Nittany Valley R. Co.* (Pa.) 423

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CASE.

A shipper of goods may maintain an action on the case against the carrier for their negligent injury, where they were sold and shipped subject to the payment of a draft against the bill of lading, the shipper guaranteeing payment of freight, although, when notified of the injury, he refused to give directions as to their disposition on the ground that he no longer had title, if the carrier did not act upon such claim to his prejudice. *Spence* v. *Norfolk & W. R. Co.* (Va.) 578

CHAMPERTY. See CLOUD ON TITLE.

CHARITIES. See TAXES, 4.

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CHURCH. See RELIGIOUS SOCIETIES.

CIGAR MAKERS' UNION. See TRADE-MARK, NOTES AND BRIEFS.

CITIZEN. See CONSTITUTIONAL LAW, 7.

CLOUD ON TITLE.

A deed or other instrument purporting to convey land, that shows upon its face that the grantors therein were out of possession of the land granted at the time of its execution, and that such land at the time was adversely

the restriction upon one class of citizens only. *Hocking Valley Coal Co.* v. *Bosser* (Ohio) 386

24. A statute prohibiting the employment of females in any factory or workshop for more than eight hours a day is unconstitutional as partial and discriminating in its character, whether applying only to manufacturers of wearing apparel and like articles, or as applying to manufacturers of all kinds of products. *Ritchie* v. *People* (Ill.) 79

25. An ordinance applying to all transient merchants, requiring a license fee, is not unconstitutional as class legislation. *Ottumwa* v. *Zekind* (Iowa) 734

26. A statute providing for the protection of trade-marks adopted by associations or unions of workingmen is not void as class legislation or as granting special privileges or immunities. *State* v. *Bishop* (Mo.) 200

27. A statute restricting the right to discharge laborers because of membership in labor unions is within a constitutional provision against special laws. *State* v. *Julow* (Mo.) 257

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CONTRACTS. See also BROKERS, 2; CARRIERS, 11; CONSTITUTIONAL LAW, 8–10, 17, 18, 24; SALE.

1. Letters and telegrams which constitute an offer and acceptance of a proposition complete in its terms may constitute a binding contract, although there is an understanding that the agreement shall be expressed in a formal writing, and one of the parties afterwards refuses to sign such an agreement without material modifications. *Sanders* v. *Pottlitzer Bros. Fruit Co.* (N. Y.) 431

2. Signing one's name in blank upon the back of a promissory note to which he is not a party, pursuant to an oral agreement to guarantee its payment, although insufficient of itself, will justify the holder to write a contract of guaranty over the signature, and thus satisfy the statute of frauds. *Peterson* v. *Russell* (Minn.) 612

3. The extension of the time of payment of a past-due note is a sufficient consideration to support a promise by a guarantor to pay it. *Id.*

4. Consideration for an agreement by a railroad company and other parties about to construct a railroad from a mine to a furnace, and from the furnace to an established railroad, that they will ship all their products at reasonable rates over the latter railroad, may be found in the purchase by the owner of the old road of a certain quantity of the bonds of the new company at par in order to supply funds for the enterprise. *Bald Eagle Valley R. Co.* v. *Nittany Valley R. Co.* (Pa.) 423

5. A contract between corporations organized to distribute and furnish water to consumers in a county and city, one of which owns a supply of water and a pipe line ending at the city limits, and the other a distributing plant within the city, for co-operation in supplying water to the city and providing a method of determining the price of water, is not in violation of public policy as a monopoly for its sale, since the California constitution reserves to municipal corporations the power of regulating water rates. *San Diego Water Co.* v. *San Diego Flume Co.* (Cal.) 839

6. The fact that the mayor of a city is also the president and a stockholder of a gas company which furnishes gas to the city, not by virtue of any contract, but by requirement of law, when he has no authority in the matter of procuring the gas, does not defeat the right to enforce payment from the city, although the charter of the city provides that no officer shall be directly or indirectly interested in any contract, work, or business, or the sale of any article for which payment is to be made from the city treasury, and that all contracts in violation thereof shall be void. *Capital Gas Co.* v. *Young* (Cal.) 463

7. A contract for the sale of property to a city through one of its officers, who receives a commission from the other party for effecting it, is illegal and void both at common law and under Ohio Rev. Stat. § 6969, declaring it a penal offense for any public officer, agent, servant, or employé to be directly or indirectly interested in any contract for the purchase of any property of the state, county, or municipality. *Findlay* v. *Pertz* (C. C. App. 6th C.) 188

8. A provision in a lease of a warehouse owned by a railroad company, that such company shall not be responsible for any damage caused by fire, is not void as against public policy on the ground that the property of the public will thereby be in danger. *Stephens* v. *Southern P. Co.* (Cal.) 751

9. It is not essential to the recovery of an instalment of the amount agreed to be paid in consideration of a release of dower rights, that the plaintiff should have physical possession of a note which the contract contemplated should be given to represent such instalment until the same became due. *Irvin* v. *Irvin* (Pa.) 293

10. A contract valid when made cannot be rendered invalid by a general statute subsequently passed. *Stephens* v. *Southern P. Co.* (Cal.) 751

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Contracts; sufficiency of contract by offer and acceptance without execution of contem-

plated formal instrument:—general statements of the law; suggestion of formal contract; understanding that there is to be a formal contract; where some terms unsettled; where the execution of a formal contract is one of the terms of the agreement; agreement to execute formal contract may be binding; where it appears that the contract when finished should be a formal one; failure to execute draft of contract; estoppel; illustrations of proposals for formal contract; intention to have formal contract as evidence. 431

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1. The Board of Regents of Kansas State University is such a corporation as is subject to the control of the court in an action in the nature of quo warranto. *State, Little,* v. *Regents of University* (Kan.) 378

2. Neither a *de jure* nor a *de facto* corporation can exist where the articles are not filed in the office of the secretary of state and the fee therefor paid as required by Colo. Sess. Laws 1887, p. 406, which expressly prohibits the exercise of any corporate powers until this is done. *Jones* v. *Aspen Hardware Co.* (Colo.) 143

3. Promoters of a corporation to whom stock and mortgage bonds are issued nominally in payment for property transferred to the corporation, which was in fact bought of a third person, will not be permitted to jeopardize such third person's collection of the purchase money by enforcing their mortgage without paying for their stock. *Hooper* v. *Central Trust Co.* (Md.) 262

4. A promoter of a corporation is affected and bound by any fraud contained in a guaranty to one selling property to the corporation by another promoter that money in his hands shall be applied to placing improvements on the property, for the purpose of securing a waiver of the vendor's lien, so that he cannot acquire a right to a judgment for the price of such improvements which he can enforce against the objection of such vendor. *Id.*

5. Promoters of a corporation who secure a waiver of the lien of one selling property to the corporation, in favor of a mortgage taken by themselves upon the property, by a fraudulent guaranty that certain money shall be applied to making improvements on the property, which is not done, will not be permitted to enforce their mortgage against his objection. *Id.*

6. A promoter of a corporation who has not paid his stock subscription will not be permitted to take an assignment of a claim for improvements made on the corporate property, so as to enforce the same in priority to valid mortgages on such property. *Id.*

7. The appointment by a corporation by its board of directors of another corporation to act as its sole agent in the sale of water within a city, to be distributed by means of plants of both corporations, is not in violation of Cal. Civ. Code, § 354, subd. 5, 8, where the agency, although exclusive, is not unlimited or unrestricted. *San Diego Water Co.* v. *San Diego Flume Co.* (Cal.) 839

8. A contract between corporations organized to distribute and furnish water to consumers in a county and city, for co-operation in supplying water to the city, is not *ultra vires* because one officer of each corporation is appointed a trustee, and they together are given general charge of the operation of the works and of keeping the accounts of receipts and expenses, with a limited power of determining what shall be charged to the account of operating expenses, and with other powers and duties simply executory and such as could not be discharged by any board of directors otherwise than through an agent. *Id.*

9. A by-law giving a corporation the first right to purchase stock which is for sale by any of its members is not valid under a statute specifying several subjects upon which by-laws may be enacted, but making no reference to the question of stock transfers. *Ireland* v. *Globe Milling & R. Co.* (R. I.) 429

10. A by-law providing that no proxy should be voted by any one who is not a stockholder of the corporation is invalid under Cal. Civ. Code, § 312, providing generally that stockholders may be represented by proxies. *People's Home Sav. Bank* v. *San Francisco Super. Ct.* (Cal.) 844

11. Directors of an insolvent corporation, who vote themselves preferences over other creditors, must show that all their secured claims are honest and justly due them. *Schufeldt* v. *Smith* (Mo.) 830

12. Officers of a corporation may be compelled to account for all sums withdrawn for salaries, with interest thereon, where they have voted and paid them partly and largely for the

purpose of depriving stockholders of the results of a litigation in case they are successful, although they are paid nominally and partly for services rendered to the company. *Eaton* v. *Robinson* (R. I.) 100

13. Stockholders who are officers of a corporation may be compelled, upon a bill properly framed, to pay directly to other stockholders their share of money which the officers have fraudulently retained as salaries. *Id.*

14. Fraud of promoters in procuring a subscription to stock of a corporation before its organization is not a defense against an assessment on the stock by the corporation after the subscriber has carried out his contract and united with others in forming the corporation, but his remedy is restricted to an action against the wrongdoers. *St. Johns Mfg. Co.* v. *Munger* (Mich.) 63

15. The right of the state to declare the forfeiture of the charter of a waterworks company for infractions of duty imposed by its charter and contract is not taken away by a provision in the contract that the city may rescind the contract if the company's works fail to meet the requirements of the contract. *Capital City Water Co.* v. *State, Macdonald* (Ala.) 743

16. The charter of a waterworks company which supplies river water, instead of pure, wholesome deep-well water as required by its charter and contract, during four droughts in two years, and refuses for a wholly insufficient reason to sink additional wells in order to furnish a proper supply of water, will be annulled, where the only reasons for not annulling are that if the charter is vacated all water supply will cease, and a promise by the company after suit is begun that it will sink the additional wells necessary to afford an adequate supply of water. *Id.*

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Corporations; right to vote by proxy in private corporations:—(I.) at common law; (II.) under statutes and by-laws: (*a*) statutes; (*b*) by-laws; (III.) form of proxy; (IV.) when and for what purpose a proxy may be used; (V.) rejection of proxy by inspectors; (VI.) revocation of proxy; (VII.) directors voting by proxy; (VIII.) miscellaneous matters. 844

Issuing stock for property purchased 264

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Restricting transfer of stock by by-law. 429

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COSTS. See also APPEAL AND ERROR, 16.

1. The relator in proceedings in the nature of quo warranto will not be required to give additional security for costs on the ground that the security given is insolvent where the evidence in support of the motion only shows that according to the tax records of the county the security has only $320 of taxable property. *Capital City Water Co.* v. *State, Macdonald* (Ala.) 743

2. An irregularity in commencing a proceeding in the nature of quo warranto for the dissolution of a corporation before giving security for costs is waived, where such security is subsequently given, and the respondent files a demurrer and motion to quash and afterwards its pleas, and no motion to dismiss on that ground is made until nearly a year after the commencement of the action, when the case comes on for hearing. *Id.*

3. The costs of a resale of railroad property after foreclosure cannot be allowed to a judgment creditor who was not made a party to the foreclosure suit, if nothing remains for him out of the proceeds after paying the superior liens, including those set up in the foreclosure suit. *Stewart* v. *Wheeling & L. E. R. Co.* (Ohio) 438

NOTES AND BRIEFS.

Costs; as to payment in coin. 593

COTENANTS. See also IMPROVEMENTS, 1; PARTITION.

1. The liability of a joint tenant or tenant in common to account to his cotenants under W. Va. Code, chap. 100, § 14, for receiving more than his just share or proportion of the benfits, does not apply to coparceners. *Ward* v. *Ward* (W. Va.) 449

2. A coparcener merely from sole occupation of the premises is not chargeable in favor of other coparceners, unless he excludes them. *Id.*

3. The right to compel joint tenants, tenants in common or coparceners to contribute to necessary repairs, applies only to mills and houses, and not to fences or other repairs to the property. *Id.*

4. The right of a joint tenant, tenant in common, or coparcener to compel others to contribute to necessary repairs, exists only as to future repairs made, after request to assist and refusal. *Id.*

NOTES AND BRIEFS.

Liability of cotenants for improvements and repairs:—(I.) improvements: (*a*) liability at common law; (*b*) liability in assumpsit for improvements; (*c*) rule in equity; (*d*) lien for improvements; (*e*) interest on improvements; (*f*) position of grantee of cotenant's share; (II.) repairs: (*a*) general doctrine; (*b*) liability in assumpsit; (*c*) necessity of a demand and notice; (*d*) lien for repairs. 449

COUNTERCLAIM. See SET-OFF, ETC.

COUNTERFEIT. See INDICTMENT, ETC., 3; TRADE-MARK, 3.

COUNTIES. See also MANDAMUS, 2.

1. The constitutional provision that money raised by county taxes should not be used for other than county purposes is not violated by

Fla. Acts 1891, chap. 4014, § 17, providing that half the funds raised for county roads and bridges shall be turned over to municipal authorities for town or city streets. *Duval County Comrs.* v. *Jacksonville* (Fla.) 416

2. Suit for the refunding of an illegal tax cannot be maintained against the county until the claim has been presented to the board of supervisors, under a statute providing that that board shall direct the treasurer to refund illegal taxes. *Bibbins* v. *Clark* (Iowa) 278

NOTES AND BRIEFS.

Counties; use of funds for county purposes. 418

COURTS. See also LIS PENDENS.

1. The mere fact that opinions are prepared by the commissioner of the supreme court of Nebraska is no indication that such cases have not been examined by the judges; but all questions of law, and, so far as practicable, questions of fact, are considered by each of the judges and commissioners, and opinions are invariably submitted for examination and criticism by the entire membership of the court. *Randall* v. *National Bldg. L. & P. Union* (Neb.) 133

2. It is the province of the courts to determine whether a statute purporting to be an exercise of the police power of the state, but taking away the property of a citizen or interfering with his personal liberty, is an appropriate measure for the promotion of the comfort, safety, and welfare of society. *Ritchie* v. *People* (Ill.) 79

3. The jurisdiction of the Supreme Court of the United States on writ of error to a state court, where a stay bond is executed after levy on a judgment, is not interfered with by an action the purpose of which is in effect to vacate the levy. *Central Trust Co.* v. *Moran* (Minn.) 212

NOTES AND BRIEFS.

Courts; rule as to declaring statutes void. 89–97

COVENANT. See also LANDLORD AND TENANT, 1.

1. The intention of the parties to a covenant respecting real property is the controlling element in determining—at least on a bill of equity—whether or not the covenant shall bind subsequent owners of the property. *Bald Eagle Valley R. Co.* v. *Nittany Valley R. Co.* (Pa.) 423

2. An obligation to pay a portion of the expense of the repairs to a dam is not created by a stipulation in a deed that the grantee shall pay a part of the sums which have to be paid for flowage or damages to proprietors of lands above the dam. *Whittenton Mfg. Co.* v. *Staples* (Mass.) 500

3. An obligation in the nature of a servitude upon an estate conveyed with a water privilege may be enforced, without any personal obligation of the owner, under a stipulation that the grantee, his heirs and assigns, shall pay a certain part of the sums paid for flowage or damages to the proprietors of land above a reservoir. *Id.*

NOTES AND BRIEFS.

Covenants; running with land. 423

CREDITORS' BILL. See also ATTACHMENT, 1.

The satisfaction or discharge of a judgment may be shown as a defense against a creditors' bill to enforce the judgment after revival on scire facias, as well as to defeat the revival. *Bickerdike* v. *Allen* (Ill.) 782

CRIMINAL LAW. See also EXECUTORS AND ADMINISTRATORS, 3.

Sentence in a criminal case may lawfully be suspended at the pleasure of the court, and the court's power over an accused is not affected or lost by an order to pay costs, both of himself and a codefendant, or even by committing him for refusal to do so, since the requirement to pay costs is not part of the sentence. *State* v. *Crook* (N. C.) 260

NOTES AND BRIEFS.

Criminal law; constitutional protection against being forced to furnish evidence to be used against one's self in a civil case:—(I.) provisions against self-accusation: (*a*) limitation to criminal proceedings; (*b*) application to proceedings for penalties and forfeitures; (*c*) general doctrine as to evidence against one's self; (*d*) the contrary doctrine; (*e*) parties in interest; (II.) unreasonable searches and seizures; (III.) right of trial by jury; (IV.) due process of law; (V.) distinction between civil and criminal or penal proceedings. 811

Innocent violation of statute 715

CRIMINATION OF SELF. See CRIMINAL LAW, NOTES AND BRIEFS.

CROSS-BILL. See PLEADING, 10, 11.

CUSTOM. See also CONSTITUTIONAL LAW, 3; EVIDENCE, 23, 24.

NOTES AND BRIEFS.

Custom; as part of contract. 220

DAMAGES.

1. Exemplary damages may be recovered by a passenger for an ejection which was malicious as well as wrongful. *Ellsworth* v. *Chicago, B. & Q. R. Co.* (Iowa) 173

2. A passenger is not called upon to submit to a wrongful ejection for the purpose of economizing the damages to be recovered, but may make any resistance not amounting to a criminal disturbance of the peace. *Id.*

3. Damages for detention of a boat by obstruction of navigation, where other means of transportation were not provided, will not include the cost of loading and unloading and of damage to the cargo by exposure after unloading. *Farmers' Co-Op. Mfg. Co.* v. *Albemarle & R. R. Co.* (N. C.) 700

NOTES AND BRIEFS.

Damages; right to make exemplary. 530

DAMS. See COVENANT, 2; EASEMENTS, 1; TAXES, 2.

DECEIT. See FRAUD.

DEED. See also CLOUD ON TITLE; FERRIES, 6; MAXIMS, 1, 2.

The releasee in a quitclaim deed who purchases in good faith and for full consideration will be protected in Connecticut from secret unrecorded encumbrances on the property. *Robinson* v. *Clapp* (Conn.) 582

NOTES AND BRIEFS.

Deed; conveying appurtenances. 52

DEFINITIONS. See CONSTITUTIONAL LAW, 13; TAXES, 10, 14.

DELEGATION OF POWER. See RELIGIOUS SOCIETIES, 1.

DEPOSITIONS. See APPEAL AND ERROR, 4.

DESCENT AND DISTRIBUTION.

1. One killing his ancestor for an estate which would naturally come to him under the statutes of descent and distribution may take it under a constitution prohibiting attainders working corruption of blood and forfeiture of estate, and statutes providing no penalty for murder except death by hanging. *Carpenter's Appeal* (Pa.) 145

2. Brothers and sisters of the half blood are included in a statutory provision for descent to brothers and sisters, unless a contrary intention appears. *Anderson* v. *Bell* (Ind.) 541

3. Inheritance is not confined to brothers and sisters of the half blood to the exclusion of descendants of deceased ones, by a statute which excludes the half-blood kindred from inheriting an estate which came to the intestate by gift, devise, or descent from an ancestor, unless they are of the blood of such ancestor, if there are any of his blood. *Id.*

NOTES AND BRIEFS.

Descent and distribution; among kindred of the half blood:—(I.) the common-law doctrine; (II.) in the United States; (III.) meaning of the words: (*a*) in general; (*b*) ancestor; (*c*) blood; (*d*) brothers and sisters; (IV.) no distinction between the whole and half blood; (V.) in the case of ancestral estates; (VI.) when the statute not express; (VII.) cases wherein the whole blood is preferred; (VIII.) when half blood preferred to remote relative of the whole blood; (IX.) when half blood take half portions; (X.) shifting descents; (XI.) equitable conversion. 541

Right of murderer to inherit. 146

DESCRIPTION. See EASEMENTS, 1.

DISCOUNT. See USURY, 3.

DISCOVERY.

NOTES AND BRIEFS.

Discovery; as affected by constitutional provision against self-crimination. 811

DUE PROCESS. See CONSTITUTIONAL LAW, 17, 18, 20-22.

DYNAMITE. See EVIDENCE, 16; EXPLOSION, NOTES AND BRIEFS.

EASEMENTS. See also COVENANT, 3.

1. A servitude by prescription charging property with the payment of a portion of the expense of repairs to a dam from which a water power is furnished to the premises is created, where for more than fifty years an annual contribution by the owner of the servient estate has been paid as a duty and collected by the other party as a right. *Whittenton Mfg. Co.* v. *Staples* (Mass.) 500

2. A purchaser of a tract of land 40 feet wide and on which is a building 11 feet wide from land retained by the grantor, with a bay window 5 feet from such land, does not obtain by implied grant the right to the light which the building will receive from the unconveyed portion, as against a subsequent purchaser for value of the remaining land. *Robinson* v. *Clapp* (Conn.) 582

NOTES AND BRIEFS.

Easement; when implied. 583

EIGHT HOUR LAW. See CONSTITUTIONAL LAW, 10, 15, 24; MASTER AND SERVANT, 1; STATUTES, 8.

ELECTRIC RAILWAYS. See RAILROADS, 2; STREET RAILWAYS.

EMINENT DOMAIN. See also INJUNCTION, 3.

1. The use of water for irrigating purposes contemplated by Neb. Act March 27, 1889, is a "public use" for which private property may be condemned without the owner's consent. *Paxton & H. Irrig. C. & L. Co.* v. *Farmers' & M. Irrig. & L. Co.* (Neb.) 853

2. Lands owned by corporations as well as by natural persons are included within Neb. Act March 27, 1889, art. 1, § 3, providing that no tract of land shall be crossed by more than one irrigating ditch without the consent of the "owners thereof." *Id.*

3. Irrigating companies organized under the laws of the state have power to acquire by condemnation the right of way for necessary canals, reservoirs, etc., under Neb. Act March 27, 1889, art. 2, § 3, providing that such corporations may acquire a right of way for such purposes over any land. *Id.*

4. The right of an owner whose property is condemned for public use, to a jury trial upon the question of damages, guaranteed by S. D. Const. art. 6, § 13, providing that private property shall not be taken for public use without just compensation as determined by a jury, is preserved by the Dakota Compiled Laws relating to the subject of assessing damages, § 1324 of which provides for an appeal and a jury trial if the parties cannot agree or the owner is dissatisfied with the award made by the supervisors. *Dell Rapids* v. *Irving* (S. D.) 861

5. The use of a street for other than legiti-

mate street purposes, which constitutes any impairment of or interference with the easements of an abutting owner, is a taking of his property within the meaning of the constitution. *Willamette Iron Works Co.* v. *Oregon R. & Nav. Co.* (Or.) 88

6. No portion of a public street can lawfully be appropriated to the exclusive and permanent use of a private corporation, under the guise of an exercise of power to alter or change the grade. *Id.*

7. Any structure on a street, which is subversive of and repugnant to its use and efficiency as a public thoroughfare, is not a legitimate street use, and imposes a new servitude on the rights of abutting owners, for which compensation must be made. *Id.*

8. A solid structure 30 feet wide erected in the middle of a street 66 feet wide and curving so as to leave on one side a passageway only 8 feet wide, built as an approach to a toll bridge owned by a private corporation, not forming a part of or extension of any public highway, although authorized by the legislature and city authorities, can lawfully be made only on payment of damages to the abutting owner. *Id.*

9. Erections upon a public street impose no additional servitude where they aid and facilitate its use for the purposes of travel and transportation. *Chicago, B. & Q. R. Co.* v. *West Chicago Street R. Co.* (Ill.) 485

10. The question whether a new method of using a street for public travel results in the imposition of an additional burden upon the fee must be determined by the use which such method makes of the street, and not by the motive power which it employs in such use. *Id.*

11. The permission to a street-railway company to lay its tracks in a street already appropriated to public use is not a grant of the right to appropriate an additional easement in the soil of the street, but the construction of such road is merely a mode of facilitating existing travel, and of modifying or changing the existing public use, adding an additional mode of conveyance to those already upon the street, and inflicting no damage upon the owner of the fee of the street. *Id.*

12. A railroad company owning the fee of the street at the point where the street is crossed by its tracks is not entitled to compensation as for an additional burden, upon the construction of street-railway tracks along the street under permission from the city, where its own tracks are not injured. *Id.*

13. The interest of a street-railway company in the street upon which its tracks are laid, although a valuable one, is part of the public easement in the street, accessory and ancillary to the existing right in the public of passing over the street. *Id.*

14. A railroad company which by city ordinances has acquired a permanent easement in streets crossed by its tracks is not entitled to compensation for the crossing of such tracks by a street railway laid along the street under permission from the city, as such easement is in subordination to the right of the public to pass along the streets, and the propelling of street cars is only a form of the exercise by the public of such right of passage, and does not operate as an infringement upon such easement. *Id.*

See also RAILROADS, 2.

NOTES AND BRIEFS.

Eminent domain; right of railroad company to compensation for laying street railway across railroad track on a street crossing. 485

What purposes are public for exercise of. 854

ESTOPPEL.

1. A city does not, by an appropriation and payment of its revenue for many years in violation of the constitution, estop itself to assert that it is prohibited in future from making such payment. *Washingtonian Home* v. *Chicago* (Ill.) 798

2. Acquiescence for nearly three years in the annexation of one's land to a city will prevent his questioning the validity of the annexation, —at least when the attack is based on mere irregularities and informalities not affecting jurisdiction. *Kuhn* v. *Port Townsend* (Wash.) 445

3. The owner of a wagon who permits the name and occupation of another person who is in possession of it to be painted thereon, for the purpose of inducing the public to believe that it belongs to and is used by the latter in his business, cannot assert ownership against an innocent purchaser from the person who had it and whose name was on it. *O'Connor* v. *Clark* (Pa.) 607

EVIDENCE.

Judicial notice.

1. Courts may take judicial notice of long-prevailing construction of a statute by executive officers. *Bloxham* v. *Consumers' E. L. & Street R. Co.* (Fla.) 507

2. The court will take judicial notice that a street-railway company is a common carrier of passengers. *Donovan* v. *Hartford Street R. Co.* (Conn.) 297

3. It is a matter of common knowledge that natural gas will not explode spontaneously without some agency acting upon it. *McGahan* v. *Indianapolis Natural Gas Co.* (Ind.) 355

4. It is a matter of common knowledge that race-courses are visited by invited spectators, who drive into the grounds in their own carriages or other vehicles under the control of themselves or their own drivers. *Hart* v. *Washington Park Club* (Ill.) 492

5. The jury must determine the facts in the case from testimony given by witnesses, and not from their own judgment or experience or knowledge. *Burrows* v. *Delta Transp. Co.* (Mich.) 468

Presumptions and burden of proof.

6. In a suit upon a contract made and to be executed in another state, in the absence of any evidence to the contrary, the court will presume that the rules of the common law prevail there. *Patillo* v. *Alexander* (Ga.) 616

7. A person seeking to establish title to an office against another in possession of it has

the burden of proving his right thereto. *Tillman* v. *Otter* (Ky.) 110

8. The burden of proof to show that, notwithstanding a substantial compliance with the California statutes as to the care of ballots, they have been tampered with, or have been exposed under such circumstances that a violation of them might have taken place, resting upon one objecting to their admission as evidence, is not discharged by simply showing that it was possible for a person to have molested them. *Tebbe* v. *Smith* (Cal.) 673

9. Funds in the hands of a trustee who has become insolvent, which are less than the amount of the trust funds, are presumed to belong to the trust. *State* v. *Foster* (Wyo.) 226

10. The burden is on the seller to show the purchaser's inability to carry out his contract, in order to avoid the payment of the broker's fees, where he accepted him without any misrepresentation or suppression of knowledge by the broker as to the purchaser's financial ability. *Fairly* v. *Wappoo Mills* (S. C.) 215

11. No presumption that grade crossings expressly authorized by a special statute were intended to be subject to the general law requiring approval of the railroad commissioners can arise from the mere fact that they are numerous, while the general policy of the law has been to restrict such crossings, if the act does not increase the total number, and indicates that they will be temporary because of the possible elevation of the track. *New York, N. H. & H. R. Co.* v. *Bridgeport Traction Co.* (Conn.) 367

12. The burden of proof is upon a city in an action for the value of property destroyed by it as a nuisance without first condemning the same, to show that its destruction was really necessary to the public health or safety. *Savannah* v. *Mulligan* (Ga.) 303

13. An accident to a person waiting for a street car, who is struck by the sudden switching of the car upon a side track, does not make a prima facie case of negligence on the part of the carrier. *Donovan* v. *Hartford Street R. Co.* (Conn.) 297

14. Negligence of the person conducting a public exhibition of horse-racing cannot be presumed from the mere fact that a spectator was injured by a runaway horse while within the place reserved for spectators. *Hart* v. *Washington Park Club* (Ill.) 492

15. The burning of a house through fire set from the sparks of a firepot placed upon its roof by workmen engaged in repairing it will be presumed to have been caused by their negligence. *Shafer* v. *Lacock* (Pa.) 254

16. An explosion of nitro-glycerine in process of manufacture into dynamite raises a presumption of negligence, in the absence of any explanation of the real cause of the explosion. *Judson* v. *Giant Powder Co.* (Cal.) 718

17. A plaintiff must be presumed to have caused an explosion of natural gas by his own act, where his complaint against a gas company for the explosion does not charge the company with any negligence except in failing to cut off the supply, and does not make any allegation as to the cause of the explosion. *McGahan* v. *Indianapolis Natural Gas Co.* (Ind.) 355

Documentary.

18. A certificate of the clerk that he has mailed a notice of scire facias addressed to the defendant, which under Ill. Rev. Stat. chap. 22, § 12, is declared to be evidence, is prima facie evidence that the notice so sent by mail was received. *Bickerdike* v. *Allen* (Ill.) 782

19. A recital in a judgment that due proof was made is at least prima facie evidence of that fact. *Id.*

20. As against strangers thereto a receipt is incompetent evidence of the payment thereby acknowledged, for as against them it is but the hearsay declaration of the party who signed it, made without opportunity for his cross-examination, and independently of his oath. *Ellison* v. *Albright* (Neb.) 737

Parol.

21. Parol evidence is admissible to ascertain the intention of the parties, where one who is not a party to a promissory note signs his name upon the back of it. *Peterson* v. *Russell* (Minn.) 612

22. Evidence of a contemporaneous agreement by a wife to procure a divorce from her husband is inadmissible to defeat recovery by her upon a written agreement valid upon its face for the release of her dower rights in real property of the husband, where she has performed the written agreement upon her part, which of itself constitutes a consideration for the undertaking of the other party, and after such agreement she resumed marital relations with her husband, although such an agreement would be admissible if the action were upon a bond, bill, or note, to prove that the consideration was unlawful. *Irvin* v. *Irvin* (Pa.) 292

23. Liability for brokerage upon a contract for the sale of a certain quantity of a commodity, "seller paying brokerage at 10 cents per ton," cannot be reduced by proof of a custom to pay brokerage only on the amount actually delivered. *Fairly* v. *Wappoo Mills* (S. C.) 215

24. Evidence of custom and usage is not admissible to explain or vary the terms of an express contract, whether written or verbal, unambiguous in its terms, unless to show the meaning of certain terms used in the contract, which by well-established custom or long usage have acquired a meaning different from that which they primarily bear. *Id.*

Declarations.

25. Evidence of a conversation which occurred in defendant's absence is not rendered admissible against him by the fact that it would tend to contradict statements made by defendant's counsel in his opening statement to the jury. *Munzer* v. *Stern* (Mich.) 859

26. That both defendants jointly sued for alienating a husband's affections, and who are shown to have acted in concert, were not present at a conversation with one of them respecting an inducement held out to the husband, will not prevent the admission of the evidence of such conversation. *Price* v. *Price* (Iowa) 150

27. Evidence of conversations between a

husband and his father, and between the latter and the wife's father, may be proved in an action for alienating the husband's affections, in order to show the weight and probable effect of a property inducement held out to him to abandon her. *Id.*

28. Evidence that a grantor of a part of a tract of land told a grantee that a well nearly on the boundary line, but on the land not conveyed, "belonged to" and "would be sold" with the land conveyed, is inadmissible to show the legal effect of the deed as against a subsequent purchaser of the remaining land. *Robinson* v. *Clapp* (Conn.) 582

29. Declarations of the workmen of one employed in repairing a house which is burned during such employment, as to the cause of the fire, are admissible to charge him with liability when made while the fire is in progress. *Shafer* v. *Lacock* (Pa.) 254

Relevancy; weight.

30. The right to prove the good character of an accused is properly confined to a few years previous to the crime, without allowing proof of his reputation long before, in boyhood days. *State* v. *Barr* (Wash.) 154

31. Evidence that it is practicable to place railings about the top of tenders to increase their capacity, and that this was not done in the case in hand, is admissible on the question of negligence in loading a tender so that coal fell from it and injured the plaintiff. *Union P. R. Co.* v. *Erickson* (Neb.) 137

32. Permanent lung trouble need not be specifically alleged to admit proof of it in an action for damages for personal injuries, if the injuries are alleged to be permanent and the evidence shows that the lung trouble would probably result from the injury received. *Montgomery* v. *Lansing City Elec. R. Co.* (Mich.) 287

33. An answer under oath has no greater force as evidence than the bill, under Ill. Rev. Stat. chap. 22, § 20, where the bill waives the oath. *Bickerdike* v. *Allen* (Ill.) 782

34. A provision in a judgment for a specific sum of money, with interest, that it be paid in United States gold coin, does not constitute it a variance from a declaration describing the judgment as for a certain number of dollars or for money simply,—especially where the complaint upon which it was rendered describes the note upon which the suit was brought as notes for the payment of so many dollars, and not so many dollars in United States gold coin, and the judgment was one by default. *Belford* v. *Woodward* (Ill.) 593

NOTES AND BRIEFS.

See also CRIMINAL LAW.

Evidence; presumption of negligence. 256, 298

Burden of proof as to negligence. 493

Burden of proof and evidence generally in respect to negligence in escape and explosion of gas. 342

Burden of proof as to excessive force. 530

To overthrow written contract. 55

Parol, as to writing. 293 612

Of repairs after accident. 133

Declarations of employés. 256

Receipt as evidence of payment as against third parties: (I.) ordinary receipts: (*a*) not admissible; (*b*) admissible; (II.) receipts in deeds. 737

EXCEPTION. See APPEAL AND ERROR, 1-4.

EXECUTION. See also JUDICIAL SALE, 2.

A levy on a portion of the property of a railroad company is not valid under Minn. Gen. Laws 1868, chap. 56, §§ 1-3, as against mortgagees of the property as to whom the road, rolling-stock, and personal property constitute an entirety, but the remedy of creditors in such a case must be against the property as an entirety. *Central Trust Co.* v. *Moran* (Minn.) 213

EXECUTORS AND ADMINISTRATORS. See also INTEREST, 3; TRUSTS, 1.

1. The mere fact that a debtor to the estate has the legal title to a piece of land does not show that a compromise with him by an executor of a claim due the estate was improper. *Re Ricker's Estate* (Mont.) 622

2. An executor may lawfully be allowed his commissions on the disbursements of the year on his accounting at the close of the year. *Re Ricker's Estate* (Mont.) 622

3. Compelling a person to disclose his possession of any property of a decedent's estate, or his knowledge concerning such estate, on penalty of imprisonment for refusal, in proceedings on behalf of the estate, being a remedial, and not a penal, proceeding, is not within the constitutional provisions against making any person a witness against himself in a criminal action, and against unreasonable searches and seizures. *Levy* v. *San Francisco Super. Ct.* (Cal.) 811

NOTES AND BRIEFS.

Executors; liability of, for compound interest. 622

EXPLOSION. See also EVIDENCE, 3, 16, 17; GAS, 2.

1. The duty of keeping natural gas under control while it is being transported is imposed by Ohio Rev. Stat. § 5561*a*, and damages resulting to others without their fault by its explosion while being thus transported by a gas company will make such company liable therefor, although not negligent in regard thereto. *Ohio Gas Fuel Co.* v. *Andrews* (Ohio) 337

2. The risk of damages from an explosion in a dynamite factory is not assumed by conveying land for use in that business, and by continuing to carry on business near by after one explosion has occurred. *Judson* v. *Giant Powder Co.* (Cal.) 718

NOTES AND BRIEFS.

Explosion; liability for explosion of gas. 337

Negligence in the manufacture and storage of gunpowder, nitro-glycerine, dynamite, and

other explosives:—(I.) general doctrine; (II.) the effect of city ordinances; (III.) negligence in the manufacture; (IV.) negligence in the storage. 718

FENCE. See RAILROADS, 1.

FERRIES.

1. A railroad company owning a ferry franchise, which runs a ferry as part of its line, cannot, while operating the rest of its line, discontinue the ferry because it is not profitable, and refuse to obey a legislative requirement to operate it. *Brownell* v. *Old Colony R. Co.* (Mass.) 169

2. Duty to operate a ferry under a franchise may be specifically enforced by a suit in court authorized by statute; and forfeiture of the charter is not the only remedy. *Id.*

3. An order by the court to operate a ferry may be, in the first instance, to provide a suitable ferry, without definitely deciding what kind of a ferry is suitable. *Id.*

4. Acquiescence by the state in the abandonment of a ferry is not shown by mere failure of officers to take action to compel its operation. *Id.*

5. The enforcement of a penalty due to the state under Mass. Stat. 1894, chap. 392, for failure to operate a ferry, cannot be had in a suit on petition of individuals to compel the operation of the ferry. *Id.*

6. Special mention of a ferry franchise is not necessary to convey it, in a transfer of a railroad of which the ferry is practically an extension. *Id.*

NOTES AND BRIEFS.

Ferry; franchise of; duty to operate. 169

FIRE. See also COMMERCE, 1; CONTRACTS, 8; EVIDENCE, 15; TRIAL, 3.

A statute requiring screens "of the best approved kind, shown by experience to be proper and suitable for protection from fire," to be used on vessels burning wood, is not unreasonable and imposes no greater burden than the common-law rule in most states imposes in the case of railroad locomotives. *Burrows* v. *Delta Transp. Co.* (Mich.) 468

FISHERIES. See also BOUNDARIES, 1.

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Fisheries; state regulation of. 715

FORFEITURE. See also BUILDING AND LOAN ASSOCIATIONS, 7, 8; CORPORATIONS, 15, 16.

NOTES AND BRIEFS.

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Compulsory evidence against one's self in case of. 813

FRANCHISE. See also CORPORATIONS, 15, 16; FERRIES; TAXES, 8–12.

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Franchise; compelling operation of. 169

FRAUD. See also CORPORATIONS, 14; SALE, 4–6.

1. Intentional fraud, as distinguished from mere breach of duty or omission to use due care, is an essential factor in an action for deceit. *Kountze* v. *Kennedy* (N. Y.) 360

2. A representation upon which an action for fraud can be based must be false, material, and made knowing it was false, or recklessly made not knowing or caring whether it was true or false. *Id.*

3. A misrepresentation designed to influence the conduct of another and upon which he acts to his prejudice, if honestly made believing it to be true, cannot create liability to an action for deceit. *Id.*

4. The omission of a claim then in litigation from a statement of the entire assets and liabilities of a corporation, which is made by the president of the company, but not stated or understood to be made upon his personal knowledge, does not make him liable for fraud and deceit to a person purchasing bonds of the company on the faith of such statement, where the president believed and had reasonable cause to believe that the claim was not valid or enforceable against the company. *Id.*

NOTES AND BRIEFS.

Fraud; liability for misrepresentations made in good faith. 361

GAME LAWS. See also CARRIERS, 10.

NOTES AND BRIEFS.

Game laws; innocent violation of. 715

GAS. See also EVIDENCE, 3; EXPLOSION, 1; HIGHWAYS, 1; PLEADING, 6.

1. A company actually using natural gas which flows through a pipe over a highway crossing cannot escape liability for the dangerous condition of poorly jointed and leaking pipes, because the contractor who laid them has not yet formally turned over the plant to the company or fully completed his contract. *Lebanon Light, H. & P. Co.* v. *Leap* (Ind.) 342

2. The acts on previous occasions of a person injured by an explosion of natural gas in defective pipes may be taken into account in determining his contributory negligence by showing his experience and knowledge of the danger,—especially when previous disturbances of the pipes are charged to have been the occasion of the explosion. *Id.*

3. Conducting natural gas at high pressure through poorly jointed pipes with numerous leaks, lying loose upon the ground where the public, including children and other inexperienced persons, daily pass,—especially when it is laid on a public highway in violation of law,—constitutes actionable negligence. *Id.*

4. An ordinance limiting the price to be charged for gas furnished to private consumers is, in the absence of legislative authority, invalid,—at least as affecting a gas company which has obtained consent to the use of streets without any condition imposed except as to the rates to be charged for public buildings. *Re Pryor* (Kan.) 398

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Gas; liability for negligence in the escape and explosion of gas:—(I.) general doctrine governing such actions; (II.) legislative and municipal control; (III.) evidence: (*a*) in general; (*b*) burden of proof; (*c*) expert testimony; (*d*) sufficient to establish negligence; (*e*) insufficient to establish negligence; (IV.) contributory negligence; (V.) questions for and instructions to the jury; (VI.) effect of contributing causes; (VII.) effect of negligence of third person; (VIII.) act of fellow servant; (IX.) the question of notice; (X.) as between landlord and tenant; (XI.) rights of the owner of the reversion; (XII.) effect of, upon insurance; (XIII.) gas generated by accident; (XIV.) right of action over. 337

GOLD. See also BONDS, 5; JUDGMENT, 1, 2.

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Gold; contract to pay in, see CONTRACTS.

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Executive function of appointment. 113

GUARANTY. See CONTRACTS, 3.

GUN. See HOMICIDE.

GUNPOWDER. See EXPLOSION, NOTES AND BRIEFS.

HEALTH. See also NUISANCES, 1.

A resolution of the state board of health without limitation or restriction, that no pigpen shall be built or maintained within 100 feet of any street or inhabited house, is not a reasonable and legitimate exercise of the power conferred by Vt. Acts 1886, No. 93, § 6, and Vt. Acts 1892, No. 82, § 11, providing that the board shall have authority to promulgate and enforce such regulations for the better preservation of the public health in contagious and epidemic diseases, and regarding the causes which tend to their development and spread, as it shall judge necessary. *State* v. *Speyer* (Vt.) 573

NOTES AND BRIEFS.

Health; regulations to preserve. 574

HIGHWAYS. See also BICYCLES; CONSTITUTIONAL LAW, 22; COUNTIES, 1; EMINENT DOMAIN, 5–14; STATUTES, 15; TELEGRAPHS.

1. Pipes for natural gas cannot be lawfully laid on the surface of a highway. *Lebanon Light, H. & P. Co.* v. *Leap* (Ind.) 342

2. An abutting proprietor is entitled to the use of the street in front of his premises to its full width, as means of ingress and egress and for light and air; and this right is as much property as the soil within the boundaries of his lot. *Willamette Iron Works* v. *Oregon R. & Nav. Co.* (Or.) 88

3. The vacation of a part of a public street constituting a thoroughfare across a railroad track, and the erection of a viaduct in another place, damages a land owner whose property is left upon a blind court, otherwise than in the same manner as the general public, and entitles him to damages, although his property did not abut upon the vacated portion of the street, but only touched it at one corner. *Chicago* v. *Burcky* (Ill.) 563

4. The right of a land owner to damages from the vacation of a portion of a street so as to leave his property upon a blind court is not affected by his subsequent opening of a street which separates his property from the vacated portion of the original street, as his rights are fixed at the time of closing the street. *Id.*

5. The facts that the tracks of a railroad company are laid across city streets, and its freight and passenger cars are permitted by the city to pass over such streets upon such tracks, give the company no exclusive use of the crossing, but only a use to be enjoyed in common with the public. *Chicago, B. & Q. R. Co.* v. *West Chicago Street R. Co.* (Ill.) 485 See also EMINENT DOMAIN.

6. A constitutional provision against a "levying of taxes by the poll" is not violated by a statute which was substantially in force when the constitution was adopted, compelling ablebodied male residents between twenty and fifty years of age to labor two days at least annually in repairing the roads, with the privilege of furnishing a substitute or paying 75 cents per day instead. *Short* v. *State* (Md.) 404

NOTES AND BRIEFS.

Highways; vacation of part as injury to abutting owner. 569

Structure injuring abutting owners. 89

Legislative power as to use of. 89-97

HOMICIDE. See also DESCENT AND DISTRIBUTION; INDICTMENT, ETC., 2.

The right to fix a loaded gun in a building so that it will be discharged on forcing open the front door, and kill a person attempting to enter is a question of fact or mixed fact and law for the jury. *State* v. *Barr* (Wash.) 154

NOTES AND BRIEFS.

Homicide; by means of spring gun, trap, or other dangerous instrument killing trespasser. 154

HORSE RACING. See also EVIDENCE, 4, 14; PLEADING, 5.

1. Grounds on which a public exhibition of horse racing is given, to which the public are invited, must be kept in a reasonably safe and suitable condition for the spectators. *Hart* v. *Washington Park Club* (Ill.) 492

2. Permitting a horse to run in a race knowing it to be dangerous and unsafe by reason of a vicious habit of track bolting, without warning a woman engaged to ride in the same race, of the character of the horse, of which she is ignorant, renders an agricultural society which is promoting, controlling, and conducting the race liable to her for injuries caused by the bolting of such horse during the race. *Lane* v. *Minnesota State Agri. Soc.* (Minn.) 708.

NOTES AND BRIEFS.

Horse race; negligence in conduct of. 708

HOTEL. See INNKEEPERS.

HUSBAND AND WIFE. See also INFANTS.

Wrongfully depriving a wife of the affection, companionship, and society of her husband, gives her a right of action for damages, under Iowa Code, § 2211, which authorizes a wife to maintain actions "for the preservation and protection of her rights and property as if unmarried." *Price* v. *Price* (Iowa) 150

NOTES AND BRIEFS.

Husband and wife; action for alienation of affection. 150

Support of children after divorce. 678

IMPROVEMENTS. See also COTENANTS, 3.

1. A coparcener allowed for improvements may be charged by way of set-off for use and occupation. *Ward* v. *Ward* (W. Va.) 449

2. Permanent improvements made by one coparcener are chargeable to the others personally or upon their shares in the land, only when made by their request or agreement. *Id.*

INDEX. See also REAL PROPERTY, 1.

NOTES AND BRIEFS.

Index; as part of records. 775

INDICTMENT AND INFORMATION.

1. The parts of a book which are obscene, indecent, and impure, when the whole book is not so, must be described or referred to in an indictment so specifically that they can be identified by the evidence, if they are not set out according to their tenor because unfit to appear on the record. *Com.* v. *McCance*, (Mass.) 61

2. An information charging that defendant purposely killed a person named is not insufficient because there was no intent to kill any particular person, but merely to kill any one who might attempt to enter a certain building, under a statute requiring the fact to be stated, but making an information sufficient against such an attack unless the defendant could be misled to his injury. *State* v. *Barr* (Wash.) 154

3. Exclusive ownership of a label need not be alleged in an information under a statute making it a misdemeanor to vend or keep for sale goods upon which any forged, imitation, or counterfeit label shall be placed to represent the goods as those of some other person, association, or union of workingmen. *State* v. *Bishop* (Mo.) 200

NOTES AND BRIEFS.

Indictment; setting out obscene language. 61

INFANTS. See also NEGLIGENCE, 1; TRIAL, 4, 5.

A woman cannot recover from her former husband for necessaries furnished their children, of whom she was given the custody in a decree of divorce based on her fault, without any order respecting their maintenance, unless he has promised to pay for such necessaries or requested that they be furnished. *Fulton* v. *Fulton* (Ohio) 678

INFORMERS.

One who did not contribute to the construction or maintenance of a sidewalk which he has a right to use may be an informer for unlawfully riding a bicycle on the sidewalk, the penalty for which is for the use of a school district. *Com.* v. *Forrest* (Pa.) 365

INJUNCTION. See also WATERS, 6.

1. A court of equity will never lend its aid, by injunction, to restrain the libeling or slandering of title to property, where there is no breach of trust or contract right involved. *Reyes* v. *Middleton* (Fla.) 66

2. Injunctions which are in substance mandatory—that is, requiring some act to be done—may be granted by the courts in proper cases. *Central Trust Co.* v. *Moran* (Minn.) 212

3. Opportunity to acquire the easement of an abutting owner by agreement or condemnation may be given before making an injunction mandatory against an unauthorized approach of a bridge which is in daily use by a large number of electric cars, wagons, and foot passengers. *Willamette Iron Works* v. *Oregon R. & Nav. Co.* (Or.) 88

4. A temporary injunction mandatory in substance, although it may be granted in a proper case under Minn. Gen. Stat. 1878, chap. 66, tit. 11, ought not to be granted, except under peculiar circumstances, and where it is clear that plaintiff will have a final decree and the court can impose such conditions that defendant shall sustain no detriment. *Central Trust Co.* v. *Moran* (Minn.) 212

5. An injunction will not lie at the suit of an abutting owner who does not own the fee to restrain the laying of a street railway in the street, as the damages which he may suffer are merely consequential. *Chicago, B. & Q. R. Co.* v. *West Chicago Street R. Co.* (Ill.) 485

6. An injunction against constructing a trolley road across a steam-railroad track at grade, the effect of which will be dangerous to passengers, cannot be defeated on the ground that it will be simply an injunction against trespassers or involves simply a claim for damages. *New York, N. H. & H. R. Co.* v. *Bridgeport Traction Co.* (Conn.) 367

7. A consumer may enjoin a city which has undertaken to furnish water to its inhabitants from shutting off his supply for the purpose of coercing payment of an old claim against him, after it has accepted the rates and furnished water for subsequent periods. *Wood* v. *Auburn* (Me.) 376

8. The use of the words "U. S. Dental Rooms" and of the letters "U. S." upon the

windows of a dental office may be enjoined at the suit of one who has adopted them as a trade-name against another who by their use is plainly attempting to convey the idea that he is carrying on a branch of the former's business, and so profit from his advertising and business reputation. *Cady* v. *Schultz* (R. I.) 524

9. An injunction to restrain a levy on part of the property of a railroad may be granted in favor of mortgagees of the whole property, under Minn. Gen. Laws 1868, chap. 56, §§ 1-3, which make all the property of the company an entirety as to mortgagees. *Central Trust Co.* v. *Moran* (Minn.) 212

10. A grantee of a part of a tract of land, who is told by the grantor that a well on the boundary line, partially on the land unconveyed, will go with the part sold, is not entitled to an injunction against covering such well with a building, where he has never used it since his purchase, and it has been covered with a flagstone all that time, and pipes connecting it with his buildings are entirely on his land. *Robinson* v. *Clapp* (Conn.) 582

11. A decree enjoining the erection of any building on defendant's property "so near as to exclude the light" from plaintiff's dwelling house is bad for indefiniteness. *Id.*

NOTES AND BRIEFS.

Injunction: against taxes. 507
Against structure in street. 89

INNKEEPERS.

A hotel keeper is not liable for the theft by his night clerk, from the hotel safe, of money of a regular boarder who has lived in the house for some months, if ordinary care and diligence were used in the employment of the clerk. *Taylor* v. *Downey* (Mich.) 93

INSOLVENCY. See also BANKS, 4-6; PARTNERSHIP.

1. The right of a state or municipality, if any exists, to priority or preference of payment from an insolvent's estate, cannot be asserted after a general assignment for creditors, which passes the title. *State* v. *Foster* (Wyo.) 226

2. A statute providing for the release of a claim in full by a creditor who accepts a dividend under an assignment cannot apply to the state or a municipality, under a constitutional provision that such liability can be extinguished only by payment into the proper treasury. *Id.*

3. A deed of trust by an insolvent corporation is not void as matter of law from the fact that the directors vote themselves preferences in payment of debt. *Schufeldt* v. *Smith* (Mo.) 830

NOTES AND BRIEFS.

See also PARTNERSHIP.

Insolvency; extraterritorial effect of. 164

Priority of state or United States in payment from assets of a debtor:—(I.) scope of note generally; (II.) priority of United States: (*a*) upon what based; (*b*) constitutionality of provisions for; (*c*) superiority over state laws; (*d*) construction and scope of: (1) generally; (2) who are debtors of the United States; (3) what debts are within the statute; (4) what constitutes insolvency; (5) sufficiency of assignment to confer priority; (6) sufficiency of attachment to confer priority; (*e*) when and to what it attaches; (*f*) nature and extent; (*g*) marshaling assets; (*h*) liability of assignee or representative; (*i*) subrogation of sureties; (*j*) what amounts to a devestiture of the right; (*k*) how asserted; (III.) priority of the states: (*a*) upon what based; (*b*) constitutionality of provisions for; (*c*) nature and extent; (*d*) to what indebtedness it applies; (*e*) subrogation of surety making payment; (*f*) when it attaches and how devested; (IV.) priority of claims for taxes. 226

INSURANCE. See also CONFLICT OF LAWS, 3.

1. The failure of an insurance company of another state to comply with the statutory prerequisites to the right to do business does not prevent such company from enforcing a claim for premiums due for insurance, although the corporation is guilty of a misdemeanor and subject to a penalty by reason of the insurance. *State Mut. F. Ins. Co.* v. *Brinkley Stave & H. Co.* (Ark.) 712

2. The right to recover unearned premiums on the termination of insurance in a mutual company does not exist until the dues or liabilities which the insured may be liable to pay under the charter and by-laws of the organization can be ascertained and deducted, where the charter provides for withdrawal by notice and "paying all dues and liabilities." *Id.*

3. Smoked meats taken from a smokehouse to a storage-room as fast as they are cured are contents of the smokehouse within the meaning of a policy in separate sums upon a butcher-shop and its contents, and the smokehouse and its contents, where it was the understanding of the parties that the smoked meats taken out of the smokehouse for storage were properly insured as contents of the smokehouse; and recovery may be had therefor when burned with the butcher-shop, although the smokehouse is not burned. *Graybill* v. *Penn Twp. Mut. F. Ins. Asso.* (Pa.) 55

4. A policy of insurance on a building and various articles of personal property therein, separately valued, is not forfeited as to the personal property by virtue of a lack of title to the land, under a provision that the entire policy shall be void if the "subject of insurance be a building on ground not owned by the insured in fee simple," since the building is not alone the subject of insurance. *Bills* v. *Hibernia Ins. Co.* (Tex.) 706

NOTES AND BRIEFS.

Insurance; by foreign corporation. 712
Construction of policy. 55

INTEREST.

1. The allowance of interest upon the value of property destroyed by negligence must be left to the discretion of the jury under Cal. Civ. Code, § 3288. *King* v. *Southern P. Co.* (Cal.) 755

2. A provision for the payment semi-annu-

ally of interest on municipal bonds at a certain per cent is unlawful, where the notice of election which the law requires to state the rate of interest names such per cent payable annually. *Skinner* v. *Santa Rosa* (Cal.) 512

3. The rate of compound interest paid by an executor on funds retained in his hands, which is more than banks would pay for a part of the time, and which has made double the income that could have been obtained by investing the money as directed by the will, will not be increased to the maximum rates at which there is evidence that money could have been loaned, with no allowance for expenses, delays, and failures,—especially where the executor has disbursed more than $50,000 during a long term of years and his accounts for the whole estate have been found correct in every item and there is no delinquency or suspicion of fraud on his part. *Re Ricker's Estate* (Mont.) 622

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Liability of executors, trustees, etc., for compound interest: (I.) origin, growth, and general statement of the doctrine; (II.) principle of the allowance: (III.) option to take interest or profits; (IV.) grounds for allowance: (*a*) generally; (*b*) misconduct or gross delinquency generally; (*c*) use and admixture of trust fund; (*d*) failure or refusal to account; (*e*) neglect to invest; (*f*) improper investment; (*g*) unnecessarily calling in investment; (*h*) neglect in winding up or paying over; (*i*) nonperformance of trusts for accumulation; (*j*) neglect or violation of duty imposed by statute; (*k*) interest or profits made; (*l*) interest or profits which might have been made; (V.) who are chargeable; (VI.) jurisdiction to allow; (VII.) how computed: (*a*) method of computing generally; (*b*) upon what computed; (*c*) when allowance should commence; (*d*) rate per cent and length of rests; (*e*) termination of allowance; (VIII.) what sufficient to release from accountability; (IX.) effect of allowance on compensation; (X.) effect of allowance on costs. 622

INTOXICATING LIQUORS. See MORTGAGE, 6, 7.

IRRIGATION. See EMINENT DOMAIN, 1–3.

JUDGMENT. See also APPEAL AND ERROR; CONSTITUTIONAL LAW, 20; MORTGAGE, 6, 7, 11; SET-OFF, ETC.

1. A judgment payable in United States gold coin is not within the rule that debt will not lie on any obligation except for the payment of a sum specifically certain, as calling for the payment of an unliquidated amount to be determined by the fluctuations of the gold market, but is an obligation to pay in money, or an agreement to deliver a certain weight of standard gold ascertainable by count of coins made legal tender by statute. *Belford* v. *Woodward* (Ill.) 593

2. A default judgment ordering payment of the amount adjudged in gold coin is void as to such provision, where the complaint showed no promise to pay in coin, but is not invalid as a whole. *Id.*

3. A judgment of another state adjudicating a matter not presented by the pleadings or within the issues may be held invalid as to such adjudication, but valid as to other matter which the judgment record shows upon its face to be easily and naturally separable and within the issues. *Id.*

4. A judgment of revival in scire facias to revive a judgment, based upon notice by mail as well as by publication to a resident of the state, is prima facie valid in a collateral proceeding. *Bickerdike* v. *Allen* (Ill.) 782

5. An affidavit in which the affiant "on oath states," but which the certificate of the notary merely states, to have been "subscribed," without saying that it was sworn to before him, on which a scire facias to revive a judgment is based, is not so defective as to defeat the judgment of revival in a collateral proceeding, where this recites that it was made on due proof. *Id.*

6. A judgment for a special assessment against a lot to pay for an improvement is not conclusive against the owner of the lot, who did not appear or defend in the proceeding for such judgment, so as to preclude an action by him for damages to the lot caused by removing the lateral support, and illegally cutting down the grade of the street in front of it in making the improvement for which the assessment was made. *Farrell* v. *St. Paul* (Minn.) 778

7. A judgment against a railroad company becomes a lien on its real property owned at the time of its recovery in the county where it was rendered, including lands acquired for roadway, right of way, depots, and other railroad purposes. *Stewart* v. *Wheeling & L. E. R. Co.* (Ohio) 433

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Judgment; form of judgment and procedure in case of liability to make payment in coin:—(I.) form of judgment: (*a*) on contract to pay coin; (*b*) on contracts for coin or equivalent; (*c*) for coin converted or misapplied; (*d*) for damages in other cases; (*e*) for obligations created by law; (*f*) for costs; (II.) pleadings and procedure. 593

Conclusiveness of. 779

Enforcement in other states. 165

JUDICIAL NOTICE. See EVIDENCE.

JUDICIAL SALE.

1. The sale of the freight house and a portion of the right of way and tracks of a railroad, although at its terminus, cannot be sustained as a mode of collecting an assessment for local improvements. *Lake Shore & M. S. R. Co.* v. *Grand Rapids* (Mich.) 195

2. A judgment creditor may cause the sale of all the property of a railroad company to satisfy his lien, in a proceeding in equity to which all persons interested are made parties

and in which the proceeds may be properly applied, although he cannot have a sale on execution of the property to which the lien attaches, if that is part only of the corporate property and necessary in connection with the balance of the property to enable the company to discharge its public duties, or when the sale would materially impair the uses and value of the balance of the property. *Stewart* v. *Wheeling & L. E. R. Co.* (Ohio) 438

3. An intent to devest a tax lien is not shown by a decree for the sale of property free from mechanics', laborers', materialmen's, and other liens or encumbrances of any kind whatsoever. *Bloxham* v. *Consumers' E. L. & Street R. Co.* (Fla.) 507

4. A tax lien cannot be devested by a judicial sale of property free from liens by order of the court in an action to which the state is not a party, so as to compel the state to look to the proceeds of the sale rather than the property itself for payment of the taxes. *Id.*

JURISDICTION. See APPEAL AND ERROR; COURTS.

JURY. See EMINENT DOMAIN, 4; EVIDENCE, 5.

LABEL. See INDICTMENT, ETC., 3; TRADE-MARK, 1, 2, NOTES AND BRIEFS.

LABOR UNION. See CONSTITUTIONAL LAW, 16, 19, 26, 27; INDICTMENT, ETC., 3; TRADE-MARK, 1-3.

LANDLORD AND TENANT.

1. A covenant in a lease of railroad property used for warehouse purposes, relieving the company from liability for loss by fire, does not bind an agent of the lessee in charge of the property, a stranger to the lease, who stores his own property in the warehouse. *King* v. *Southern P. Co.* (Cal.) 755

2. The occupancy of a part of a schoolhouse as a residence by a teacher for the purpose of enabling him the better to perform his contract to teach does not make him a tenant of the school district employing him, but his occupation is that of the district. *Alpine Twp. School Dist. No. 11* v. *Batsche* (Mich.) 576

3. A person lawfully in possession of land, who holds over without right, becomes a tenant at sufferance if the owner permits him to remain a sufficient length of time to imply an intentional acquiescence in the occupancy, although his previous holding was not that of a tenant; and a consent to the occupancy, either express or presumed from lapse of time, is not essential to create that relation. *Id.*

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Landlord and tenant; negligence of, in respect to gas. 358

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Use and occupation; school district as landlord. 577

LEASE. See CONTRACTS, 8.

LEAVE. See QUO WARRANTO, 1.

LEGISLATURE. See OFFICERS, 2.

LEVY AND SEIZURE. See EXECUTION; INJUNCTION, 9; MORTGAGE, 13.

LIBEL. See also INJUNCTION, 1; PLEADING, 13.

1. Falsely to publish of a person that he "would be an anarchist if he thought it would pay" is libelous. *Lewis* v. *Daily News Co.* (Md.) 59

2. Where it appears from a complaint in an action for libel based on an allegation in a pleading in another action, that the defamatory allegation was wholly gratuitous, irrelevant, and immaterial, that it was well known by defendant to be false and untrue, and that it was published without cause or justification and with express malice,—it is not privileged. *Sherwood* v. *Powell* (Minn.) 153

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LIBRARY. See COLLEGES.

LICENSE. See also BROKERS, 2; COMMERCE, 2, 3; CONSTITUTIONAL LAW, 25; MUNICIPAL CORPORATIONS, 6, 7; PATENTS; PEDDLERS; STATUTES, 16.

1. An ordinance for the licensing of transient merchants is not to be regarded as discriminating against nonresidents merely because there may not be any resident merchants who are compelled to pay the license. *Ottumwa* v. *Zekind* (Iowa) 734

2. A license fee of $250 per month, or $25 per day for shorter periods, exacted from transient merchants by an ordinance, is excessive and invalid, amounting to an exercise of the taxing power rather than a police measure. *Id.*

3. A privilege tax on a street-car company is not within Colo. Const. art. 10, § 3, requiring "all taxes" to be uniform on the same class of subjects. *Denver City R. Co.* v. *Denver* (Colo.) 608

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See also COMMERCE.

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LIENS. See JUDGMENT, 7; TAXES, 17-19; VENDOR AND PURCHASER, 3.

LIGHT. See EASEMENTS, 2; INJUNCTION, 11.

LIMITATION OF ACTIONS.

1. A foreign contract between nonresidents may constitute a cause of action within the meaning of a statute providing that if any person liable to an action shall be absent from the state when it accrues he shall have no benefit of the statute of limitations while such absence continues. *Mason* v. *Union Mills Paper Mfg. Co.* (Md.) 273

2. A nonresident of the state whose obligation is sought to be enforced by another nonresident through garnishment of funds in the hands of a resident is within the provisions of a statute that any person liable to an action who is absent from the state when it accrues shall have no benefit of the statute of limitations while the absence continues. *Mason* v. *Union Mills Paper Mfg. Co.* (Md.) 273

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As to nonresidents. 273

LIS PENDENS.

1. Actions and judgments in the courts of the United States are not affected by Ohio Rev. Stat. § 5056, providing that a certified copy of a judgment must be recorded in the county in which property is situated before third persons in that county will be charged with notice of an action or judgment in another county affecting the property. *Stewart* v. *Wheeling & L. E. R. Co.* (Ohio) 438

2. A suit in a federal court to foreclose a railroad mortgage is constructive notice throughout the district, so that the decree will bind all persons acquiring an interest in or lien on any part of the property during the pendency of the suit. *Id.*

LOBSTERS. See CARRIERS, 10.

MANDAMUS.

1. Mandamus to compel officers to turn over funds can be granted only to the extent of the funds that are in the treasury, although they may have improperly disposed of a part of the funds which they should have turned over. *Duval County Comrs.* v. *Jacksonville* (Fla.) 416

2. Mandamus may issue to county commissioners to turn over road funds in the county treasury by issuing a warrant for that purpose, when the law makes it their duty to turn over the funds, and the money can only be drawn on a warrant issued pursuant to their order. *Id.*

3. An order directing a railroad company to restore and operate a passenger train as before is not final or conclusive under the Kansas statute, and cannot be specifically enforced in the courts by mandamus. *State, Kellogg,* v. *Missouri P. R. Co.* (Kan.) 444

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Mandamus; to compel acts by corporations. 444

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Marshaling; of assets as affecting priority of state or United States. 238

MASTER AND SERVANT. See also CARRIERS; CONSTITUTIONAL LAW, 10, 12, 15, 16, 18, 19, 24, 27; PROXIMATE CAUSE, 1; STATUTES, 8.

1. A statute providing that no female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week, prohibits both the employer and the employé from entering into a contract of employment for a greater time and restricts their right to contract with each other with reference to the hours of labor. *Ritchie* v. *People* (Ill.) 79

2. A railroad employé is not bound to report to the company facts which it already knows. *Pennsylvania Co.* v. *McCaffrey* (Ind.) 104

3. A railroad company which requires a train crew to be on duty nineteen hours each day, without time for rest or food, is liable for an injury to a track hand, caused by the attempt of some of the crew to operate the train while others have temporarily left it to procure food. *Id.*

4. It is not negligence for a conductor and engineer of a train to leave it to procure food after thirteen hours of consecutive service, with no provision made by the company for a food supply. *Id.*

5. A railroad company is liable for injuries to a track hand, which are caused by its attempt to operate a train with only a fireman and a brakeman. *Id.*

6. A section boss, knowing the custom of a portion of a train's crew to leave it at a certain time for food, is not charged with the duty of ascertaining that they have not left it before attempting to put his car on a track which the train has passed, for fear the train may back on him without warning. *Id.*

7. The effort of a section boss to save a hand car in his charge from injury by a train backing towards it is not negligence as matter of law, although in trying to get away after ascertaining that the car cannot be saved he falls under it and is injured, if he acts naturally, and not recklessly, although by acting differently he might have escaped. *Id.*

8. A section man is not a fellow servant of a fireman or one employed to load tenders with coal. *Union P. R. Co.* v. *Erickson* (Neb.) 137

9. Consociation in the same department of duty or line of employment is necessary to make fellow servants. *Id.*

10. Minn. Gen. Laws 1887, chap. 13, making railroad companies liable for injuries sustained by the negligence of fellow servants, is not applicable to street railways, although operated by cable. *Funk* v. *St. Paul City R. Co.* (Minn.) 208

11. The boss or foreman of a gang of men unloading and leveling dirt on a railroad, who is under the immediate control of a railroad official who is often present, sometimes daily, directing the work, is a fellow servant of a member of the gang who is injured by the foreman's failure to give notice that the train is about to move, whether he had authority to hire and discharge the men under him, or not. *Schroeder* v. *Flint & P. M. R. Co.* (Mich.) 321

12. One engaged in repairing a house is not

relieved from liability for injury thereto by fire through the negligence of his workmen, because he furnished proper appliances and competent workmen. *Shafer* v. *Lacock* (Pa.) 254

13. A mine foreman is personally liable for his negligence causing injury to a workman in the mine, either under Pa. Act of 1891 permitting only certified foremen to be employed and regulating their duties, or without regard to such statute. *Durkin* v. *Kingston Coal Co.* (Pa.) 808

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See also BAILMENT.

Who are fellow servants. 138

Foreman as fellow servant. 321

Negligence of fellow servant causing explosion. 358

Assumption of risks in service. 105

MAXIMS.

1. A grantor cannot be allowed to derogate from his own grant. *Robinson* v. *Clapp* (Conn.) 582

2. A grantor is presumed to convey, so far as it is in his possession, whatever is necessary for the reasonable enjoyment of the thing conveyed. *Id.*

3. Res ipsa loquitur. *Hart* v. *Washington Park Club* (Ill.) 492; *Judson* v. *Giant Powder Co.* (Cal.) 718

4. Sic utere tuo ut alienum non lædas. *Brim* v. *Jones* (Utah) 97

5. Stare decisis. *Denver City R. Co.* v. *Denver* (Colo.) 608

6. Volenti non fit injuria. *Judson* v. *Giant Powder Co.* (Cal.) 718

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Loss between innocent parties. 607

MINES. See MASTER AND SERVANT, 13.

MONEY. See BONDS, 5; CONTRACTS, NOTES AND BRIEFS; JUDGMENT, 1, 2, NOTES AND BRIEFS.

MORTGAGE. See also BONDS, 4; COSTS AND FEES, 3; PLEADING, 10, 11; REAL PROPERTY; SUBROGATION; TAXES, 17, 19.

1. The transfer of a note secured by a mortgage carries with it the mortgage also. *Parke* v. *Randolph* (S. D.) 33

2. Bona fide purchasers for value before maturity of genuine notes accompanied by a forged copy of a recorded mortgage securing them, which the purchasers took on the faith of the records, are entitled to the security of the mortgage as against persons to whom the assignor had previously sold forged copies of the notes accompanied by an assignment and delivery of the genuine mortgage. *Kernohan* v. *Manss* (Ohio) 317

3. That commissioners appointed to make partition of a decedent's estate refused to recognize any value in second-mortgage bonds taken for property sold to a corporation will have no bearing upon the question whether or not such bonds shall be given priority over the first-mortgage bonds, which were issued to promoters, because of their fraud in procuring their preference. *Hooper* v. *Central Trust Co.* (Md.) 262

4. A stipulation in second-mortgage bonds of a corporation that they shall not be enforced against the individual estate of stockholders, will not prevent equity from refusing to enforce a first mortgage held by such stockholders until they have paid for their stock. *Id.*

5. First mortgagees will not be permitted by equity to assert their lien against the property in preference to a grantor's lien for unpaid purchase money, a waiver of which they procured by a fraudulent device so as to let in their mortgage as a first lien, although the grantors agreed to take a second mortgage as security, which on its face declares that it is subject to the lien of the first. *Id.*

6. The interest of a prior mortgagee cannot be displaced by the lien of a judgment for damages in consequence of the sale of intoxicating liquors, under the Illinois Dramshop Act, § 10, providing that if any person shall rent or lease to another any building to be used for the sale of such liquors, or knowingly permit it to be so used or occupied, it may be sold to pay any such judgment against any occupant. *Bell* v. *Cassem* (Ill.) 571

7. The provision of the Illinois Dramshop Act, § 10, making the building and premises where intoxicating liquors are sold with permission of the owner liable to sale under a judgment against the occupant for damages from the sale of such liquors, applies only to owners or those having a rentable interest in the property, and not to a contingent interest, such as that of a mortgagee. *Id.*

8. A grantee of mortgaged property is personally liable to the owner of the mortgage under his assumption of the payment of the mortgage debt as part of the consideration of the conveyance to him, without reference to whether his immediate grantor is liable or not. *Hare* v. *Murphy* (Neb.) 851

9. The purchaser of a mortgage obtains no rights as against a prior mortgagee by the wrongful act of his own agent in discharging the prior mortgage, which remained in his possession after the transfer of a note which was secured by it. *Parker* v. *Randolph* (S. D.) 33

10. A purchaser of railroad property on foreclosure takes it discharged from all liens and interests acquired pending the suit by persons charged with constructive notice thereof, although they were not made parties to the suit, and the latter must seek satisfaction from the proceeds of the sale. *Stewart* v. *Wheeling & L. E. R. Co.* (Ohio) 438

11. A judgment recovered in a state court against a railroad company before commencement of a foreclosure suit, by a creditor who was not made a party on foreclosure, is unaffected by the decree and sale. *Id.*

12. The proceeds of a resale of railroad property on behalf of a judgment creditor, after sale in a foreclosure suit to which he was not made a party, must first be applied to the satisfaction of encumbrances superior to his

lien, if there be any, including those set up in the foreclosure suit. *Stewart* v. *Wheeling & L. E. R. Co.* (Ohio) 438

13. The lien of a chattel mortgage upon property exempt from execution is not waived by obtaining judgment upon the notes secured by the mortgage and levying upon the mortgaged property under execution thereon, although the exempt property is set off to the debtor as such; but such lien may be enforced under the terms of the mortgage in a jurisdiction where the mortgage creates only a lien and does not transfer the legal title, as there is no such inconsistency between remedies as there would be where the levy asserted title in the mortgagor while the enforcement of the mortgage claimed title in the mortgagee. *Barchard* v. *Kohn* (Ill.) 803

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Mortgage; as incident to note secured by it. 318

Priority as to judgment. 572

Assumption of, by grantee. 851

Chattel, how enforced. 804

MUNICIPAL CORPORATIONS. See also BONDS, 5, 6; CONSTITUTIONAL LAW, 1; CONTRACTS, 6, 7; COUNTIES, 1; ESTOPPEL, 1, 2; GAS, 4; INSOLVENCY, 1; LICENSE, 1; SALE, 1–3; STATUTES, 16; TELEGRAPHS; WATERS, 5.

1. The right of a municipal corporation to exercise the authority, powers, and functions of an incorporated city, can be questioned only in a direct proceeding prosecuted by the proper public officers, and not by private action for an injunction against taxes. *Kuhn* v. *Port Townsend* (Wash.) 445

2. Mere irregularities and informalities not affecting jurisdiction afford no ground for collateral attack on proceedings to annex territory to a city. *Id.*

3. The mayor cannot adjourn either of the two branches of the general council alone, under authority of a charter providing that if they cannot agree on an adjournment he "shall adjourn them to a day not beyond the regular time of meeting." *Tillman* v. *Otter* (Ky.) 110

4. The mayor of a city has no power to adjourn the general council to a time beyond that at which it is directed by statute to elect a certain city official, for the purpose of depriving it of power to make such election and permitting it to be done by the alternative electing body provided by the statute in case of the council's failure to elect. *Id.*

5. The majority of one branch of the general council of a city cannot, by refusing to consent to fix a time for the election of a city official whom a statute requires the council to elect, and by remaining away from the meeting, prevent the remaining members of the general council, who constitute a majority of both branches, from making a valid election. *Id.*

6. A city whose charter provides therefor may collect a license imposed by it on street cars by enforcing a penalty for failure to pay for the license. *Denver City R. Co.* v. *Denver* (Colo.) 608

7. A city has power to pass an ordinance requiring a license to hawk and peddle therein, under Burns's (Ind.) Rev. Stat. 1894, § 3541, empowering cities to "restrain" hawking and peddling. *South Bend* v. *Martin* (Ind.) 531

8. A corporation composed of private individuals, not restrained by law from conducting its business for private benefit, which does not report to and is not inspected by any state official, which elects its own managers without the state's approval, and by law owes the state no duty,—is a private corporation within the provisions of the Illinois Constitution prohibiting municipalities from making donations to private corporations. *Washingtonian Home* v. *Chicago* (Ill.) 798

9. A city having the power to pave streets and pay therefor from its treasury is liable for the cost of paving under a contract providing that assessments shall be accepted by the contractor in payment, and that the city shall not be otherwise liable under the contract, whether the assessments are collectible or not, where the statute under which they are made is held invalid and the assessments are therefore without authority, as the contract contemplates valid charges on the property, and failure to make the required assessments renders the city in default upon the contract. *Barber Asphalt Pav. Co.* v. *Harrisburg* (C. C. App. 3d C.) 401

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Municipal corporations; validity of annexation to. 446

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NAME. See TRADE-MARK, 6.

NATURAL GAS. See GAS.

NAVIGATION. See DAMAGES, 3; NUISANCES, 3, 4.

NEGLIGENCE. See also AGRICULTURAL SOCIETIES; CONTRACTS, 8; EVIDENCE, 13–17; EXPLOSION, 2; GAS, 1–3; HORSE RACING; LANDLORD AND TENANT, 1; MASTER AND SERVANT; PLEADING, 5–9; TRIAL, 4–9.

1. A child nine years of age is not guilty of negligence if he exercises that degree of care which under like circumstances would reasonably be expected from one of his years and intelligence. *Lake Erie & W. R. Co.* v. *Mackey* (Ohio) 757

2. A railroad company is not liable for injuries to a licensee by the sliding of a bank along the top of which was a footpath which he was using, in consequence of the removal of a boulder to prevent its falling on the tracks, unless the person doing the work knew that such removal left the path unsafe, and failed to use reasonable precautions to avoid injury

to persons likely to use it, or to notify them of the danger. *Norfolk & W. R. Co.* v. *Wheeler* (Va.) 825

NOTES AND BRIEFS.

See also CONTRACTS; EXPLOSION; GAS.

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What constitutes. 138
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NITRO-GLYCERINE. See EVIDENCE, 16; EXPLOSION, NOTES AND BRIEFS.

NONRESIDENT. See ATTACHMENT, 1; CONFLICT OF LAWS, 1; LICENSE, 1; LIMITATION OF ACTIONS.

NOTICE. See also TAXES, 16.

1. The principal is not chargeable with the knowledge of the agent in relation to a fraud which he perpetrates in collusion with the other party. *Hickman* v. *Green* (Mo.) 39

2. Notice to a special agent employed to make a certain exchange of property, without any authority to pass upon the title, of matters connected with the title to the property obtained in the exchange, is not imputed to the principal,—especially when the agent was acting for the other party also, and his concealment of the facts was a fraud on his principal. *Id.*

3. Possession of premises by a woman who furnishes to her vendee as evidence of her title a quitclaim deed to herself, with an abstract showing a perfect record title in her grantor, does not charge her vendee with notice of a prior unrecorded warranty deed from the same grantor to her and the heirs of her body. *Id.*

NUISANCES. See also EVIDENCE, 12; HEALTH.

1. Property which is itself a nuisance endangering the public health or safety may be destroyed by the municipal authorities without compensation to the owner, under a provision of the charter conferring the power to abate such nuisances, where it is first condemned as a nuisance by appropriate proceedings, or its destruction is really necessary to the public health or safety, and an emergency exists. *Savannah* v. *Mulligan* (Ga.) 303

2. A private action for a public nuisance may be maintained by one who is not the sole or even a peculiar sufferer, if his grievance is not common to the whole public, but is a common misfortune of a number or even a class of persons. *Farmers Co-Op. Mfg. Co.* v. *Albemarle & R. R. Co.* (N. C.) 700

3. The fact that a boat was doing business as a common carrier, as well as for the manufacturers who owned it, does not preclude a private right of action by the owner for obstruction of navigation. *Id.*

4. The owner of a boat, whether licensed or not, and whether other individuals own boats similarly engaged in navigating a river or not, may have a private action for an obstruction to a navigable river, where his boat was engaged in transporting material for manufacturing purposes from a point below the obstruction to a point above it. *Id.*

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OATH. See JUDGMENT, 5; REAL PROPERTY, 3.

OBSCENITY. See INDICTMENT, ETC., 1.

OFFICERS. See also APPROPRIATIONS, 1; CONSTITUTIONAL LAW, 4; CONTRACTS, 6, 7; EVIDENCE, 7; MANDAMUS, 1, 2; STATUTES, 10.

1. A certificate of qualification from a judge, obtained after election as county court clerk, but before the term of office began, is sufficient in this respect under Ky. Const. § 100, providing that no person shall be "eligible to the office" unless he has procured such certificate, while it expressly makes the eligibility for certain offices, so far as age and residence are concerned, depend on the time of the election. *Kirkpatrick* v. *Brownfield* (Ky.) 703

2. The general assembly may appoint to all offices existing and not otherwise provided for at the time of the adoption of the Indiana constitution, by virtue of art. 15, § 1, authorizing their choice "in such manner as now is or hereafter may be prescribed by law," and other clauses of the constitution referring to offices "the appointment to which is vested in the general assembly." *French* v. *State, Harley* (Ind.) 113

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PARENT AND CHILD. See INFANTS.

PARLIAMENTARY LAW. See also MUNICIPAL CORPORATIONS, 3-5.

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Adjournment of body; quorum. 110

PARTIES. See ACTION OR SUIT.

PARTITION.

In dividing the proceeds of property which was unsusceptible of partition, a coparcener who has made repairs and permanent improvements upon the property, for which he could not compel contribution, may be allowed from such proceeds to the amount by which the property at the date of the sale remains enhanced in value from the improvements, but not for their original cost. *Ward* v. *Ward* (W. Va.) 449

PARTNERSHIP. See also ATTACHMENT, 3; ATTORNEYS, 1; TAXES, 18, 20.

1. Members of a company which fails in an attempt to acquire corporate existence must be given the advantages as well as the liabilities of a partnership. *Jones* v. *Aspen Hardware Co.* (Colo.) 143

2. The giving of firm paper for individual debts of the partners for money borrowed and contributed by them individually to the firm capital cannot be declared fraudulent merely because the firm was at the time insolvent, or was made so by the act of making the notes. *Re Edwards & W.'s Estate* (Mo.) 681

3. Individual debts of partners may, in the absence of fraud, be converted into firm debts which will share equally with other firm debts in case of dissolution, by an agreement between the partners to that effect and the execution of firm paper for them. *Id.*

NOTES AND BRIEFS.

Partnership; assumption by a partnership of individual debts of the partners:—(I.) the general rule; (II.) the question of insolvency; (III.) the question of fraud; (IV.) assumption held sufficient; (V.) insufficient assumption; (VI.) by mortgage of firm property; (VII.) by new firm of debts of old firm; (VIII.) assumption of debt originally incurred for firm benefit. 681

PATENTS.

A state statute requiring a license for the sale of patent-rights is in violation of the rights of the patentee under federal law. *Com.* v. *Petty* (Ky.) 786

NOTES AND BRIEFS.

Patents; power of state to restrict and regulate the sale or enjoyment of patent rights:—(I.) as to sales: (*a*) sales of patent rights; (*b*) sales of patented articles; (II.) police regulations of other business in which patents are used; (III.) restricting right of action for infringement; (IV.) taxation of patent rights. 786

PEDDLERS. See also COMMERCE, 3; MUNICIPAL CORPORATIONS, 7.

One engaged in going personally from house to house, and selling chairs and delivering them at the time of the sale, is a peddler within an ordinance requiring peddlers to obtain a license. *South Bend* v. *Martin* (Ind.) 531

PENALTY. See also FERRIES, 5; MUNICIPAL CORPORATIONS, 6.

NOTES AND BRIEFS.

Penalties; compulsory evidence against one's self in case of. 813

PIGPEN. See HEALTH.

PLEADING. See also EVIDENCE, 17; LIBEL, 2.

1. An objection that a suit should have been brought at law, instead of in equity, cannot be taken by demurrer. *Bibbins* v. *Clark* (Iowa) 278

2. That a purchaser was not able to fulfill his contract so as entitle the broker to commissions on the sale is not shown by an allegation that an extension of time for payment after the first draft was due was requested because the purchaser was not able to pay it "at that time." *Fairly* v. *Wappoo Mills* (S. C.) 215

3. A prayer of a complaint for damages for breach of a contract, and one for specific performance of the same, based upon the same facts, do not render the complaint obnoxious to the objection that it joins several causes of action without separately stating them. *San Diego Water Co.* v. *San Diego Flume Co.* (Cal.) 839

4. Averments that notice of dishonor was received in due time by the acceptor and at once delivered to the drawer and indorser by him are mere conclusions of the pleader and do not sufficiently state due diligence. *Sebree Deposit Bank* v. *Moreland* (Ky.) 305

5. A declaration does not sufficiently allege negligence of the person conducting a public exhibition of horse racing by stating an invitation to the public and that a spectator, while in the place set apart for such persons and without fault on his part, was struck and injured by a runaway horse, without further allegations as to the place of the injury or defendant's control over the immediate cause of it. *Hart* v. *Washington Park Club* (Ill.) 492

6. A complaint charging a gas company with negligence in failing to cut off the supply of gas from a building in which there was a defective pipe, and denying that plaintiff was guilty of contributory negligence, is insufficient to show that the negligence of such company was the efficient cause of an injury to plaintiff from an explosion, as this would be impossible without some agency acting upon the leaking gas. *McGahan* v. *Indianapolis Natural Gas Co.* (Ind.) 355

7. Striking from the complaint in an action to recover damages for negligent injuries the allegation that defendant was a common carrier of passengers is not error, unless other allegations show that the relation of carrier and passenger existed between plaintiff and defendant. *Donovan* v. *Hartford Street R. Co.* (Conn.) 297

8. A cause of action is stated by a complaint which alleges that the railroad company moved a train without signals or guards, or any one except a fireman in charge of it, back upon and injured a track hand free from fault. *Pennsylvania Co.* v. *McCaffrey* (Ind.) 104

9. Allegations of negligence of a railroad company in unlawfully stopping a freight train more than five minutes across a public highway, and wrongfully and negligently backing it while a person was attempting to cross between the cars, are not separable in the sense that only one would be the proximate cause of the injury, but together constitute a sufficient allegation of negligence as against a general demurrer. *Lake Erie & W. R. Co.* v. *Mackey* (Ohio) 757

10. A prayer for payment of stock subscriptions cannot properly be inserted in a crossbill filed by second mortgagees on corporate property in a suit to foreclose a first mortgage held by stockholders of the corporation, the priority of which over the second mortgage is attacked on the ground of fraud. *Hooper* v. *Central Trust Co.* (Md.) 262

11. A crossbill by second mortgagees is not so far foreign to a bill filed to foreclose the first mortgage as to be improper, where the matter alleged is the same as set out in the answer, and

attacks the priority of the first mortgage, seeking to establish that of the second, and the question of priority cannot be adjusted without the aid of the crossbill. *Id.*

12. A plea in a proceeding in the nature of quo warranto for the dissolution of a corporation, alleging that respondent has fully performed all its duties arising out of its charter by providing a system of waterworks of sufficient capacity and power to furnish the city an abundant supply of water, does not deny an allegation in the petition that respondent failed to supply the city and its inhabitants with such water. *Capital City Water Co.* v. *State, Macdonald* (Ala.) 743

13. Defining alleged libelous terms in a paraphrastic way, and pointing out that they were intended to apply to the plaintiff, is strictly within the office of an innuendo. *Lewis* v. *Daily News Co.* (Md.) 59

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Pleading; averment as to particulars of personal injury. 287

Allegation of libel. 59

Use of crossbill. 263

POLICE POWER. See CONSTITUTIONAL LAW, 13–16.

POLL TAX. See also HIGHWAYS, 6.

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Poll taxes:—(I.) what are poll taxes; (II.) power to impose; (III.) restrictions and limitations; (IV.) the restriction and equation of the North Carolina constitution; (V.) upon what imposed; (VI.) place of taxation; (VII.) the levy and collection; (VIII.) disposition; (IX.) payment of poll taxes as a qualification of electors. 404

PRESUMPTIONS. See EVIDENCE.

PRINCIPAL AND AGENT. See BROKERS; CONTRACTS, 7; MORTGAGE, 9; NOTICE, 1, 2; SALE, 1.

PRIVATE ACTIONS. See MUNICIPAL CORPORATIONS, 1; NUISANCES, 2, 3.

PROFANITY. See CARRIERS, 2, 3.

PROMOTERS. See CORPORATIONS, 3–6; RECEIVERS, 4.

PROXIES. See CORPORATIONS, 10, NOTES AND BRIEFS.

PROXIMATE CAUSE.

1. Requiring a train crew to be on duty nineteen hours each day, without time for food, is the proximate cause of an injury to a track hand by the train's backing on him without warning while the fireman is the only member of the crew on board, the brakeman being off to operate a switch and the others in search of food. *Pennsylvania Co.* v. *McCaffrey* (Ind.) 104

2. The negligence of a bandman in walking close to an electric-railway track while playing his instrument cannot, as a matter of law, be said to be the proximate cause of his injury by a car overtaking him, where the evidence would justify a finding that the motorman was guilty of reckless and wanton conduct as to the speed with which he approached the band. *Montgomery* v. *Lansing City Elec. R. Co.* (Mich.) 287

PUBLIC IMPROVEMENTS. See also JUDGMENT, 6; JUDICIAL SALE, 1; MUNICIPAL CORPORATIONS, 9.

A tax on a railroad "in lieu of all other taxes" does not exempt it from assessments for local improvements. *Lake Shore & M. S. R. Co.* v. *Grand Rapids* (Mich.) 195

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Public improvements; exemption from assessments for; charge on railroad property. 196

PUBLIC MONEYS. See BANKS, 5.

QUITCLAIM. See DEEDS; NOTICE, 3; REAL PROPERTY, NOTES AND BRIEFS; VENDOR AND PURCHASER, 1, 2.

QUO WARRANTO. See also CORPORATIONS, 1; COSTS AND FEES, 1, 2; PLEADING, 12.

1. The relator in a proceeding in the nature of quo warranto for the dissolution of a corporation need not obtain leave or an order of court to institute and prosecute such proceedings. *Capital City Water Co.* v. *State, Macdonald* (Ala.) 743

2. A proceeding in the nature of quo warranto for the dissolution of a corporation need not be commenced by summons and complaint under Ala. Code, §§ 2651, 2652, requiring all "civil actions," except as otherwise provided, to be so commenced. *Id.*

3. An action in the nature of quo warranto may be maintained in the name of the state by the attorney-general to oust the Board of Regents of the University of Kansas from the exercise of corporate powers in excess of those conferred on it by law. *State, Little,* v. *Regents of University* (Kan.) 378

4. The assumption by the Board of Regents of the State University of the power to collect fees from students for use of the library, and to exclude students from the library for nonpayment thereof, is an unwarranted assumption of corporate powers from the exercise of which they will be ousted by suit brought in the name of the state by the attorney-general. *Id.*

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Quo warranto; against corporation. 743

RAILROADS. See also CARRIERS, 6, 11; COMMERCE, 2; CONTRACTS, 4, 8; COSTS AND FEES, 3; EMINENT DOMAIN, 12, 14; EVIDENCE, 11; EXECUTION; FERRIES, 1, 6; HIGHWAYS, 5; INJUNCTION, 6, 9; JUDGMENT, 7; JUDICIAL SALE, 2; LANDLORD AND TENANT, 1; MANDAMUS, 3; MASTER AND SERVANT; MORTGAGE, 10; NEGLIGENCE, 2; PLEADING, 7–9; PROXIMATE CAUSE, 1; STATUTES, 14; TAXES, 7, 13, 14; TRIAL, 4–7.

1. The fact that a railroad is not fenced, in the absence of a statutory requirement, does

not make a railroad company liable for injuries to a person who was driving along a highway parallel to the track. *Reynolds* v. *Great Northern R. Co.* (C. C. App. 8th C.) 695

2. Compensation to a railroad company for the inconvenience to it is not a necessary condition to the crossing of its tracks at grade by an electric street railway under legislative authority. *New York, N. H. & H. R. Co.* v. *Bridgeport Traction Co.* (Conn.) 367
See also EMINENT DOMAIN, 9–14.

3. The duty to give warning signals of the approach of a train at a crossing, imposed by Dak. Comp. Laws 1887, § 3016, does not extend to a person driving along a highway parallel to the railroad, who has not lately used and does not intend to use any crossing, although he expects a signal to be given at a private crossing near by. *Reynolds* v. *Great Northern R. Co.* (C. C. App. 8th C.) 695

4. The term "any other road," in Dak. Comp. Stat. 1887, § 3016, providing for railroad signals at crossings of other roads, refers only to public highways, and not to a private crossing. *Id.*

5. A person driving along a highway 10 or 12 feet distant from and parallel to a railroad track, with a buffalo coat turned up against his ears, while the wind is blowing so that he does not hear a train coming behind him, but who does not look behind him to see the train, or drive with tight reins so as to prevent his horse, which is gentle, from drawing him against the train as it passes, is guilty of such negligence as will prevent recovery for injuries thereby received. *Id.*

NOTES AND BRIEFS.

See also EMINENT DOMAIN.

Railroads; signals at crossings. 695
Rights as to grade crossings. 368
Negligence causing injury at crossings. 757

REAL PROPERTY. See also DEEDS; NOTICE, 3; VENDOR AND PURCHASER, 1, 2.

1. Failure of the officer to index a mortgage is not fatal to its validity, in the absence of any statute making the indexing a part of the recording. *Armstrong* v. *Austin* (S. C.) 772

2. A mortgage covering both real and personal property was properly recorded in a lien and mortgage book, under S. C. Rev. Stat. 1872, p. 422, chap. 82, § 2, requiring a real-estate mortgage to be recorded in the register's office, without specifying in what book the record should be made. *Id.*

3. Failure of a subscribing witness to a mortgage to sign an affidavit made by him does not invalidate the affidavit so as to prevent the record of the mortgage in the absence of a statute or rule of court requiring such signing. *Id.*

NOTES AND BRIEFS.

Real property; the effect of a quitclaim deed in an otherwise perfect record title:—as to latent equities; purchaser with notice; other rulings; distinction between conveyance of land and of mere interest; doctrine of United States Supreme Court; where not protected; where entitled to protection; the Iowa doctrine; necessity of care; remote quitclaim in chain of title. 33

RECEIPT. See EVIDENCE, 20, NOTES AND BRIEFS.

RECEIVERS. See also ATTORNEYS, 2; BANKS, 4; BUILDING AND LOAN ASSOCIATIONS, 9, 11; TRUSTS, 2.

1. A receiver appointed by the courts of one state cannot sue in another state to recover property belonging to the estate, which has never been in his possession. *Commercial Nat. Bank* v. *Matherwell Iron & S. Co.* (Tenn.) 164.

2. The receiver in insolvency of a building association is the proper person to ascertain the amount of losses of the association, and make an assessment on the members to meet the same. *Eversmann* v. *Schmitt* (Ohio) 184

3. Vested liens upon the property of individuals and private corporations cannot be displaced by means of receivers' certificates. *Hooper* v. *Central Trust Co.* (Md.) 262

4. Receivers' certificates issued to a promoter of a corporation for money advanced to pay for improvements put on the corporate property will not be given priority over the rights of the seller of the property, who waived his lien upon the fraudulent guaranty by another promoter at the time of the sale that money was in his possession which would be applied to pay for such improvements. *Id.*

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Receivers; extraterritorial powers. 164

RECITAL. See EVIDENCE, 19.

RECORDS. See REAL PROPERTY, NOTES AND BRIEFS; VENDOR AND PURCHASER, 2.

REFERENCE.

1. An exception to the report of a commissioner, which is not made within ten days, is not sufficient under W. Va. Code, chap. 129, § 7, to permit any new evidence which would reopen the report, but is effectual only to support a motion for a recommital of the report, or a claim for a rehearing. *Ward* v. *Ward* (W. Va.) 449

2. A point as to variance in the clerk's signature to the certificate of record and to the affidavit attached to a mortgage, not raised before a master or passed upon by him, or raised by any exception to his report, cannot be considered by the court in passing upon such report, for the purpose of invalidating the mortgage. *Armstrong* v. *Austin* (S. C.) 772

RELIGIOUS SOCIETIES.

1. The administrative duties of the supreme body of a religious organization may be delegated. *Krecker* v. *Shirey* (Pa.) 476

2. The duty to fix a time and place for holding the general conference of a religious organization is administrative when the laws of the organization provide for the holding of such

conferences at regular intervals, and name the bodies which shall fix the day and place at which they shall be held. *Id.*

3. The appointment of the place of meeting of the next general conference of a religious organization, and giving notice thereof to the annual conferences in time for them to select delegates to represent them in the general conference, by a standing board of the general conference, to which the duty was delegated by the conference, is a fixing of such place according to laws of the organization which place the duty upon the general conference, so as to prevent action by the oldest annual conference, upon which the duty is devolved in case the general conference fails to act. *Id.*

4. The laws of an ecclesiastical body will be recognized and enforced by the civil courts when not in conflict with the constitution and laws of the state. *Id.*

5. An exposition by the supreme judicial tribunal of a religious association, of a provision of the discipline to the effect that under it a second trial after one acquittal upon substantially the same charges is illegal, is binding upon the members of the association and must be respected by the civil courts. *Id.*

6. Decisions of ecclesiastical courts which plainly violate the law they profess to administer, or are in conflict with the laws of the land, will not be followed by the civil courts. *Id.*

7. The question of the regularity and legal effect of the organization of an annual conference of a religious organization, after forcibly intercepting the entrance of the bishop appointed to preside over it because of his alleged suspension from his office under the discipline of the organization, raises an ecclesiastical question upon which the decision of the highest tribunal of the order is binding on the civil courts. *Id.*

8. Appointments of preachers by an annual conference of a religious organization, which has been pronounced by the highest tribunal of the order to have been illegally organized, confer no rights and impose no duties in respect to members or congregations still holding their allegiance to the old organization. *Id.*

9. An annual conference of the Evangelical Association, organized by a bishop with less than a quorum of those entitled to sit as members in the conference, is, under the discipline of that denomination, irregular and illegal; and its appointment of preachers will confer no authority and impose no duty on the churches. *Id.*

10. Congregations or parts of congregations of a religious body which has adopted as part of its polity the itinerant plan for pastoral supply of the churches, who refuse to accept the supply sent by authority of the regular ecclesiastical agencies acting in accord with the general conference,—cease to adhere to the organization. *Id*

11. Adherents to a general conference of a religious organization, held at a time and place designated by an annual conference without authority after another time and place had been regularly designated under the laws of the organization, place themselves outside of the organization, and, although in the majority, have no title to the property of the organization as against persons claiming under the regularly appointed general conference. *Id.*

12. Ecclesiastical standing, and not numbers, determines the title to and the right of control over property held for the use of a religious denomination. *Id.*

13. The minority members of the annual conference of a religious denomination, when confronted with a revolt from the association of a majority of the members of the conference, for which condition the discipline makes no provision, may provide temporarily for the religious care of those adhering to the minority, which action may subsequently be ratified by the highest tribunal of the denomination; but neither alone nor both combined can give the action of the minority regularity which will make it binding upon the revolting members. *Id.*

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Religious societies; constitutional law of; secession by majority of. 477

RESUME.

For résumé of contents of book, see p. 865

RIVERS. See BOUNDARIES.

SALE. See also ESTOPPEL, 3.

1. A city upon discovering that its agent was paid a commission upon a sale to it may either repudiate or ratify and affirm the contract, as it elects. *Findlay* v. *Pertz* (C. C. App. 6th C.) 188

2. The right of a city to rescind a sale to it because a commission was paid to its officer through whom it was made is not affected by the fact that the seller did not know that the city was ignorant of the double relation of such officer and supposed that he would give the city credit for the commission. *Id.*

3. Ratification of a sale to a city notwithstanding a commission paid to its agent by the seller confirms it subject to the warranties made; and the city may, when sued for the purchase price, recoup to the extent of any damage sustained by the breach of any warranty. *Id.*

4. Fraud in the purchase of goods is waived by the seller's entering into a compromise agreement with the purchaser, by which the latter returns a portion of the goods and agrees to pay for the balance on terms satisfactory to the seller. *Munzer* v. *Stern* (Mich.) 859

5. Sellers of goods to one who purchased with intent to defraud, who have been induced to leave a portion in possession of the buyer under a compromise agreement entered into by the latter with the intent to defraud, may rescind the agreement and retake the goods. *Id.*

6. A tender back of what he obtained by the compromise is not necessary to justify its rescission, where one from whom goods were fraudulently purchased regained a portion of them under a compromise agreement which left the remainder in the buyer's possession,

but which was entered into by the buyer with intent to defraud the seller of the property. *Munzer* v. *Stern* (Mich.) 859

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Sale; bona fide purchaser. 607

SCHOOLS. See also LANDLORD AND TENANT, 2; TAXES, 4.

1. A statute authorizing school authorities to make vaccination a condition of the privilege of attending public schools is essentially a police regulation, and does not violate the constitutional guaranties of due process of law or equal protection of the law. *Bissell* v. *Davison* (Conn.) 251

2. The existence of smallpox in a town, or an indication that an epidemic of that disease is likely to present itself, is not necessary to permit school committees to require vaccination of pupils before attending public schools, under Conn. Gen. Stat. §§ 2137, 2197. *Id.*

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Schools; regulation as to attendance. 252

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The right to set off independent judgments rendered in different suits growing out of different causes of action is subject to attorneys' liens or claims for services. *Roberts* v. *Mitchell* (Tenn.) 705

SHIPPING. See COMMERCE, 1; DAMAGES, 3; FIRES.

SLANDER OF TITLE. See INJUNCTION, 1.

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STATE INSTITUTION. See also AGRICULTURAL SOCIETIES; COLLEGES; CORPORATIONS, 1; QUO WARRANTO, 3, 4.

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Nature of incorporated institutions belonging to the state:—(I.) in general: (*a*) banks; (*b*) educational institutions; (*c*) other state institutions; (II.) liabilities of such institutions; (III.) directors, trustees, and officers: (*a*) in general; (*b*.) personal liability. 378

Public nature of. 708

STATUTES. See also APPROPRIATIONS; CONSTITUTIONAL LAW, 26; CONTRACTS, 10.

Title.

1. So long as the generality of the subject expressed in the title of a statute is not employed as a guise to conceal the real object of the law, or some provision therein, it will not be objectionable. *Duval County Comrs.* v. *Jacksonville* (Fla.) 416

2. Surreptitious legislation, and not comprehensive titles, is prohibited by Neb. Const. art. 3, § 11, providing that no bill shall contain more than one subject, which shall be clearly expressed in the title. *Paxton & H. Irrig. C. & L. Co.* v. *Farmers' & M. Irrig. & L. Co.* (Neb.) 853

3. A provision for the acquirement, by irrigation companies, of the right of way for canals and ditches, is within the title of Neb. Act March 27, 1889, entitled "An act to provide for water rights and irrigation and to regulate the use of water for agricultural and manufacturing purposes." *Id.*

4. A provision in a statute for the application of part of a county road tax to streets in cities and towns is within the general subject of the title of the act when that is the laying out and maintaining of public roads of the counties. *Duval County Comrs.* v. *Jacksonville* (Fla.) 416

5. A provision for recovery of damages occasioned by neglect to provide fire screens for vessels as required by statute is sufficiently expressed in the title, "An act to compel steam vessels . . . to provide fire screens, . . . and to provide a penalty for its violation." *Burrows* v. *Delta Transp. Co.* (Mich.) 468

6. The mere omission of the word "steam" before the word "vessel," in a section of an act requiring fire screens, the title of which relates to steam vessels, does not render the act repugnant in its terms, as the provisions apply only to steam vessels. *Id.*

7. A statute containing two distinct subjects, both of which are expressed in the title, is wholly void under Ill. Const. art. 4, § 13, declaring that no act shall embrace more than one subject and that shall be expressed in the title; but if any subject be embraced which is not expressed in the title, the act is void only as to so much thereof as shall not be expressed. *Ritchie* v. *People* (Ill.) 79

8. A statute entitled "An act to regulate the manufacture of clothing, wearing apparel, and other articles," etc., and providing in its body that no female shall be employed in any factory or workshop more than eight hours a

day, will embrace only employment in the manufacture of articles of the same kind as those expressly enumerated. *Id.*

9. The title of Ill. Act June 17, 1893, entitled "An act to regulate the manufacture of clothing, wearing apparel, and other articles in this state, and to provide for the appointment of state inspectors to enforce the same, and to make an appropriation therefor," does not express two subjects because the appropriation for salaries of the factory inspectors provided for is a separate subject, as the words "appropriation therefor" do not necessarily imply that the appropriation is for such salaries, but may be for the payment of their expenses. *Id.*

10. The appropriation in Ill. Act June 17, 1893, § 10, for the salaries of factory inspectors, is a subject not expressed in the title, "An act to regulate the manufacture of clothing, wearing apparel, and other articles in this state, and to provide for the appointment of state inspectors to enforce the same, and to make an appropriation therefor," and is void under Ill. Const. art. 4, § 13, declaring that if a subject shall be embraced in an act which is not expressed in the title the act shall be void as to so much thereof as is not expressed. *Id.*

Construction.

11. A word occurring in a statute, which is evidently an interpolation, and has no relation to the body of the statute, and is without sensible meaning, will be disregarded in giving effect to its provisions. *Paxton & H. Irrig. C. & L. Co.* v. *Farmers' & M. Irrig. & L. Co.* (Neb.) 853

12. Great deference and respect should be paid by the court to the long-prevailing construction of a statute made by the executive department of the state government. *Bloxham* v. *Consumers' E. L. & Street R. Co.* (Fla.) 507

13. The meaning judicially given to words in a statute will be taken as that intended when used in a subsequent similar statute. *Anderson* v. *Bell* (Ind.) 541

Repeal.

14. A special act permitting a grade crossing by an electric railway over the track of a steam railroad, which is made subject to general laws "except as otherwise herein expressly provided," is not affected by a general law previously passed, but which does not take effect until subsequently, which prohibits such grade crossings "except upon approval by the railroad commissioners." *New York, N. H. & H. R. Co.* v. *Bridgeport Traction Co.* (Conn.) 367

15. The Dakota Compiled Laws relating to the assessment of damages in laying out town roads are not repealed by S. D. Act 1891, chap. 94, providing for the assessment of damages for property taken by municipal or other corporations, as the corporations contemplated are those referred to in S. D. Const. art. 17, § 18, and do not include townships organized under the laws of the state. *Dell Rapids* v. *Irving* (S. D.) 861

16. A statute requiring a county and city to pay a percentage of liquor license fees to a certain home is repealed, but not retrospectively repealed, by a constitutional provision prohibiting municipalities from making donations to a private corporation. *Washingtonian Home* v. *Chicago* (Ill.) 798

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Implied repeal of. 368
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STOCKHOLDERS. See CORPORATIONS.

STREET RAILWAYS. See also CARRIERS, 1-3; EMINENT DOMAIN, 11-14; INJUNCTION, 5, 6; LICENSE, 3; MASTER AND SERVANT, 10; MUNICIPAL CORPORATIONS, 6; PROXIMATE CAUSE, 2; RAILROADS, 2; STATUTES, 14; TRIAL, 8, 9.

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Street railway; as a railroad. 209

SUBROGATION.

The purchaser on foreclosure may be subrogated to the rights of the mortgagee, in a proceeding for that purpose, if necessary for his protection, to the extent of the purchase money paid. *Stewart* v. *Wheeling & L. E. R. Co.* (Ohio) 438

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Subrogation; of sureties as affected by priority of United States or of state. 240, 248
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SUSPENSION OF SENTENCE. See CRIMINAL LAW.

TAXES. See also APPEAL AND ERROR, 8; CONSTITUTIONAL LAW, 21; COUNTIES, 2; HIGHWAYS, 6; JUDICIAL SALE, 3, 4; PUBLIC IMPROVEMENTS.

1. The exemption of property from taxation is beyond the power of a town in the absence of constitutional legislative authority. *McTwiggan* v. *Hunter* (R. I.) 526

2. Land covered by water held back by a dam for furnishing power is assessable for taxation at its enhanced value, in the town in which it lies, under a statute making real estate taxable where situated, although the power is used in another town. *Amoskeag Mfg. Co.* v. *Concord* (N. H.) 57

3. The constitutional exemption from taxation of public property used exclusively for any public purpose does not extend to real property owned and leased by a private party, although it is by contract with public authorities used as a public market house or place with an agreement that it shall be exempt from taxation. *State, Realty Co.* v. *Cooley* (Minn.) 777

4. A school is not a purely public charity so that the property used for it is exempt from taxation, when conducted by a master as a business enterprise under a contract by which he pays one eighth of the gross receipts from tuition to the corporation owning the property, and receives tuition for all pupils, although the

corporation, which was organized to conduct a school for the rich at reasonable rates and for the poor gratuitously, itself pays the tuition of a small part of the pupils out of income received from endowments and legacies. *Philadelphia* v. *Overseers of Public Schools* (Pa.) 600

5. Stock which a corporation issues in payment for property is not a debt incurred by it which can be deducted in determining the amount invested in such property, for the purpose of taxation. *People, Hecker-Jones-Jewell Mill. Co.* v. *Barker* (N. Y.) 393

6. The sum invested in the state, on which a foreign corporation can be taxed under N. Y. Laws 1855, chap. 37, when it has purchased property in the state and paid for it only in part, is the sum paid, and cannot include the indebtedness for the unpaid part of the purchase money. *Id.*

7. A bridge owned by a bridge company but used exclusively for railroad purposes and leased forever to a railroad company, subject to termination of the lease for default of the lessee to perform its terms and conditions, is not railroad property which can be assessed as such with the railroad track by the Illinois state board of equalization, instead of the local assessor. *Chicago & A. R. Co.* v. *People, Windmiller* (Ill.) 69

8. The value of a franchise for the purpose of taxation is the benefit derived from its possession. *Com.* v. *Henderson Bridge Co.* (Ky.) 73

9. Debts of a corporation cannot be deducted in finding the value of its franchise as the difference between the values of its capital stock and tangible property, where the constitution requires the property of corporations to be taxed like that of individuals, and debts of the latter are not deducted from their property for taxation. *Id.*

10. The "capital stock" of a corporation, within the meaning of Ky. Stat. § 4079, from which the value of its tangible property is to be deducted in order to find the value of its corporate franchise for the purpose of taxation, means the entire property, real and personal, tangible and intangible, including assets and franchise. *Id.*

11. The right of the state to tax the franchise of a bridge corporation created by it is not defeated by the fact that the company had obtained from another state the privilege of extending its bridge from the boundary of that state at low-water mark of the river to the high lands, and had acquired from congress the privilege of maintaining the bridge across a navigable river and the designation of the bridge as a post road. *Id.*

12. Interstate business is not taxed by taxing the franchise of a bridge company which maintains a toll bridge between states. *Id.*

13. The special exemption of a railroad from taxation by its charter does not extend to lines which it operates under a lease and which were organized under the general laws of the state. *Lake Shore & M. S. R. Co.* v. *Grand Rapids* (Mich.) 195

14. A street railroad is a "railroad" within the meaning of Fla. Acts 1893, chap. 4115, §§ 48, 49, providing for the taxation of railroad property and the sale thereof as an entirety for delinquent taxes thereon. *Bloxham* v. *Consumers' E. L. & Street R. Co.* (Fla.) 507

15. The omission by assessors to include property in an assessment, solely by reason of their mistake as to the binding effect of an agreement for an exemption, and not by any intentional disregard of law or other wrongful or fraudulent purpose,—will not make their assessment void. *McTwiggan* v. *Hunter* (R. I.) 526

16. The only notice to taxpayers of an assessment required by R. I. Pub. Stat. chap. 43, is that required by § 6 in respect to the time and place of meeting, at which each taxable person is directed to bring in an account; and no subsequent notice of a time to hear objections is required. *Id.*

17. A statute simply making personal property taxes a lien on the real estate of the owner does not give them priority over mortgage liens existing at the time they attach. *Bibbins* v. *Clark* (Iowa) 278

18. Individual real estate of a partner is subject to the lien of a tax assessment upon the personal property of the partnership under a statute making taxes due from any person a lien upon any property owned by him. *Id.*

19. A mortgagor who permits his personal property taxes to become a lien on the mortgaged land can be compelled to reimburse the mortgagee who is compelled to pay them to protect his own interests. *Id.*

20. Members of a partnership the personal taxes of which have been levied on the real estate of their copartner cannot be compelled to reimburse a mortgagee of such real estate, who, to protect his own interests, has been compelled to pay the taxes. *Id.*

NOTES AND BRIEFS.

See also POLL TAXES.

Jurisdiction as to taxation of bridge over river forming boundary of a state or its divisions:—general rule; statutory rule; effect on commerce; capital stock. 69

On land under dam. 57

Priority of claims for taxes against the assets of a debtor:—(I.) scope of note; (II.) upon what based; (III.) constitutionality and construction of provisions for; (IV.) what is included in the right: (*a*) taxes generally; (*b*) claims against collectors; (V.) nature and extent of priority; (VI.) subrogation of person paying the tax; (VII.) what amounts to a devestiture of the right; (VIII.) enforcement of the right. 278

On corporate investments in state. 394

Exemption of. 526, 777

Notice to taxpayer. 526

TELEGRAPHS.

A city ordinance exacting a specified sum as rent from a telegraph company for the entry upon and occupation of the streets with its poles is void under Miss. Laws 1886, p. 93, § 1, authorizing companies to operate telegraph lines on and along all streets, without provid-

ing for compensation to the cities. *Hodges* v. *Western U. Teleg. Co.* (Miss.) 770

TENDER. See SALE, 6.

TICKET. See CARRIERS, 4.

TOWN. See STATUTES, 15; TAXES, 1.

TRADE-MARK. See also CONSTITUTIONAL LAW, 26.

1. A labor union may be protected by appropriate state legislation in the use of a label for the designation of articles manufactured by its members, and use of the label prohibited to persons other than members of the union or persons who employ such members. *State* v. *Bishop* (Mo.) 200

2. Labels, symbols, or advertisements adopted by any association or union of workingmen as a trade-mark to distinguish articles manufactured by their members from those manufactured by other persons, are protected by Mo. Laws 1893, p. 260, when they are adopted in accordance with its provisions. *Id.*

3. Proof of guilty knowledge is necessary to sustain a conviction under Mo. Act 1893, p. 260, making it a misdemeanor to have for sale goods bearing counterfeit labels representing that they were made by a certain person, association, or union of workingmen. *Id.*

4. No exclusive right can be acquired to the use of the words "scientific dentistry at moderate prices." *Cady* v. *Schultz* (R. I.) 524

5. There can be no property right in the shape, size, color, or arrangement of signs without regard to the letters which they bear. *Id.*

6. Names which are not trade-marks strictly speaking may be protected as property if they are taken by others with fraudulent intention and are so used as to be likely to effect such intention. *Id.*

NOTES AND BRIEFS.

Protection of trade-union labels or trade-marks:—(I.) in general; (II.) contents of label; (III.) effect of statutes. 200

TRADE-NAME. See also INJUNCTION, 8.

NOTES AND BRIEFS.

Trade-name; protection of. 524

TRADE UNIONS. See TRADE-MARKS, NOTES AND BRIEFS.

TREES.

A land owner may cut from a tree, the trunk of which stands on the boundary line, all the roots and branches on his side up to the trunk. *Robinson* v. *Clapp* (Conn.) 583

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Trees; on boundary; rights in. 583

TRESPASS.

NOTES AND BRIEFS.

Liability for killing or injuring trespassers by means of spring guns, traps, and other dangerous instruments:—(I.) the general doctrine of liability; (II.) liable as for homicide; (III.) when considered as a nuisance; (IV.) the property owner's or the trespasser's act; (V.) the question of notice; (VI.) the act held legal; (VII.) English cases. 154

TRIAL. See also EMINENT DOMAIN, 4; HOMICIDE; INTEREST, 1; PROXIMATE CAUSE, 2.

1. The testimony of a witness, admitted without objection, cannot be excluded because the other party to the transaction was dead. *Hickman* v. *Green* (Mo.) 39

2. The use by a city of gas separators sold to it, for two months after discovering that its agent was paid a commission upon the sale, is not so conclusive of ratification of the sale as to take that question from the jury. *Findlay* v. *Pertz* (C. C. App. 6th C.) 188

3. It is for the jury to determine which of various screens described by witnesses would comply with the requirements of a statute; and therefore an instruction that there could be no liability for a fire alleged to have been caused by want of a screen, if one of the screens described in the testimony would not have prevented the fire, is erroneous. *Burrows* v. *Delta Transp. Co.* (Mich.) 468

4. Negligence of a child nine years old in attempting to pass between cars at a railroad crossing when the train had stood longer than the law allowed is a question for the jury. *Lake Erie & W. R. Co.* v. *Mackey* (Ohio) 757

5. Whether or not a child nine years of age is a trespasser in attempting to cross a railroad track by climbing over a car coupling is a question for the jury. *Id.*

6. Negligence in moving a train after it has stood longer than the statutory period of five minutes across a public street, without giving timely warning of an intention to do so, is a question for the jury. *Id.*

7. Negligence of a railroad company in loading a tender with coal so that a large piece fell off and injured a section man is a question for the jury. *Union P. R. Co.* v. *Erickson* (Neb.) 127

8. Negligence of a street-railway company in not avoiding the deflection of a car from the main track to a branch track so as to strike a person waiting to take it is a question for the jury. *Donovan* v. *Hartford Street R. Co.* (Conn.) 297

9. Whether or not a motorman used due care is a question for the jury, where, with his lever in next to the fastest notch until within a few feet of it, he overtook a band playing while parading the streets, knowing that some of the men were in close proximity to the track. *Montgomery* v. *Lansing City Elec. R. Co.* (Mich.) 287

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Trial; right to jury as affected by compulsory evidence as against one's self. 819

Duty to instruct peremptorily. 105

Question for jury as to negligence. 757

TRUSTS. See also ACTION OR SUIT; BANKS, 5, 6; EVIDENCE, 9.

1. A trust in land bought by an executor for himself is not established in favor of the heirs by the fact that part of the purchase price was paid from funds of the estate, where he has long since accounted for such funds, with interest, and his accounts have been annually approved; and the fact of such payment cannot be overcome by a claim that a higher rate of interest ought to have been charged against him, which would make him still indebted to the estate. *Re Ricker's Estate* (Mont.) 622

2. Consignors cannot impress funds of the consignees in the hands of a receiver with a trust lien for the proceeds of goods sold, if the consignees dissipated such proceeds in paying current expenses of their business, although the claims against the funds in the receiver's hands were thereby diminished. *Ferchen* v. *Arndt* (Or.) 664

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Liability of trustees for compound interest. 622

Trust; tracing into proceeds. 664

TURNPIKES. See BICYCLES, 2, 3.

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Priority in respect to payment from assets of debtor. 226

UNIVERSITY. See COLLEGES; CORPORATIONS, 1; QUO WARRANTO, 3, 4.

USURY. See also CONSTITUTIONAL LAW, 3.

1. Usury forming part of the face of a renewal note discounted in the regular course of business, at the legal rate, without notice and before maturity, is not an available defense under a statute changing the law making usurious contracts "void" so that they shall "be deemed to be for an illegal consideration" as to the interest. *Lynchburg Nat. Bank* v. *Scott* (Va.) 827

2. Taking interest in advance on a negotiable note at the highest rate allowed by the constitution is not usury. *Bank of Newport* v. *Cook* (Ark.) 761

3. The fact that a note is payable twelve months after its date does not take it out of the rule which permits the highest rate of lawful interest to be taken in advance. *Id.*

NOTES AND BRIEFS.

Usury; effect on bona fide holders of notes. 827

VACCINATION. See SCHOOLS.

VARIANCE. See APPEAL AND ERROR, 15.

VENDOR AND PURCHASER. See also DEEDS; NOTICE, 3; MORTGAGE, 8.

1. A grantee in a quitclaim deed cannot be a bona fide purchaser,—at least where the grantor, who had full knowledge of the equities affecting the title, was the agent of the grantee in the purchase of a note and mortgage for the surrender of which the deed was given. *Parker* v. *Randolph* (S. D.) 33

But see next case.

2. A quitclaim deed to a vendor who is in possession of the premises, from one who has the record title, is sufficient to give the vendee the right to claim the protection of the recording laws against a prior unrecorded deed by which such grantee was given a life estate only. *Hickman* v. *Green* (Mo.) 39

3. Equity will relieve against the waiver of a vendor's lien, procured by a fraudulent guaranty on the part of the vendee. *Hooper* v. *Central Trust Co.* (Md.) 262

VIADUCT. See HIGHWAYS, 3.

VOTE. See CORPORATIONS, 10.

VOTERS AND ELECTIONS. See also EVIDENCE, 8.

1. A statute requiring the use of an official ballot may properly be deemed necessary by the legislature in order to secure to the voters a full and fair election and an accurate and honest count, and does not impair the constitutional rights of the voters. *Cole* v. *Tucker* (Mass.) 668

2. A statute making an official ballot compulsory in the election of city officers, but optional in the election of town officers, is not void as partial and unequal in its operation upon the rights of voters. *Id.*

3. Ballots will not be vitiated, in the absence of fraud, by the fact that the official stamp required by statute to be placed on them was not so placed until they were returned by the electors to be placed in the box, having gone into the possession of the electors unstamped. *Moyer* v. *Van de Vanter* (Wash.) 670

4. A law forbidding the counting of ballots upon which the election officers have not placed their initials cannot be sustained where the constitution provides that persons possessing certain qualifications "shall be entitled to vote at all elections." *Id.*

5. Failure of election officers to provide booths which comply with the law is a mere irregularity which will not render void the votes cast in that precinct. *Id.*

6. The opening of the polls an hour later than the time prescribed by statute, and the removal of the ballot box from the polls in violation of Cal. Pol. Code, §§ 1160, 1162, invalidates the election in the precinct, although the misconduct is prompted merely by ignorance and lack of appreciation by the election officers of the responsibility of their positions. *Tebbe* v. *Smith* (Cal.) 673

7. An initial in a space left in a ballot for the insertion of the name of a candidate, although made with the intention of writing a name, which was abandoned, is a distinguishing mark making the ballot void. *Id.*

8. A cross in the marginal space at the right of the name of a candidate and outside of the square is not a distinguishing mark within Cal. Pol. Code, § 1215, as the Code does not expressly require the mark to be placed within such square, although it requires the clerk in printing the ticket to place upon it the

words, "To vote for a person, stamp a cross (×) in the square at the right of the name." *Id.*

9. The ballots cast at a precinct will be excluded from the count where all of them bear in the same writing the name of a person followed by the name of a party, and there was but one person in the precinct lawfully assisted in the marking of his ballot as provided by Cal. Pol. Code, § 1208, where it does not appear who did the writing or whether it was upon the tickets when they were put into the voters' hands, under § 1211, providing that any ballot which is not made as provided in the act shall be void, and shall not be counted. *Id.*

10. A blurred spot plainly made on a ballot, which might have been made for identification, or a cross not opposite the name of any candidate, or a number of crosses in a bunch, or a mark which is not a cross, or the use of a blue lead pencil,—is ground for rejecting the ballot under the Nevada Ballot Law, §§ 20, 26, providing that the ballot shall be marked with a cross after the names of the persons for whom the elector votes, in black pencil, and that any marks except as provided in the act shall invalidate the ballot. *Dennis* v. *Caughlin* (Nev.) 731

11. A slightly blurred spot or erasure on a ballot, made to correct a mistake, and not indicating an intention to identify the ballot, or a slight pencil mark made by mistake, or a tobacco stain, will not avoid the ballot under the Nevada Ballot Law, § 26, providing that any ballot on which appear marks written or printed, except as provided, shall not be counted. *Id.*

12. A ballot law which permits the name of a candidate to appear on the official ballot but once, although he may be nominated by different parties, is not unconstitutional although some voters may be unable to vote, as voters of other parties can, for all the candidates of their party without marking the ballot more than once, or to have all the candidates of their party appear on the party ballot. *Todd* v. *Board of Election Comrs.* (Mich.) 330

13. A statute requiring a person nominated for the same office by different parties at the same election to notify the election commissioners, within a limited time, upon the column of which party his name shall appear, and forbidding its appearance in more than one place, will not apply to cases in which the specified time has elapsed before the act takes effect. *Id.*

NOTES AND BRIEFS.

Voters and elections; payment of poll taxes as a qualification of electors. 414
Construction of ballot law. 670
Validity of ballot law. 330, 668
Distinguishing marks on ballots. 674

WATERS. See also BOUNDARIES; CORPORATIONS, 15, 16; EMINENT DOMAIN, 1, 2; INJUNCTION, 7; NUISANCES, 3, 4.

1. The low-water mark, which in Vermont defines the limit of private ownership of land abutting upon a navigable lake, is the ordinary low-water mark, and not the point to which the water recedes in an exceptionally dry season. *McBurney* v. *Young* (Vt.) 539

2. One irrigating company has no right to connect with the ditches of another or take water therefrom without the latter's consent, under the Nebraska Irrigation Law of 1889. *Paxton & H. Irrig. C. & L. Co.* v. *Farmers' & M. Irrig. & L. Co.* (Neb.) 853

3. A provision in the contract of a waterworks company, that if any "unforeseen or inevitable accident" shall happen to any part of its system of works the company shall have a reasonable time to repair injuries resulting from the accident, and that such accident shall not be construed to be a breach of the contract, does not apply to an insufficiency of water during a drought, caused by the failure of the company to bore wells necessary to an adequate supply in such seasons. *Capital City Water Co.* v. *State, Macdonald* (Ala.) 743

4. A waterworks company whose charter makes it its absolute duty to supply pure, wholesome deep-well water, is not justified in failing to supply such water by the fact that extra expense would be required in digging the necessary deeper wells, for which the city would not have to pay if it should ever elect to purchase such works, which it has the right to do. *Id.*

5. A city which has undertaken to furnish its inhabitants with water cannot, after accepting the rates and furnishing water to a consumer for a period beyond that for which a disputed unpaid claim against him exists, shut off the supply for the purpose of coercing payment of such claim. *Wood* v. *Auburn* (Me.) 376

6. The question of the validity of an old claim against a water consumer will not be investigated in an injunction proceeding by him against the city to prevent its shutting off his supply after it has accepted the rates and furnished water for periods subsequent to that covered by the disputed claim. *Id.*

NOTES AND BRIEFS.

Water; cutting off supply to enforce payment of rates. 376

WELL. See also INJUNCTION, 10.

NOTES AND BRIEFS.

Well; as appurtenant. 584

WITNESSES. See also EXECUTORS AND ADMINISTRATORS, 3.

A witness may be properly asked on cross-examination how a private crossing came to be put in over a railroad, where he has testified in chief that he knew who put it in and when it was put in. *Reynolds* v. *Great Northern R. Co.* (C. C. App. 8th C.) 695

WOMEN. See also CONSTITUTIONAL LAW, 10, 15, 24; MASTER AND SERVANT, 1; STATUTES, 8.

WRIT AND PROCESS.

The objection that an affidavit for substituted service was in the disjunctive in stating that defendant was concealed within the state, or had gone out of the state so that process could not be served upon him, is not well taken where the material fact of the impossibility of finding his whereabouts is alleged. *Bickerdike* v. *Allen* (Ill.) 782