troversy for the purpose of purchasing another graveyard. Neither does the City assume to retain the land for the purpose of appropriating it to any kindred use with the dedication. If it be a fact that it permits it to be used as a park or place of recreation for the comfort or amusement of the living, the use could not be justified as an application of the doctrine of *cy près*. But the City, in its answer, denies any diversion, and expressly alleges a continuance of the original use for which it was dedicated. It claims in its answer, and in the arguments of its counsel, that the place is still a graveyard. Under these circumstances, I think this court is relieved from the task of determining whether this dedication is subject to the doctrine of *cy près*. It is not called upon by the state of the record to authoritatively dispose of such a question. My conclusion is that the plaintiffs in the case made in this record must prevail if the use of the land for a graveyard has been discontinued and abandoned by the public and its representatives. Upon any lawful cessation of the use, the title reverts.

4. This brings us to the issue of fact made between the parties to the suit, the principal issue of the controversy, which was submitted to the jury, and decided in favor of the plaintiffs. It is not an issue for this court to determine. As an appellate tribunal, it can only decide whether the issue of discontinuance, and abandonment of the use, was submitted to the jury on proper instructions of law to guide them, and whether their finding of the issue is supported by substantial evidence tending to prove the issue as found by them. The question was submitted on the following instructions: "(1) The court instructs the jury that, to constitute abandonment of a graveyard, it is not sufficient that burials therein have ceased or been prohibited. So long as it is kept and preserved as a resting place for the dead, with anything to indicate the existence of graves, or so long as it is known or recognized by the public as a graveyard, it is not abandoned. On the other hand, it may contain the remains of the dead, and yet be abandoned. If no interments have for a long time been made, and cannot be made, therein, and, in addition thereto, the public, and those interested in its use, have failed to keep and preserve it as a resting place for the dead, and have permitted it to be thrown out to the commons, the graves to be worn away, grave-stones and monuments to be destroyed and the graves to lose their identity, and if it has been so treated and used or neglected to the public as to entirely lose its identity as a graveyard, and is no longer known, recognized and respected by the public as a graveyard, then it has been abandoned; or if the public, and those interested in its use as a graveyard, have permanently appropriated it to a use or uses entirely inconsistent with its use as a graveyard, in such a way as to show an intention of permanently ceasing to use it as a graveyard, and it has become impossible to use it as a graveyard, then it has been abandoned; and in determining the question of abandonment the jury should take into consideration all the facts and circumstances given in evidence. (2) Although you may believe from the evidence that the land in controversy was dedicated, at the time and in the manner as alleged in defendant's answer, to the public for its use as a graveyard, and that the public, for a number of years after such dedication, used the said land for such purpose, if you further believe from the evidence that the public, and those interested in the use of said land as a graveyard, had before the commencement of this suit abandoned the same as a graveyard, and that the same was not at the commencement of this suit a graveyard, and was in possession of defendant, then you should find for the plaintiff." I have considered these instructions very carefully; and, although they may be open to the criticism of repetition and redundancy, I am satisfied that they gave the jury to understand very clearly that the plaintiffs were not entitled to recover unless the jury was satisfied from the evidence that the original uses for which the land had been dedicated had been discontinued and abandoned before commencement of the suit.

In order to determine whether there was evidence to sustain the finding of the jury on this issue, it will be necessary for me to recall briefly the evidence proving, or tending to prove, what was done, or permitted to be done, with the old graveyard both by the City and the public at large. The dedication in 1847 took place before incorporation of the present City. When the City was incorporated, in 1852, its limits included the graveyard. It is distant now only a few blocks from headquarters. On the 14th May, 1855, it was resolved by the city council that the location of this graveyard was too near the business thoroughfares of the City, and that immediate steps should be taken for the purchase of other grounds for burial purposes. On the 30th of October, 1857, an ordinance was passed accepting the proposition of the Union Cemetery Association to sell the City five acres for a potter's field. By the second section of the ordinance the land in controversy was "vacated for graveyard uses," and a penalty ranging from $25 to $100 was imposed on anyone who should inter therein the body of any person whomsoever. In its capacity as trustee and guardian of the rights of the public in this graveyard, the City had no power to change or destroy its use (*Trustees of M. E. Church* v. *Hoboken*, 33 N. J. L. 19; Mo. Sess. Acts 1875, pp. 204, 205; *Hannibal* v. *Draper*, 15 Mo. 634); but, as an arm of the civil government, it was vested with full police power, as early as 1853, "to make regulations to secure the general health of the inhabitants, and prevent and remove nuisances." This general grant of power has been usually accepted as sufficient to authorize the prohibition of burials, and discontinuance of graveyards, in the populous districts of cities. *Bogert* v. *Indianapolis*, 13 Ind. 134; *Charleston* v. *Wentworth Street Baptist Church*, 4 Strobh. L. 306; *Coates* v. *New York*, 7 Cow. 585; *Austin* v. *Murray*, 16 Pick. 127.

The prohibition of future burials destroys at once the interest of the public generally in a graveyard. Only those members of the public who have relatives buried there could have any special interest in it,—an interest to preserve the remains and monuments of the dead. *Kincaid's App.* 66 Pa. 411; *Gumbert's App.* 110 Pa. 496, 1 Cent. Rep. 589; *State* v. *Wilson*, 94 N. C. 1015.

The effect of such a prohibition in discontinuing the land entirely for graveyard purposes would be soon worked out by the lapse of time. Its effect would be more marked upon a graveyard like the one in controversy than upon an old cemetery filled with graves and costly monuments. It will be observed that the ordinance does not consist only in a positive prohibition of future burials. The import of its language bearing upon the discontinuance of this ground as a graveyard is unqualified, and assumes to vacate the ground for all graveyard uses. The language contemplates and authorizes disinterment, if that should be necessary to complete the vacation of the land for graveyard uses. The subsequent action of the city council and city authorities is in strict accord with this construction of the ordinance. In August, 1866, the city council, by published notice, required all persons who had relatives and friends buried within the square to remove them. The evidence shows that this was very generally done. The city undertaker, while engaged in removing the remains of the unknown to the potter's field, says that he removed to other places remains which were claimed by friends and relatives. Many removals took place under the direction and supervision of relatives and friends of the dead. But notwithstanding the notice of removal, and the actual removal by relatives, the majority of the remains were left to be removed by the City.

Originally the land in controversy was part of a high knoll or ridge running almost north and south. Its highest elevation was near the northwest corner. From this point, it sloped gently towards the south and east, also slightly towards the west, which was bounded on the original plat by Oak Street. Locust Street, which bounds the square on the east, was graded in 1868 or 1869 by raising it several feet above the square in certain points with earth obtained from the square. The embankment resulted in a pond on the square which subsequently was filled with earth from the square. In 1869 some grading was done on Oak Street, and then, or during the gradings which followed, the square was used at times by the City, with its work-house force, breaking rocks for the streets. In 1870 and 1871 a portion of the north side of the square was taken to fill up Fifth Street, which was in the vicinity. In 1872 came the grading of Missouri Avenue, which bounds it on the north. The grade ranged from five to seventeen feet below the surface of the square. In 1872 or 1874 the further grading of Oak Street took place. The grades on Oak Street and Missouri Avenue left the square many feet above the grade. In the course of time the embankments left by the grades sloughed off, leaving in many places the remains and coffins of the dead exposed to view. In 1878 or 1879 the City completed the grading of the square, reducing its high parts, and bringing up its low parts to a level with the surrounding streets. It is claimed on the part of the defendant that this was necessitated by the grading of Oak Street and Missouri Avenue, which left the unsightly banks of the square open to public comment and criticism. On the part of plaintiffs it is claimed that this final grading of the whole square was in pursuance of a resolution of the city council passed in June, 1877, which reads as follows: "Be it resolved by the common council of the City of Kansas that the city engineer be instructed to employ the work-house force, when not otherwise engaged, to grade the old graveyard, and get it in shape for a public park." There is much evidence in the record tending to prove that the grading of the square went below all the graves in it except, perhaps, a few buried in the low parts of the square on the eastern slope, upon which from four to ten feet of earth have been placed. According to the evidence of the city undertaker, who had a contract from year to year for the removal of remains, and who received a compensation therefor at the rate of $5 a skull, all the remains in the square encountered in the gradings prior to 1878 were removed either by him or friends of those who could be identified. In this testimony he is corroborated by other witnesses. The undertaker did not attend the final grading in 1878, and what was done with the remains then exhumed will be noticed presently. After the final grading the ground was in other respects improved and ornamented as already stated. Trees were planted, grass sown, walks laid out through it, and it was lighted for the convenience of the public. It has been used for public entertainments, accompanied with music and feasting. It is named and recognized by the City as a park. No visible grave or monument to perpetuate the memory of the dead is discernible to the visitor. It is used and recognized by the public, as well as the City, as a park for the living, and not as a graveyard for the dead. The public has acquiesced in the change.

It would not be proper for me to close this opinion without some notice of the facts and acts which the defendant pretends are sufficient to preserve this land as a resting place for the repose of the dead, and for perpetuating their memory. During the final grading in 1878 the city authorities discontinued the removal of the remains exhumed, and caused the bones to be gathered up by the work-house force engaged in the grading, and reinterred as near the place from which they were taken as possible. This was done in small pine boxes, procured from a planing-mill, about ten inches wide and deep, and from two to three feet long. Some of the witnesses say that no attempt at preserving the separate identity of the remains was made. Skulls and bones which had no connection with each other in life were frequently thrown with mould into the same box. Other witnesses testify that the individuality of the remains was preserved in the reinterment except in some cases, where a great many remains were found in one grave. There is a conflict of evidence as to the number of these pine boxes containing unknown bones and mouldering earth, the plaintiffs fixing the number at eleven, while the defendant claims there must have been eighty-four. There is evidence tending to show that, when the boxes were buried, stakes were driven so as to indicate their location, and that afterwards small stones, eight by ten or twelve inches in surface, took the place of the stakes. These stones had no names on them, but were numbered. They were either placed five or six inches under the

earth or they had sunk to that depth before the trial of this case, as many witnesses testify that they never saw them in the square. Shortly before the trial at Warrensburg, the existence and location of many of these stones, under instructions from defendant's agents, were ascertained and brought to light by "prospecting" through the square with a sharp iron rod. Some of them which were thus found have been uncovered. One of the stones is said to be in the line of a walk, which had been uncovered for some time, possibly in laying out the walk. It is claimed that Mr. Reinhart, a witness for defendant, has identified the grave of a brother fourteen years old, buried some thirty odd years ago. I have read his evidence carefully, and find in it too much doubt and uncertainty to justify the conclusion he swears to. When the public was removing remains from the ground before it was graded, Mr. Reinhart went to the graveyard for the purpose of ascertaining the location of his brother's remains, with a view to their removal. He admits that he could not then find the grave. After the grading, he finds in the ground a broken piece of stone, without name or number, which he claims to identify as a part of the base of the tombstone of his brother; and from this he infers that his brother's grave is there or near by. He never uncovered the surface to see what was below. It is from evidence relating to those re-interments that the defendant insists that this ground is still preserved for the uses of a graveyard. There is evidence tending to show that the re-interments made in 1878 were directed by the city authorities for the sole purpose of preventing a reverter of the land. This was advised by the city engineer as early as 1873, and there were persons present at the re-interments of 1878 who testify that the city engineer and other city officers admitted that such was the purpose still. The defendant's evidence relating to those re-interments went to the jury for what it was worth. It was fairly susceptible of the construction that it was not a genuine movement in the way of repentance, as ingeniously claimed by defendant's counsel, to preserve the remains and memory of the dead, but as a sham and a fraud on the donors and their representatives. The jury must have found that there was nothing in it which could operate as a revocation of the ordinance, notice and previous acts of the City vacating the ground "for graveyard uses." They must have been satisfied that the use of this land for the purpose of a graveyard could not be continued for ages to come by such a transparent device and weak invention. As this finding is sustained by competent and abundant evidence, it ought not to be disturbed by this court.

It may well be that the donors of this land never actually contemplated any return of it to themselves or their representatives. It is not at all probable that they foresaw the marvelous growth and sudden splendor of the City which has sprung to life around the old graveyard as if evoked from airy nothing by the wand of some mighty magician. But their gift was made, necessarily, subject to the unforeseen changes in the womb of time, and the demand of a higher public weal.

5. It has been argued by counsel for defendant that, as the donors of this land sold other parcels on the showing of the map or plat which dedicated it to the public, they must have received value for their dedication in the increased price of the sales, and that they are estopped from claiming a return of the land. It may well be that the dedication of highways and parks furnishes a valuable inducement to purchasers of surrounding property. But I do not think that the proximity of, or convenient access to, a graveyard can be reasonably classed among the inducing causes of the sale of real estate. One witness in this case testifies that he was deterred from buying by reason of the existence of this old graveyard. I do not think that easy and convenient access to cemeteries can be regarded as an inducement which would add any appreciable value to the sale of contiguous property.

Upon the whole, I am persuaded that the verdict and judgment are for the right parties, and should be affirmed, and it is so ordered.

Ray, *Ch. J.*, and **Sherwood** and **Barclay,** *JJ.*, concur; **Brace,** *J.*, dissents, **Black,** *J.*, not sitting.

Petition for rehearing overruled December 15, 1890.

T. J. WITTING, *Respt.*,
v.
ST. LOUIS & SAN FRANCISCO R. CO., *Appt.*

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

1. **An appeal by defendant from a justice's judgment** waives all errors and defects in the original summons and in the service thereof.

2. **A statement of a cause of action filed before a justice of the peace** in the following form: "R. Co., to W. Dr., to damages in negligently breaking soda apparatus shipped May 2, 1889, from O. to St. L., $200," is sufficient.

3. **Where goods are shipped under a contract exempting the carrier from liability for the breakage** of certain kinds of goods, and are delivered to the consignee in a broken condition, if the carrier shows that the broken articles are within the exception of the contract, the owner, to recover for their loss, must show that the carrier's negligence was the sole or an active co-operating cause in producing the damage. The law does not in such cases presume negligence from the fact of the breakage so as to cast the burden of proving its absence on the carrier.

4. **In a suit to recover damages for the breakage of an article while in a carrier's possession** for transportation, the success of which depends upon showing negligence on the part of the carrier, a demurrer to the evidence is properly overruled if it tends to show that the article was delivered to the carrier in good condition properly packed, and that it reached its destination badly broken, the crate in which it was packed being broken on one side while one of the inside stays was broken and others out of place.

(November 17, 1890.)

CASE certified from the St. Louis Court of Appeals after judgment reversing a judg-

See also 32 L. R. A. 354; 44 L. R. A. 515.

ment of the St. Louis Circuit Court in favor of plaintiff in an action brought to recover damages for the breakage of a soda apparatus while in defendant's possession for transportation. *Judgment of reversal affirmed.*

The facts are stated in the opinion.

Messrs. **E. D. Kenna** and **Adiel Sherwood,** for appellant:

The carrier was exempt when he produced the contract showing that the goods were shipped at "owner's risk," and that "marbles" were taken at "owner's risk of breakage," and that the shipment was subject to the "dangers incident to railroad transportation" and "unavoidable accidents."

Kiff v. *Atchison, T. & S. F. R. Co.* 32 Kan. 263; *Little Rock, M. R. & T. R. Co.* v. *Harper,* 44 Ark. 208; *Heil* v. *St. Louis, I. M. & S. R. Co.* 16 Mo. App. 370; *American Exp. Co.* v. *Perkins,* 42 Ill. 459; *Bradstreet* v. *Heran,* 2 Blatchf. 117; Abbott, Shipping, Story's ed. 216; *The California,* 2 Sawy. 12; Hutchinson, Car. §§ 767, 768; *Whitworth* v. *Erie R. Co.* 87 N. Y. 413; *Little Rock, M. R. & T. R. Co.* v. *Talbot,* 39 Ark. 523; *Little Rock, M. R. & T. R. Co.* v. *Corcoran,* 40 Ark. 375; *Missouri P. R. Co.* v. *Haley,* 25 Kan. 35; *Muser* v. *Holland,* 17 Blatchf. 412; *Carey* v. *Atkins,* 6 Ben. 562; *Lamb* v. *Camden & A. R. & Transp. Co.* 46 N. Y. 278, 281, 282; *Farnham* v. *Camden & A. R. & Transp. Co.* 55 Pa. 53; *Steamboat "Emily"* v. *Carney,* 5 Kan. 645; *Morrison* v. *Phillips etc. Const. Co.* 44 Wis. 405; *Grace* v. *Adams,* 100 Mass. 505; *Ward* v. *Andrews,* 3 Mo. App. 277; *Nolan* v. *Shickle,* 3 Mo. App. 304, 305; *Schultz* v. *Pacific R. Co.* 36 Mo. 32; *Czeh* v. *General Steam Nav. Co.* L. R. 3 C. P. 18; *Dorr* v. *New Jersey Steam Nav. Co.* 11 N. Y. 492, 493; *Stump* v. *Hutchinson,* 11 Pa. 533; *The Bereire,* 8 Ben. 301; *Lamb* v. *Western R. Corp.* 7 Allen, 98; *Patterson* v. *Clyde,* 67 Pa. 500; *Memphis & C. R. Co.* v. *Reeves,* 77 U. S. 10 Wall. 189, 190, 19 L. ed. 912, 913; *York Mfg. Co.* v. *Illinois C. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *Muddle* v. *Stride,* 9 Car. & P. 380; *Colton* v. *Cleveland & P. R. Co.* 67 Pa. 211; *Witting* v. *St. Louis & S. F. R. Co.* 28 Mo. App. 103.

The fact that goods or wares are broken or damaged in transit is not proof of negligence and raises no inference of negligence, and from it negligence cannot be presumed.

Lamb v. *Western R. Co. supra; Ward* v. *Andrews,* 3 Mo. App. 277; *Nolan* v. *Shickle,* 3 Mo. App. 304, 305.

The presumption that every man does his duty runs in favor of the carrier.

Farnham v. *Camden & A. R. Co.* 55 Pa. 53; *Waldron* v. *Rensselear & S. R. Co.* 8 Barb. 394; *Lord Halifax Case,* Buller, N. P. 298; *Hartwell* v. *Root,* 19 Johns. 345.

The so-called petition filed before the justice states no fact. This defect was called to the court's attention in the motion to dismiss and again before any evidence was introduced. It does not advise defendant of the nature of the claim and without proof *aliunde* would not bar another action.

Rev. Stat. 1879, § 2852; *Indianapolis, C. & L. R. Co.* v. *Robinson,* 35 Ind. 380; *Toledo, W. & W. R. Co.* v. *Weaver,* 34 Ind. 298; *Butts* v. *Phelps,* 79 Mo. 302; *Swartz* v. *Nicholson,* 65 Mo. 508; *Brashears* v. *Strock,* 46 Mo. 221; *Casey* v. *Clark,* 2 Mo. 11; *Field* v. *Chicago, R. I. & P. R. Co.* 76 Mo. 614; *Ensworth* v. *Barton,* 60 Mo. 511; *Ward* v. *Farrelly,* 9 Mo. App. 370; *Todd* v. *Germania F. Ins. Co.* 1 Mo. App. 472; *Scott* v. *Robards,* 67 Mo. 289; *Pier* v. *Heinrichoffen,* 52 Mo. 333; *Jones* v. *Tuller,* 38 Mo. 363; *Biddle* v. *Boyce,* 13 Mo. 533; *Bankston* v. *Farris,* 26 Mo. 175; *Davis* v. *Missouri, K. & T. R. Co.* 65 Mo. 441; *Frazer* v. *Roberts,* 32 Mo. 457; *Mechanics Bank* v. *Donnell,* 35 Mo. 373; *Leduke* v. *St. Louis & I. M. R. Co.* 4 Mo. App. 485; *Murdock* v. *Brown,* 16 Mo. App. 549; *Moss* v. *Pacific R. Co.* 49 Mo. 167; *Jeffersonville, M. & I. R. Co.* v. *Dunlap,* 29 Ind. 426; *Gurley* v. *Missouri Pac. R. Co.* 12 West. Rep. 330, 93 Mo. 450; *Indianapolis, C. & L. R. Co.* v. *Robinson,* 35 Ind. 380; *Harrison* v. *Missouri Pac. R. Co.* 74 Mo. 369; *Waldhier* v. *Hannibal & St. J. R. Co.* 71 Mo. 515; *Ockendon* v. *Barnes,* 43 Iowa, 615; *Wing* v. *Hayden,* 10 Bush, 276.

Messrs. **Davis & Davis** for respondent.

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

This suit was commenced before a justice of the peace by filing the following account:

"St. Louis & San Francisco Railway Company to Theo. J. Witting (formerly Reichenbach), Dr. To damages in negligently breaking soda apparatus, shipped May 2, 1884, from Oswego, Kansas, to St. Louis, Mo., $200."

The justice gave judgment by default, and thereafter the defendant appealed to the circuit court, where, upon a trial anew, the plaintiff again recovered judgment, and the defendant appealed to the St. Louis Court of Appeals. That court reversed the judgment, and remanded the cause for error in the instructions. The cause was then certified to this court, because one of the judges deemed the decision in conflict with prior decisions of this court.

1. In the circuit court the defendant moved to dismiss the cause, because the justice had no jurisdiction over the person of the defendant, and hence the circuit court had no jurisdiction. The only specific reason assigned in the motion is that a copy of the complaint filed before the justice was not served on the defendant. It does not appear by the constable's return that he served the defendant with a copy of the complaint, as seems to be provided for by section 2865 of Revised Statutes 1879, as amended by the Act of March, 1883. Acts 1883, p. 104. The defendant, however, by suing out an appeal, waived all errors and defects in the original summons and in the service thereof, and for this reason the motion to dismiss was properly overruled. *Fitterling* v. *Missouri Pac. R. Co.* 79 Mo. 504.

2. The defendant objected to the introduction of any evidence, because the statement filed with the justice disclosed no cause of action. The statement not only advised the defendant of the nature of the plaintiff's claim, but a judgment upon it would bar another action for the same demand, and the statement is therefore all that the law requires. *Butts* v. *Phelps,* 79 Mo. 302.

3. On the trial in the circuit court, the plaintiff produced evidence showing that he acquired the soda fountain, which was made of Italian marble, from one Kingsbury at Oswego, in the State of Kansas; that the apparatus was packed in a crate, and when so packed was re-

ceived by the defendant's agent at the last-named place, for shipment to St. Louis. When plaintiff received it from defendant one side of the crate was broken. The fountain had been placed in the centre of the crate with inside braces on each side and on the top, to keep it in place. Of these inside braces, one was broken, and the others out of place. The pieces of marble forming the fountain were all broken, except one side piece. With this evidence the plaintiff closed his case. The evidence produced by defendant tends to show that the apparatus, when received at Oswego, was packed on the inside of a crate; that the outside packing appeared to be secure, but the inside packing could not be seen; that the crate was placed in a car with care, with no other freight near it. The trainmen say the car received no rough or unusual handling; that there was no unusual jarring or jolting; and that the car came through without accident. The car was not opened while in transit. The loading clerk at St. Louis says: "Found the crate standing upright near the car door, in good shape. The boards were not broken. Could see inside the crate through the slats. Marble was cracked on two sides. Myself and men put it down carefully on the warehouse floor. The crate had the appearance of being second-hand, and did not fit the fountain. It was too large. The crate itself was in good order, and not broken." Kingsbury, the consignor, says: "The apparatus was fastened together with screws. The screw holes were drilled in the marble, and the holes filled with lead or other metal, and threads for the screws cut in the metal. The screws went through the outside slabs into the ends of the inside slabs. The fountain was old, and the screw holes worn. I frequently plugged the holes with wood so that the screws would not slip out. Do not remember whether or not I plugged the screw holes just before I shipped the apparatus." Defendant put in evidence the bill of lading, which recites the receipt of the property "in apparent good order" and contains, among others, this condition: "Marbles at owner's risk of breakage."

At the request of the plaintiff, the court instructed the jury that if they believed the apparatus, when delivered to defendant, "was in good order, that is to say, not broken, and it was properly packed for such shipment, and that the same was delivered in St. Louis in an injured and broken condition, then the law presumes that such damage and injury was occasioned through the fault of the defendant: provided, also, the jury believe and find that, by the exercise of ordinary care on the part of defendant's employés handling its trains and handling the said soda apparatus, the same could be carried and delivered to the consignee in the same condition it was in when defendant received it." And the court of its own motion gave this instruction: "The court instructs the jury that the plaintiff is not entitled to recover unless he has shown by a preponderance of the evidence, direct and circumstantial, that the injury complained of was occasioned by the negligence of the defendant, its servants, agents or employés; and the court further instructs you that the burden of proving negligence rests upon the plaintiff."

It must be taken now as the settled law that a common carrier may, by a special contract, limit his common-law liability as insurer of property intrusted to him for transportation against loss or damage. It is equally well settled that he cannot limit his liability so as to free himself from loss or damage occasioned by his negligence, or that of his servants. When this case went to the jury, it stood as a conceded and undisputed fact that the goods were shipped under the special contract which exempted defendant from liability for breakage; so that the issue of fact was whether the soda apparatus was broken by reason of negligence on the part of the defendant or its servants. The instruction given by the court, of its own motion, places the burden of proof of this issue on the plaintiff. The instruction given for the plaintiff places the burden of proof upon the defendant, after the jury have reached the conclusion that the soda apparatus was properly packed and delivered to the plaintiff in good condition, and was delivered to the consignee in a broken condition. The objection that these instructions are inconsistent need not be considered.

The real question presented is, Upon whom did the burden of proof on the issue of negligence rest when this case went to the jury? Upon this question, the authorities are in direct conflict. On the one hand, it is held that, when the common carrier relies upon a contract exemption, he must bring himself within the exemption, and that he does not do this by simply showing that the goods were lost, or destroyed, or injured, by the excepted peril or accident, but that he must go further, and show that he was free from any negligence contributing to the loss or injury. The following are some of the cases which support this doctrine: *Brown* v. *Adams Exp. Co.* 15 W. Va. 812; *Berry* v. *Cooper*, 28 Ga. 543; *Chicago, St. L. & N. O. R. Co.* v. *Moss*, 60 Miss. 1003; *Graham* v. *Davis*, 4 Ohio St. 362; *Union Exp. Co.* v. *Graham*, 26 Ohio St. 595.

The same doctrine was asserted by this court in *Levering* v. *Union Trans. & Ins. Co.*, 42 Mo. 89, and in the subsequent case of *Ketchum* v. *American Merch. Union Exp. Co.*, 52 Mo. 390. The question arose in the first of these cases on a bill of lading for the shipment of cotton, containing the words "at owner's risk of fire." *Judge* Wagner, speaking for the court, said it devolved upon the defendant to show, notwithstanding the exception from liability stated in the contract, that the accident did not occur through any fault, want of care or negligence on the part of defendant or its agent. By the other line of authorities it is held to be sufficient for the carrier to show that the loss or damage was occasioned by some accident or peril, from liability for which he is exempted, either by his contract or by law; and that he is not required to go further and show, in addition, that he was free from negligence contributing to the loss or damage. The following are some of the cases which assert this doctrine: *Lamb* v. *Camden & A. R. Co.* 46 N. Y. 271; *Whitworth* v. *Erie R. Co.* 87 N. Y. 413; *Farnham* v. *Camden & A. R. Co.* 55 Pa. 53; *Patterson* v. *Clyde*, 67 Pa. 500; *Little Rock, M. R. & T. R. Co.* v. *Talbot*, 39 Ark. 526; *Memphis & C. R. Co.* v. *Reeves*, 77 U. S. 10 Wall.

176, 19 L. ed. 909; *Read* v. *St. Louis, K. C. & N. R. Co.* 60 Mo. 199; *Davis* v. *Wabash, St. L. & P. R. Co.* 89 Mo. 340, 5 West. Rep. 445.

Observations made in *Wolf* v. *American Union Exp. Co.*, 43 Mo. 422, are in line with the cases just cited, but the question of the burden of proof did not fairly arise in that case. It did, however, arise in the case of *Read* v. *St. Louis, K. C. & N. R. Co.*, *supra*. In that case the potatoes were shipped at owner's risk of freezing. On the subject of the burden of proof this court, speaking by Wagner, *J.*, said: "When the loss occurs from any of the causes excepted in the undertaking, the exception must be the proximate cause of the loss, and the sole cause. And where the loss is attributable to such cause, still, if the negligence of the carrier mingles with it as an active and co-operating cause, he is responsible. When the loss of the goods is established, the burden of proof devolves upon the carrier to show that it was occasioned by some act which is recognized as an exception. This shown, it is prima facie an exoneration, and he is not required to go further and prove affirmatively that he was guilty of no negligence. The proof of such negligence, if negligence is asserted to exist, rests on the other party." This quotation has been made for the purpose of showing that the court then abandoned the rule concerning the burden of proof, laid down in the prior cases of *Levering* v. *Union Trans. & Ins. Co.*, and *Ketchum* v. *American Merch. Union Exp. Co.*, *supra*. There can be no doubt but the earlier cases were overruled on the point we are considering. They cannot stand as law in the face of the quotation we have made. Seventeen years later, the principle of law asserted in *Read* v. *St. Louis, K. C. & N. R. Co.* was applied in *Davis* v. *Wabash, St. L. & P. R. Co.*, *supra*.

It must therefore be taken as the established law of this State that, when the cause of action stands on the ground of negligence on the part of the carrier, the burden of proof is upon the plaintiff. The authorities cited are not all agreed as to the ground upon which the rule stands. The true reason, it seems to us, is that negligence is a positive wrong, and will not be presumed, though it may be inferred from circumstances. When the carrier brings himself within the exception, he need go no further to relieve himself from his liability as insurer. The party who founds his cause of action upon negligence must be prepared to establish the assertion by proof. If the cause of action stands on negligence of the carrier, and not on the common-law liability of the carrier as an insurer, the burden of proof is upon the plaintiff, from the beginning to the end of the case. We do not see that there is anything so unreasonable in the rule as some courts seem to think, when it is remembered that by the common law the common carrier is regarded as an insurer of the safety of the goods against all losses, except such as are caused by the act of God or the public enemy. He may contract against this liability as an insurer, but he cannot contract against his negligence or that of his servants. Though the goods may be carried under a special contract relieving him from the liability of an insurer, still he is none the less a common carrier; and the question of negligence is to be determined in the light of the fact that he is a common carrier, and of the duties which he has assumed to perform. He is bound to use due care in the transportation of goods, regardless of any common-law liability as an insurer. *New York C. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Bank of Ky.* v. *Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872.

It follows from what we have said that the court erred in the instruction given at the request of the plaintiff; for the cause of action standing, as it did, upon negligence when it went to the jury, the burden of proof was upon the plaintiff. That is to say, it devolved upon the plaintiff to satisfy the minds of the jurors from the evidence, taken as a whole, that the negligence of defendant caused the damage complained of, or was an active co-operating cause in producing the damage.

It is further insisted that the court erred in refusing to give defendant's instruction, at the close of all the evidence, in the nature of a demurrer thereto. This raises the question whether there was evidence tending to show negligence on the part of the defendant or its servants. If there was, then the demurrer was properly overruled. There is evidence tending to show that the fountain was properly packed, and was delivered to the defendant in good order. It was badly broken when placed in the defendant's warehouse at St. Louis. The evidence of plaintiff and his brother is that the crate was then broken on one side, and that one of the inside stays was broken, and the others out of place. All this tends to show want of care on the part of defendant. Had the plaintiff brought this suit in the circuit court, by declaring on the contract, setting out its provisions, and founding his case on negligence only, we think the evidence would have entitled him to go to the jury. It will not do to say the evidence shows no more than the simple fact that the apparatus was broken. The very circumstances which disclose this fact tend to show very great negligence on the part of the defendant. It is enough for the plaintiff to disclose circumstances sufficient to raise a fair inference of negligence. We can say with safety that such a breakage does not ordinarily occur, where the property is transported with due care. There is an abundance of evidence to entitle the plaintiff to go to the jury on the issue of negligence, and especially is this so, since the means of showing how the accident occurred is with the defendant, and not the plaintiff.

The judgment of the St. Louis Court of Appeals is affirmed.

All concur.

MINNESOTA SUPREME COURT.

Louis H. MAXFIELD *et al.*, *Appts.*,
v.
Michael SCHWARTZ *et al.*, *Respts.*

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

***1. When one of two contracting parties is fraudulently induced to execute a written instrument** upon the false representation that it expresses the agreement which they have made, the party defrauded may defend against the enforcement of the fraudulent instrument by the other party, even though he may be chargeable with want of prudence in relying upon the false representations.

2. This defense may also be made when a third party, for whose benefit the contract was made, seeks to enforce it.

(December 30, 1890.)

APPEAL by plaintiffs from an order of the District Court for Scott County overruling a demurrer to a defense interposed in an action brought to recover upon an alleged contract of defendants to pay a debt due plaintiff from Berens & Nachtsheim. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. **Southworth & Coller** for appellants.

Mr. **J. L. MacDonald** for respondents.

*Head notes by DICKINSON, J.

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

This is an appeal by the plaintiffs from an order overruling their demurrer to one of the defenses, as set forth in the answer. The plaintiffs, creditors of the partnership of Berens & Nachtsheim, prosecute this action to recover from the defendants the amount of their debt against that firm, basing their right of recovery on a written instrument executed between Berens & Nachtsheim and the defendants, by the terms of which the latter, in consideration of the sale and delivery to them by that firm of all their property, agreed to pay all their debts. The right of the plaintiffs to recover in this action was affirmed by our decision upon a former appeal. *Maxfield* v. *Schwartz*, 43 Minn. 221.

While the answer is so drawn as to be subject to criticism, and while the defense to which we are about to refer is obscured by allegations of immaterial matter, we think that the pleading must be regarded as alleging that the real agreement of the contracting parties was that, in consideration of the transfer by Berens & Nachtsheim of all their property to the defendants, the latter should pay the debts of Berens & Nachtsheim to the extent of the proceeds of such property, but that Berens & Nachtsheim procured the defendants to execute the written instrument, upon which this action is brought, by falsely and fraudulently representing to them that it expressed the agreement which they had made, they believing such

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NOTE.—*Contract obtained by circumvention and deceit.*

To sustain a defense at law, that defendant was induced to sign a bond by fraudulent representations, the only fraud permissible to be proved is fraud touching the execution of the instrument. George v. Tate, 102 U. S. 564, 26 L. ed. 232; Hartshorn v. Day, 60 U. S. 19 How. 212, 15 L. ed. 605; Osterhout v. Shoemaker, 3 Hill, 513; Belden v. Davies, 2 Hall, 433; Franchot v. Leach, 5 Cow. 506.

Where the signature to a contract was obtained through fraudulently false representations of its contents, the defense of fraud may be set up in an action based upon the contract. *Non est factum* could have been pleaded at common law. Van Valkenburgh v. Rouk, 12 Johns. 337; Stacy v. Ross, 27 Tex. 3; Foster v. Mackinnon, L. R. 4 C. P. 704; Vorley v. Cooke, 1 Giff. 230.

"Fraud" is the term which the law applies to certain facts; and where upon the facts the law adjudges fraud, it is not essential that the complaint should in terms allege it. It is sufficient if the facts stated amount to a case of fraud. Stimson v. Helps, 9 Colo. 33; Kerr, Fraud and Mistake, 366; 2 Estee, Pl. 423.

Fraud or circumvention which the Illinois Statute embodying a rule of common law allows as a defense to written instruments against the guilty party or an assignee is not that which goes merely to the consideration, but to the execution or making; and there must be a trick or device by which one kind of instrument is signed in belief that it is another kind, or the amount or nature or terms of the instrument must be misrepresented. Oregon v. Jennings, 119 U. S. 74, 30 L. ed. 323; Shipley v. Carroll, 45 Ill. 285; Elliott v. Levings, 54 Ill. 213; Maxcy v. Williamson County Ct. 72 Ill. 207.

Neglect to take precautions, not to defeat right of defense.

Where the written instrument has not passed from the hands of the original holder, it does not lie in his mouth to say that the defendant was not in law defrauded, because he was careless in trusting to the representations made which induced its execution. Mackey v. Peterson, 29 Minn. 298; Cole v. Williams, 12 Neb. 440; Nebeker v. Cutsinger, 48 Ind. 436; Spurgin v. Traub, 65 Ill. 170.

Where the parties to a transaction do not stand on an equal footing, one induced to act to his prejudice by fraudulent representation of the other is not precluded from recovering damages because he did not prosecute diligent inquiry as to the truth or falsity of the representations. Cottrill v. Crum, 100 Mo. 397; Waunell v. Kem, 57 Mo. 478; Bigelow, Frauds, 534.

But a party to a contract who refuses to make diligent inquiry and exercise his own judgment cannot complain that the other party practiced fraud upon him. Cheyenne First Nat. Bank v. Swan (Wyo.) Feb. 5, 1890.

Proof of fraud must be clear and strong.

It is inexpedient upon grounds of public policy that a solemnly executed instrument should be set aside upon the ground of fraud, unless proof of the fraud be clear and strong. Cannon v. Jackson, 40 Ark. 417; Parlin v. Small, 68 Me. 290; Brown v. Blunt, 72 Me. 415; Martin v. Berens, 67 Pa. 459.

False representations. See *notes* to Nounnan v. Sutler County Land Co. (Cal.) 6 L. R. A. 219; Tarpan v. Albany Brewing Co. (Cal.) 5 L. R. A. 428; Dawe v. Morris (Mass.) 4 L. R. A. 158; Finlayson v. Finlayson (Or.) 3 L. R. A. 801; Davis v. Nuzum (Wis.) 1 L. R. A. 774.

representations to be true. It is further alleged that the defendants are Germans by birth, and understood the English language so imperfectly that they were unable to read the written contract intelligently, or to understand its purport if it were read to them. If the facts were as stated, the execution of the written instrument by the defendants was procured by the fraud of the other contracting parties, and for that reason the defendants may resist a recovery upon it. They may deny that it is their contract, although, of course, it being, as they admit, impossible to now rescind, they would be bound to perform the agreement actually made by them. This they allege they have done. If Berens & Nachtsheim were seeking to enforce the written contract, a plea of fraud, such as is here presented, would constitute a defense, even though the defendants may have been wanting in ordinary prudence in relying upon the representations of the other contracting party as to the tenor or contents of the writing. They might still rely upon the defense that this was not their contract. *Aultman* v. *Olson*, 34 Minn. 450; *Frohreich* v. *Gammon*, 28 Minn. 476; *Miller* v. *Sawbridge*, 29 Minn. 442; *Albany City Sav. Inst.* v. *Burdick*, 87 N. Y. 40; *Linington* v. *Strong*, 107 Ill. 295; *Gardner* v. *Trenary*, 65 Iowa, 646; *Thorough-good's Case*, 2 Coke, 9; *Stanley* v. *McGauran*, L. R. 11 Ir. 314; *Redgrave* v. *Hurd*, L. R. 20 Ch. Div. 1, 13; Pollock, Cont. 401, *et seq.*, and cases cited; Bigelow, Fraud, 523–525.

While, in the ordinary business transactions of life, men are expected to exercise reasonable prudence, and not to rely upon others, with whom they deal, to care for and protect their interests, this requirement is not to be carried so far that the law shall ignore or protect positive, intentional fraud successfully practiced upon the simple minded or unwary. As between the original parties, one who has intentionally deceived the other to his prejudice is not to be heard to say, in defense of the charge of fraud, that the innocent party ought not to have trusted him. See authorities above cited. It is true that, upon obvious grounds of policy and necessity, written instruments executed by the parties for the purpose of expressing and showing the agreements entered into by them are not to be avoided, except by clear, strong and satisfactory evidence. *McCall* v. *Bushnell*, 41 Minn. 37.

But this relates to the subject of proof, not of pleading, which is the question now before us.

These plaintiffs have no rights under this alleged contract, so far as appears, superior to those of Berens & Nachtsheim, the original contracting parties. They simply stand in the place of Berens & Nachtsheim, entitled to the benefits of their contract. If the contract sued upon was affected by any infirmity which would have constituted a defense to an action on it by Berens & Nachtsheim, the same defense may be made as against the plaintiffs. They do not stand in such a position that the doctrine of estoppel or any rule of necessity under the commercial law, as might be the case in respect to negotiable paper, should bar the defense of fraud.

Order affirmed.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA
v.
George McAFEE, *Appt.*

(....N. C.....)

1. **The commission of a criminal assault** in the presence of one known to be a justice of the peace will justify an arrest by the latter of the offender without warrant and without giving information of the nature of the charge.
2. **A man's striking his wife with a stick** from four to five feet in length and from one to two inches in thickness when so near an officer that the latter can distinctly hear the conversation and the sound made by the blow is a breach of the peace in the presence of the officer within the rule permitting an arrest without warrant, although the officer could not at the time see the parties on account of darkness.
3. **The raising of a stick which is from four to five feet long** and from one to two inches in thickness by one whom an officer is attempting to arrest over the latter's head so as to cause him to step aside to avoid an apprehended blow constitutes an assault upon him.

(December 15, 1890.)

APPEAL by defendant from a judgment of the Criminal Court for Mecklenburg County convicting him of assault and battery. *Affirmed.*

Statement by **Avery, *J.***:

Indictment for assault and battery tried at February Term, 1890, of the Criminal Court of Mecklenburg County, before Meares, *J.* The State introduced H. C. Severs, a justice of the peace, as a witness, who testified that he lived about a mile from Charlotte, his house being situated near a public road. About 8 o'clock at night, on a Saturday in July, 1890, he was informed by one Watts that the defendant was beating his wife, and about to kill her, and that he and his son went out to the road and heard persons talking in a loud tone down the road. They were coming up the road in the direction of witness' house. It was dark, and witness could not see the persons who were talking loud, but, when they approached to within forty feet of him, he heard a blow given as with a stick, and a woman's voice cried out very loud, as if in distress. In a few minutes thereafter, the defendant and his wife came along the road, and the defendant had a stick in his hand, and was cursing and talking violently, and his wife was crying in a loud voice. Witness went up to the defendant and told him to consider himself under arrest, and imme-

NOTE.—Authority to arrest for breach of the peace without warrant. See *note* to State v. Hunter (N. C.) 8 L. R. A. 529.

See also 17 L. R. A. 626.

diately the defendant drew back his stick and told witness to stand back, that he had done nothing to be arrested for, and would not be arrested. The defendant held the stick uplifted, and in a position as if he intended to strike the witness; and witness, believing he was about to strike, got out of defendant's way, and defendant and his wife then walked on down the road. The stick was the limb of a sycamore tree, four or five feet long, and one or two inches in diameter. Witness did not see the defendant strike his wife. When he told defendant to consider himself under arrest, he was about to take hold of him in order to arrest him, but before he could do so the defendant lifted the stick, and assumed a striking position, and ordered him to stand back. Defendant is well acquainted with witness, and knew that witness was a justice of the peace. Witness had not issued any warrant, and did not profess to have any warrant in his possession at the time of the attempted arrest. William Severs, a son of the above-named witness, was introduced, and corroborated the statement of his father. The defendant introduced one Watts, who testified that he was walking along the road in company with defendant and his wife and sister, and, when they were near a bridge about one quarter of a mile from Severs' house, he saw the defendant push his wife two or three times, and slap her, but did not see him strike her with a stick; that he went up to Severs' house, who is a magistrate, and told him that defendant was beating his wife. The defendant testified in his own behalf that, while going along the road on the night in question, he pushed his wife two or three times merely in play, and she fell into a ditch, and then began to cry. He denied that he struck her with a stick, and stated that he did not strike her at all. When he got in front of Severs' house, Severs was standing in the middle of the road, and told him to consider himself under arrest, and he replied that he had done nothing to be arrested for. He walked around Severs and passed by him, and Severs never moved from his position. He neither raised his stick nor threatened to strike Severs. He had one or two drinks that evening. Maria McAfee, wife of defendant, testified that defendant did not strike her with a stick that night. She said he did not hurt her, and that she cried because her feelings were hurt. She did not think he was angry with her, but that he had been drinking. She went home and stayed with her husband that night.

The defendants' counsel asked the court to instruct the jury (1) that there was no evidence that the prisoner assaulted Severs, the prosecutor; (2) that no person without a warrant could make an arrest unless he was present at a riot, rout, affray or other breach of the peace, and he could only make the arrest then when it was necessary to prevent or suppress the same; (3) that there was no evidence that there was any riot, rout, affray or any breach of the peace committed by the defendant; (4) that there was no evidence that, if a breach of the peace was committed by George McAfee (defendant), it was done in the presence of the prosecutor. The court refused the first, third and fourth instructions, but gave, in substance, to the defendant the full benefit of the second prayer for instructions. On the question which was raised as to what constitutes a presence in law, the court told the jury that an officer of the law had no power to arrest a person on a charge of assault and battery, or other breach of the peace, without a warrant, unless the same was committed in the presence of an officer; and, although it was night-time, and the officer could not see the persons committing a breach of the peace, yet, if it was done so near that what was done by the parties could be distinctly heard by him, this would be considered by the law as a breach of the peace committed in the presence of the officer. If Severs, the justice of the peace, heard defendant strike his wife with a stick, and heard her cry out at a distance of only forty feet (as the State alleges) from where he was standing, the law would consider the deed as done in his presence, although it was night-time and he could not see the parties. The court also told the jury that a husband had no right to whip his wife with a stick no larger than a man's thumb if the chastisement was inflicted from pure malice; that the State's witness had testified that the stick used on this occasion was four or five feet long, and from one to two inches in diameter; that, while it was indictable for a husband to chastise his wife with a whip or stick out of pure malice, a husband has nevertheless a right to chastise his wife for the purpose of correction; that the question of malice must be determined by the jury, who must take into consideration all the facts and circumstances testified to by witnesses in this case. If the jury believe the testimony of Severs, the justice of the peace, to be true, he had the right to arrest the defendant, and it was has duty to have done so; but, if they believe the witnesses for the defendant, then the defendant is not guilty. There was a verdict of guilty, and defendant submitted a motion for a new trial upon the following alleged errors: "(1) that the court refused to give the instructions prayed for; and in charging (2) that it was a question of malice whether a man was guilty of chastising his wife; (3) that the presence under the testimony was a sufficient presence to justify the prosecutor in making the arrest without a warrant; (4) there was no evidence that, if the defendant McAfee struck his wife, it was done with malice."

The motion for a new trial was overruled, and the defendant appealed from the judgment rendered.

Messrs. **Heriot Clarkson** and **C. H. Duls,** for appellant:

The defendant had a right even to use necessary force to prevent an illegal arrest of his person.

The attempted arrest was illegal: (1) because there was no evidence that he had committed a breach of the peace; (2) if so, it was not done in the presence of said Severs; (3) if so, it was not necessary for him to do so in order to suppress or prevent the same.

State v. *Freeman,* 86 N. C. 685; *State* v. *Belk,* 76 N. C. 13.

In the absence of permanent or malicious injury inflicted or threatened, the court will not interfere with or attempt to control family government in favor of either husband or wife.

State v. *Jones*, 95 N. C. 596; *State* v. *Edens*, 95 N. C. 696.

The alleged breach of the peace was not committed in the presence of the justice of the peace.

The justice must see the felony or breach of peace committed.

1 Chitty, Crim. Law, *25; Hale, P. C. p. 86; 1 Russell, Crimes, 9th ed. p. 410; *People* v. *Haley*, 48 Mich. 495; *Sternack* v. *Brooks*, 7 Daly, 142; Rapalje, Crim. Proc. § 11; *Ross* v. *State*, 10 Tex. App. 455; Del. Gen. Sess.; *State* v. *Crocker*, 1 Houst. Crim. Rep. 434.

Where a breach of the peace is merely threatened or impending, or has been fully committed before the officer's arrival, an arrest without process is unwarranted.

State v. *James*, 78 N. C. 455; *Quinn* v. *Heisel*, 40 Mich. 576.

If the person arrested was not committing an offense at the time he was arrested for a supposed misdemeanor, the officer is not justified in making the arrest.

Shaw v. *Chairitie*, 3 Cromp. & R. 21; *Cook* v. *Nethercote*, 6 Car. & P. 741; *Price* v. *Seeley*, 10 Clark & F. (H. L.) 28; 1 Bennett & H. Lead. Crim. Cas. 143; *State* v. *Parker*, 75 N. C. 249; *Rex* v. *Bright*, 4 Car. & P. 387; *Boyleston* v. *Kerr*, 2 Daly, 220.

Mr. **Theodore F. Davidson,** *Atty-Gen.*, for the State.

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

A justice of the peace, a constable or a sheriff can unquestionably arrest without warrant one who commits a felony or breach of the peace in his presence. *State* v. *Hunter*, 106 N. C. 793, 8 L. R. A. 529; *State* v. *Freeman*, 86 N. C. 683; 3 Wharton, Crim. Law, § 2827.

But in *State* v. *Hunter*, where the right of a policeman to arrest under the provisions of the charter without warrant for a violation of a city ordinance was declared the same as in cases of breaches of the peace, the court says that they (policemen) "must determine at their peril, preliminary to proceeding without warrant, whether a valid ordinance has been violated," and that the question of good faith on the part of an officer comes to his aid only where he is resisted in making a lawful arrest. The rule is different when arrests are made by officers for felonies, however, because reasonable ground to believe a felony had been committed or a dangerous wound inflicted is sufficient to justify an officer in arresting. If the assault with the stick described was committed in the presence of the officer, Severs, and he was known to the defendant to be a justice of the peace, it was not unlawful to arrest without informing the offender of the nature of the charge, as well as without warrant. 3 Wharton, Crim. Law, § 2829.

We concur with the judge below in the view expressed in his charge, that, if the defendant struck his wife with the stick described by the witness at a point so near to the officer that he could distinctly hear what was said, and the sound made by the blow, it would be considered, in law, a breach of the peace in his presence, though he could not at the time actually see the former, because it was too dark. The principal evil intended to be avoided by restricting the right to arrest to breaches of the peace committed in the officer's presence was depriving a person of his liberty except upon warrant issued on sworn information, or upon the actual personal knowledge of the officer that the offense was committed. The reason of the law is as fully met, therefore, if the officer heard enough to satisfy him that the law was violated, as if he had acquired the information through his sense of sight. He incurred the risk of subjecting himself to indictment for assault, if the defendant did not in fact strike his wife with the stick; and, under the instruction given by the court, the jury must have found that the defendant did commit an assault upon his wife with the same stick afterwards drawn over the prosecutor. The stick that was raised over the head of the prosecutor was a piece of the limb of a sycamore tree, from four to five feet in length, and from one to two inches thick. There was evidence tending to show, and sufficient, it seems, to satisfy the jury, that the defendant struck his wife with that stick. His honor, in his charge, left the question of striking with the stick to the jury, and made the guilt of the defendant dependent upon it, and the defendant had no reason to complain of such instruction. *State* v. *Huntley*, 91 N. C. 617.

If the defendant raised the stick described in striking posture over the prosecutor's head, and caused the prosecutor to step aside to avoid an apprehended blow, it was an assault. *State* v. *Shipman*, 81 N. C. 513.

There was evidence tending to show that the defendant committed an assault, *first*, upon his wife in presence of the prosecutor; and, *secondly*, that he committed an assault upon the prosecutor, who was attempting to arrest him, and was known to the defendant to be a peace officer. The jury passed upon the disputed facts.

There is no error, and *the judgment is affirmed.*

NEW YORK COURT OF APPEALS.

Daniel ARFF, *Appt.*,
v.
STAR FIRE INSURANCE CO., of the City of New York, *Respt.*

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

1. A person exclusively employed on behalf of insurance agents as a solicitor, although his compensation is regulated by the applications he procures, and who has a desk in their office for that business, is a clerk of such agents, notice to whom of other insurance on property insured through him operates as notice to the company.

NOTE.—*Insurance agent, employment of clerks.*

An insurance company will be construed as having anticipated the employment of clerks to attend to the office of its agent during the latter's absence or sickness, and not as requiring that the agent should attend to all the details of his business in

See also 30 L. R. A. 842.

2. A provision in an insurance policy that "only such persons as shall hold the commission of this company" shall be considered as its agents in any transaction relating to the insurance will not prevent the employment of clerks by the authorized agents of such company, who may act in behalf of such agents and bind the company in the proper scope of their employment.

3. Evidence of the habit of insurance agents in respect to performing the details of the business, and of the employment of clerks and of their duties, is admissible on the question of the power of a clerk of such agents to bind the insurance company.

(Earl and Gray, JJ., dissent.)

(December 2, 1890.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of the Rensselaer Circuit dismissing the complaint in an action upon a policy of fire insurance. *Reversed.*

The facts are stated in the opinion.

Mr. **Henry A. Merritt,** for appellant:

If McDonald & Van Alstyne had authority to consent to additional insurance, that act could be done by a servant or employé working for them.

See *Bodine* v. *Exchange F. Ins. Co.* 51 N.Y. 117; *Clark* v. *Glens Falls Ins. Co.* 36 Hun, 640; *Cooke* v. *Etna Ins. Co.* 7 Daly, 555; *Chase* v. *People's F. Ins. Co.* 14 Hun, 456; *Allen* v. *St. Louis Ins. Co.* 85 N. Y. 473; *Davis* v. *Lamar Ins. Co.* 18 Hun, 230; *Kuney* v. *Amazon Ins. Co.* 36 Hun, 66.

A broker is one who makes a bargain for another and receives a commission for so doing.

Story, Ag. § 28.

Strecker in obtaining the policy was not pursuing an independent employment, or acting for the plaintiff, but solely as the servant or employé of McDonald & Van Alstyne, agents of the defendant.

A person holding such a relation cannot be deemed acting for the insured instead of the company for whom he solicits insurance, without disclosing his relation and vocation.

Mohr & M. Distilling Co. v. *Ohio Ins. Co.* 13 Fed. Rep. 74.

Plaintiff had a right to suppose Strecker had the authority he apparently possessed.

Mechanics Bank v. *New York & N. H. R. Co.* 13 N.Y. 599; *Farmers & M. Bank* v. *Butchers & D. Bank,* 16 N.Y. 125; *Perkins* v. *Washington Ins. Co.* 4 Cow. 645; *Johnson* v. *Jones,* 4 Barb. 369; *Lightbody* v. *North American Ins. Co.* 23 Wend. 18.

The facts proved constituted Werner Strecker the servant or clerk of McDonald & Van Alstyne, agents of the defendant, so far as plaintiff was concerned.

McEwen v. *Montgomery County Mut. Ins. Co.* 5 Hill, 101.

Mr. **R. A. Parmenter,** for respondent:

Strecker was not in any sense the agent of the defendant, and notice to him of other insurance was insufficient.

Elwood v. *Western U. Teleg. Co.* 45 N.Y. 549; *Herman* v. *Niagara F. Ins. Co.* 1 Cent. Rep. 707, 100 N.Y. 411.

Notice to a mere insurance broker is not notice to the company who issues the policy.

Devens v. *Mechanics & T. Ins. Co.* 83 N. Y. 168; *Mellen* v. *Hamilton F. Ins. Co.* 17 N. Y. 609; *Herman* v. *Niagara F. Ins. Co. supra.*

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

This is an action to recover upon a policy of insurance issued by the defendant upon certain personal property belonging to the plaintiff. A loss having occurred, and plaintiff having made a demand upon defendant for payment under the policy, the defendant refused to pay, because it appeared that other insurance had been taken subsequent to the issuing of the policy in question, and, as defendant claimed, no notice had been given to it of the taking of such insurance. There was a clause in the policy by which the plaintiff "agreed to notify the Company if at the making of this insurance, or at any time during its continuance, there shall be any other insurance applied to the property herein described, or any part thereof, whether the same be valid or not." It was also provided that the policy should become void if the assured neglected to comply with its terms, conditions or covenants. There was also a provision in the policy, that "only such persons as shall hold the commission of this Company shall be considered as its agents in any transaction relating to this insurance or any renewal thereof, or the payment of premium to the Company. Any other person shall be deemed to be the agent of the assured, and payment of the premium to such person shall be at the sole risk of the assured." The plaintiff claimed upon the trial that he had given the notice required by the Company. He had in fact given it to one Werner Strecker, and whether or not that notice is sufficient is the only question in the case. The plaintiff was nonsuited on the ground that he had not given the notice as required by the policy, and that judgment of nonsuit has been affirmed by the general term, and the plaintiff appeals here.

It appeared in evidence that McDonald & Van Alstyne were the duly commissioned agents of the Company in the City of Troy at the time when this policy was issued. Mr.

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person. Deitz v. Providence Washington Ins. Co. 33 W.Va. 526; Bodine v. Exchange F. Ins. Co. 51 N. Y. 117.

The maxim of *delegatus non potest delegare* does not apply in such a case. Story, Ag. § 14.

When a clerk of an agent of an insurance company is authorized and intrusted to examine property and to write out a policy thereon, his contract and knowledge are the contract and knowledge of the agent; and any accidental mistake which he may make is a mistake of the agent, and will be corrected in an action on the policy. Deitz v. Providence Washington Ins. Co. *supra.*

The company is bound by the knowledge of the agent's clerk, who, for the purpose of the policy, must be regarded as the company's soliciting agent. Iowa Laws 1880, chap. 211, § 1; Bennett v. Council Bluffs Ins. Co. 70 Iowa, 600.

Company responsible for acts of its agents. See *notes* to Equitable L. Assur. Soc. v. Hazlewood (Tex.) 7 L. R. A. 217; German Ins. Co. v. Gray (Kan.), 8 L. R. A. 70.

Van Alstyne swore that his firm had authority, as agents of the defendant, to give permits for additional insurance, and to consent to assignments for transfers of insurance. He also stated that their authority as agents of the defendant was to do a general insurance business for the Company, collect premiums, give receipts and consents and easements on insurance policies. They had been agents of the defendant for five or six years at the time in question. When this policy was issued, and up to the time of the occurrence of the loss, this firm had been doing business in the City of Troy for the defendant as general insurance agents, and during that time Mr. Van Alstyne said that they "had in their employ, among others, this Werner Strecker," and he designated the manner of his employment as "working for us as a broker. I mean soliciting insurance on commission. He was soliciting insurance for our firm, and our firm only, on a commission. His compensation was regulated by certain commission on business he brought. He did not do other fire insurance that I know of. What he would do would be to go and solicit insurance and bring it to our office. If we approved it, we would take it and pay him his commission. That was all. He was not soliciting fire insurance for anyone else. His arrangement about his working for us in the way of fire insurance was that he was employed by us to solicit insurance for our office exclusively, upon which we paid him a commission upon the business he brought in." He also said that Strecker had a desk in their office during this time. "Not one of his own, but he used one that was in the office, the same as any person. When he happened in, he came in and used a desk there the same as any broker. He had a desk that he used pretty much all the time for himself."

Mr. Strecker himself testified that he was in the insurance business principally in 1884,—fire and life both; working for McDonald & Van Alstyne, and for no one else, not in fire insurance. "I was paid according to the business I brought in. If I did a great deal of business, I got a great deal of money; and, if I didn't, I got less. During that year, I do not know whether it would be called working under a salary or not; it was always regulated by the amount of business. There was a desk in the office I usually occupied. The nature of my employment was soliciting." He solicited from Mr. Arff an application for the policy in question, and it was after the issuing of the policy that the plaintiff informed Mr. Strecker that other insurance had been taken through Mr. Fromann.

It was also stated by Mr. Van Alstyne that, under their agreement with Mr. Strecker, "he was at liberty to work for any other insurance company if he pleased. He could place his business with other insurance companies if he chose. He could place such business as he solicited with other companies if he chose, with other agents. He had, for some considerable period anterior to 1884, acted for us in the matter of soliciting fire insurance. His office was located with us. He had a desk in our office. Prior to this he had been in our employ since 1880, doing business exclusively for our Company, and having a desk in our office during that time."

There was thus evidence from which the jury could infer that Mr. Strecker was solely in the employ of these agents, and that the kind of employment in which he was engaged was the soliciting for them of policies of insurance, and for them exclusively, and that his compensation for the services performed by him for them depended upon the amount of business which he was able to do; or, in other words, the number of applications which he secured for them, and which they accepted. It is true that Mr. Van Alstyne denominated this kind of service as the service of a broker, and he also stated that Mr. Strecker was at liberty to work for any other insurance company if he pleased. If he meant that Mr. Strecker had the power to violate his agreement with them, and, instead of working exclusively for them, work for others, why that is a self-evident proposition, and has no bearing upon the question as to the capacity in which he was then employed by them. If he meant to assert that he was not exclusively employed by them, then it is a contradiction of what the witness had already several times stated to be the truth, and also a contradiction of the testimony of Mr. Strecker himself, and the fact of exclusive employment, if material, should have been left to the jury to determine. If the witness Strecker were really nothing but an ordinary insurance broker, notice to him of subsequent insurance would not be notice to the Company. *Mellen* v. *Hamilton F. Ins. Co.* 17 N. Y. 609; *Devens* v. *Mechanics & T. Ins. Co.* 83 N. Y. 168.

What is understood under the designation of an "insurance broker" is one who acts as a middleman between the insured and the company, and who solicits insurance from the public under no employment from any special company; but, having secured an order, he either places the insurance with the company selected by the insurer, or, in the absence of any selection by him, then with the company selected by such broker. Ordinarily the relation between the insured and the broker is that between the principal and his agent, and, according to Arnould on Insurance (vol. 1, 2d ed. p. 108, chap. 5), "the business of a policy broker would seem to be limited to receiving instructions from his principal as to the nature of the risk, and the rate of premium at which he wishes to insure; communicating these facts to the underwriters; effecting the policy with them on the best possible terms for his employer; paying them the premium and receiving from them whatever may be due in case of loss." In the two cases above cited of *Mellen* v. *Hamilton F. Ins. Co.* and *Devens* v. *Mechanics & T. Ins. Co.*, it appeared that the broker who effected the insurance in either case was not in the employment of the insuring company at all, and that the only connection between the company and him was that when he presented to them an application for insurance, if the company chose to issue a policy, he was paid a commission thereon by the company. In each of those cases the man procuring the insurance was not confined to any company in his labors. He was in no sense in the employment of any company, and the nature of his connection was

such that upon receipt of the premium by the company, and the delivery of the policy to the insured, his connection with the company wholly ceased. The connection in this case between this assumed broker and his principals is entirely different. Assuming the truth of the statement that he was in the exclusive employment of these agents, and that it was his duty in such case to bring whatever applications he received to the agents because of his agreement with them that he should work for them exclusively, it would seem that his character as an ordinary insurance broker had ceased from the time that he entered into such employment. However these agents might characterize his employment, the fact upon the testimony in the case, assuming its truth as above construed, leaves him, in my opinion, nothing more or less than a clerk or employé of these agents. He performs the same duties that would be performed by an individual employed as a clerk, and told to do this business. The mere solicitation of insurance, and the bringing of the application to these agents, who are to determine finally whether it shall or shall not be accepted, is not of such a nature that it could not be done by an ordinary clerk, nor does the doing of it in that way, and under such circumstances, necessarily preclude the person who does it from occupying the position of clerk, and place him in the position of an ordinary insurance broker. If, upon these facts, he acted as clerk, and the oral notice were given to him in his capacity of clerk of these agents, such notice would be sufficient. *McEwen* v. *Montgomery County Mut. Ins. Co.* 5 Hill, 101, approved in *Wilson* v. *Genesee Mut. Ins. Co.* 14 N. Y. 418, 421.

It has been held that an ordinary agent of an insurance company has the power to employ clerks to discharge the ordinary business of his agency, and that a waiver of a character which the agent himself could make is to be attributed to him when made by his clerk.

In *Bodine* v. *Exchange F. Ins. Co.*, 51 N. Y. 117, it was said by Earl, *C.*, at page 123: "We know, according to the ordinary course of business, that insurance agents frequently have clerks to assist them, and that they could not transact their business if obliged to attend to all the details in person; and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums and to take payment of premiums in cash or securities, and to give credit for premiums, or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person. The maxim of *delegatus non potest delegare* does not apply in such a case. Story, Ag. § 14."

In the case of *Clark* v. *Glens Falls Ins. Co.*, 36 Hun, 640, the general term of the supreme court held that the policy in that suit, countersigned by a clerk in the office of the authorized and commissioned agents of the defendant, was a proper and valid policy, where the clerk was authorized by the agents to contract new insurance and to give renewals, to make monthly and daily reports, and collect premiums on policies and renewals issued.

In *Chase* v. *People's F. Ins. Co.* 14 Hun, 456, it was held that the knowledge of a clerk of the agents of defendant's company that the house insured was vacant was the knowledge of the agents of the company, and therefore the knowledge of the company itself. And in *Kuney* v. *Amazon Ins. Co.* 36 Hun, 66, the Supreme Court in the Fifth Department held that a general agent of a foreign insurance company had a right, by virtue of its authority, and for the purpose of discharging the duties appertaining to his office, to employ all necessary agents, clerks and surveyors to enable him to conduct the business with correctness, intelligence and promptness, and that, when he did in fact employ others, their acts and contracts would be binding upon the company the same as if made personally by Miller, the general agent. Enough has been said to show that an agent of an insurance company has the right to, and indeed it is the expectation of the company that he will, employ such clerks and other assistants as may be necessary and proper in order that he may do the business for which he has been appointed agent. Soliciting insurance is part of the business of such agents, and it is not to be assumed that such solicitation can be made only by the agents personally, nor can it be held, as matter of law, that, when it was made by some person employed exclusively by them, such solicitation on the part of the person thus employed makes him an insurance broker, and takes away from him his character as clerk or employé of the agent. The fact that Strecker was compensated for his services to these agents by a commission on the business which he brought in is not conclusive upon the question of the capacity in which he worked. Clerks or other employés are frequently compensated by a commission upon the amount of business brought to the employer by them. In order to constitute Strecker such an employé that he might receive notice for his employers as to subsequent insurance in a case like this, it is not necessary that he should have been engaged to perform only such duties as may be and are done in the office of his employer. The place of the performance of the duties is neither the sole, nor always a necessary, criterion by which to judge of the nature of such service. The employé of the agent in the case of *Bodine* v. *Exchange F. Ins. Co.*, *supra*, was not confined to the office in the performance of duties which he discharged for his employer. There is, moreover, in the evidence of one of the agents, sufficient for a jury to infer that Strecker had a desk in their office and belonging to them, assigned to him for his personal use while at the office in the discharge of duties pertaining to his employment by them, and that it was his habit to so use the desk, which was regarded as his for such purpose. But, upon the question of the character of the service, we think it is sufficient that the person is engaged by the agent to do for him some portion of the ordinary, usual and well-known duties pertaining to the position of the agent, and what he does in the course of that employment, and within its general scope, is done by the agent. The notice which he receives while in the performance of his duties, and which relates to the subject matter thereof, must be regarded in the same light as and

equivalent to a notice to the agent. The proof in the case is susceptible of the inference that Strecker was employed exclusively by the agents of defendants, and to perform for them that which is part of the ordinary and usual business of an agent of an insurance company, viz., to solicit business. If the agents refused to accept the particular application, Strecker had nevertheless done all that he was employed to do by bringing it to them. By his agreement, their refusal did not authorize him to solicit some other agent or company to take the risk. At least this construction can be given to some of the evidence on the part of the plaintiff. In truth, in one view of the evidence, Strecker was not a middleman at all. He did not act as such in this case. What he did was done by him from the very first in the interest of and for these particular agents. Nor does the provision in the policy, that no one not holding the commission of the Company shall be considered as its agent, prevent the agents' employment of the usual, and indeed necessary clerical and other assistance, in order to enable them to properly perform their duties as commissioned agents of the Company. And, when thus employed, the ordinary rules of law are applicable to their acts and positions. We think that if Strecker were exclusively employed by the agents, and that his duties could only be honestly discharged while the agreement between them lasted by giving his entire service in that line to the agents of the defendant, and if he were thus employed at the time that he procured this application and received this notice, the defendant is bound by such notice the same as if it had been given in person to their agents. If, on the contrary, according to some possible construction of the evidence of one of the agents, the employment were not exclusive, and he was occupying really the position of a simple insurance broker, then the notice was not sufficient. There were many questions put to the agent when he was on the stand, the purpose of which was to show (what may be inferred from the nature of the business) that the agents employed clerks. Counsel for the plaintiff also asked the witness whether clerks in his employ did not frequently and generally sign consents for other and additional insurance in respect to this Company; whether it had been the habit of this firm of agents to attend to the details of the business, and how many clerks the firm had at this time. All these questions were objected to, and ruled out by the court below. We think they were proper for the purpose of showing the manner in which the business of this firm was conducted, although perhaps the court might assume or take judicial notice of the fact that agents of an insurance company do business largely through clerks and sub-agents, and that many of the details of their business are not performed by themselves. We should not perhaps, in this instance, reverse the judgment for the refusal to admit this evidence, but we think its admission would not have been error.

Upon the whole *we think the learned judge erred in nonsuiting the plaintiff, and that the judgment entered upon the nonsuit must be reversed*, and a new trial granted, with costs to abide the event.

All concur, except **Earl** and **Gray, JJ.**, dissenting.

ILLINOIS SUPREME COURT.

WHEELER *et al.*, *Appts.*,
v.
WHEELER.

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

The saving clause in favor of persons absent from the State in the Statute providing that suits to contest the probate of wills must be brought within three years, applies only to those who are subject to the jurisdiction of the State and have departed from that jurisdiction for temporary purposes, and does not apply to citizens of other States or foreign countries.

(October 31, 1890.)

APPEAL by complainants from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County, which sustained a demurrer to a bill filed to set aside the will of Thomas Wheeler, deceased. *Affirmed.*

The facts are stated in the opinion.

Mr. **Mason B. Loomis** for appellants.

Mr. **M. J. Dunne** for appellee.

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

This is a bill in chancery, filed by appellants, under the 7th section of the Statute of Wills (chapter 148, Rev. Stat.), to set aside the will of Thomas Wheeler, deceased, on the ground of mental incapacity of the decedent to make a will, and of the undue influence exercised upon him in procuring its execution. The bill was filed October 24, 1888, and the will was duly admitted to probate, as alleged in the bill, October 13, 1873, substantially fifteen years prior to the filing of the bill. The bill alleges that the complainants, and each of them, were, at the time of the death of said Wheeler, and ever since have been, nonresidents of the State of Illinois, and have never resided in this State. That two of them have resided in Ireland, and one in the State of Massachusetts, and that, until immediately prior to the filing of their bill, they, nor neither of them, had any knowledge that said decedent had made a will, or of the probate of an instrument purporting to be his will. A demurrer was filed to the bill and sustained. The only question presented by the record is whether the complainants by their bill bring themselves within the saving clause of the Statute.

It is the established doctrine that, independently of statutes authorizing it, courts of equity have not, under their general chancery powers, jurisdiction to entertain a bill to set aside a will or the probate thereof. *Gaines* v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524; 2 Pom. Eq. Jur. § 913; *Gould* v. *Gould*, 3 Story, 516; *Holden* v.

Meadows, 31 Wis. 284; *Webb* v. *Claverden*, 2 Atk. 424.

We therefore held in *Luther* v. *Luther*, 122 Ill. 558, 11 West. Rep. 77, that, as the jurisdiction of courts of equity in this State to entertain bills to set aside the probate of wills is derived exclusively from the Statute, such jurisdiction can only be exercised in the mode and under the limitations therein prescribed, and that the time limited within which bills for that purpose might be brought was jurisdictional, and the bill must be exhibited within the period thus limited or the court is without power to entertain the same. It follows that the allegations of the bill must be such as will warrant the court in proceeding, and, if the jurisdictional facts are not alleged, a demurrer will properly be sustained. The section of the Statute under consideration, after providing for the proceedings upon the probate of the will, further provides: "That if any person interested shall, within three years after the probate of any such will, testament or codicil, appear and by his or her bill in chancery contest the validity of the same, an issue at law shall be made up, whether the writing exhibited be the will of the testator or testatrix or not; . . . but if no person shall appear within the time aforesaid, the probate aforesaid shall be forever binding and conclusive upon all parties concerned, saving to infants, *femes covert*, persons absent from the State or *non compos mentis* a like period after the removal of their respective disabilities," etc. As applicable here, the saving is "to persons absent from the State;" and the question prescribed is, Are the complainants "persons absent from the State" within the meaning of this Statute? We are aware that in England, and in many of the States, similar provisions in Limitation Laws have been construed to save the right of action to nonresidents as well as to residents absent from the jurisdiction. Thus in *Von Hemert* v. *Porter*, 11 Met. 210, it was held that, where the saving was "to persons absent from the United States," it was applicable to foreigners who were never within the United States. So in *Hall* v. *Little*, 14 Mass. 203; *Putnam* v. *Dike*, 13 Gray, 535.

In *Paine* v. *Drew*, 44 N. H. 306, the words "absent from" in the saving to the Statute are held to include all nonresidents. And it was there said that in the various States where the question has been presented, except the States of New Jersey and Texas, a like construction has been adopted. At a very early day, the courts of England in the construction of the Limitation Acts held the same rule. The concurrence of decision by courts of such eminent respectability ordinarily would be controlling, and be followed in construction of similar statutes, but we do not feel bound thereby in the decision of this cause. This court, in *White* v. *Hight*, 1 Ill. 204, gave similar construction to the saving clause contained in the 7th section of the Act of the 10th of February, 1827 (Laws 1827, p. 248), which saved the right to bring suit, etc., to persons under the age of twenty-one years, insane, *feme covert* or "beyond the limits of this State," provided said suit, etc., was brought within the period fixed by the Act after becoming of full age, sane, *feme sole* or "coming within this State." The limitation having been pleaded, it was held that a replication that the plaintiff when the cause of action accrued was and ever since has been beyond the limits of the State, to wit, in the State of Ohio, was a good answer to the plea. And it was there held that the saving included nonresidents of the State as well as residents who might be temporarily without its limits. At the next session of the Legislature, after the promulgation of this decision, the Legislature amended the Act of 1827 so as to exclude nonresidents from the operation of the saving clause, unless they were infants, insane or *femes covert*, and confining the saving to such persons only until the disabilities of insanity, infancy or coverture should cease. It is manifest that the construction contended for by appellees, if adopted, would have the effect of extending rights to foreigners and nonresidents of the State that have not been conferred upon our own citizens. The most that could be rightfully claimed under the Constitution, or as a matter of comity, would be that the citizens of a sister State should be placed upon a footing with citizens of this State, and accorded equal rights and immunities under our law. And we cannot suppose that it was intended to give greater protection to nonresidents than to residents of the State, and the Act should not be so construed, unless we are compelled by the language of the Legislature to attribute to them such an intention. This State has extended to nonresidents the most liberal protection under its Limitation Laws. If the cause of action be barred by the laws of the State where it accrued, a plea of such foreign statute will be held good to bar recovery within this State. And so in respect of the enforcement under our laws of claims accruing elsewhere. If they are not barred by the law of the place where they accrued, or the domicil of the parties, they will not be barred under our law until the running of the Statute within this State. It will, however, be unnecessary to notice in detail the various Acts bearing upon the general subject of the limitation of actions; but it may be said that since the passage of the Act of 1837, before mentioned, now over a half century, through all the changes in the Limitation Laws, and other Acts affecting the assertion of private rights within this State, the legislative department of the government has uniformly adhered to the principles promulgated by that Act. No Act of the Legislature has been called to our attention where a different policy has been indicated, or where by any fair inference it can be argued that nonresidents are accorded privileges or exceptions not enjoyed by citizens of this State, unless it be the Act in question. In the 8th section of the Limitation Statute (Rev. Stat. chap. 83), taken from the Act of 1839, copied into the Act of 1845, and literally therefrom in the Revision of 1874, the saving is to those "out of the limits of the United States, and in the employment of the United States or of this State." Section 9 of the same Act saves rights to persons absent "from the United States in the service of the United States or of this State." By these sections, a distinction between nonresidents and persons "out of" or "absent from" the State is clearly drawn, and it would seem clear that an intention was manifested not to follow the rule announced in *White* v. *Hight*, and other cases

alluded to, but to exclude from the saving clause of the Statute all persons who were not residents, or not absent in the particular employment designated. So with the limitation of personal actions, the saving is simply to minors, persons insane or in prison, and formerly to *femes covert*. So again, in the Administration Act, the saving is to *femes covert*, infants, persons of unsound mind, or imprisoned, or "without the United States, in the employment of the United States or of this State." Other illustrations of the legislative policy might be given, such as the Statute allowing the opening of decrees, etc., which have been rendered upon constructive notice, and many others, but sufficient has been shown to clearly indicate the policy of the State in this regard.

Again, the Legislature, in a very marked manner, has established a policy to facilitate the speedy settlement of estates, and the prompt distribution of funds to creditors and distributees. This has been repeatedly recognized by this court. Moreover, public policy demands that such construction to the law should be given, if practicable, and such rules of procedure established, as will most nearly effect a realization of the full value of the estates of decedents. In this respect the legislative policy is again strikingly manifest in the many provisions of law giving the court supervision of sales, requiring publications and notice, permitting sales on credit, requiring valuation, and like provisions. Without pausing to discuss the effect of the rule contended for, it is clear that while the purchaser at executors' sales or from devisees might be willing to purchase at the expiration of three years, or before, if there was a reasonable certainty as to who might contest the will, yet if, after an indefinite period, bills of this character might be filed, no one would feel at liberty to purchase at the value of the premises. And no one could safely buy property, the title to which depended upon the validity of a will, where there might be nonresident heirs, except at such diminished price as would enable him to bear the contingency of losing the land, or engaging in expensive litigation to maintain his title. It is conceded that the policy thus indicated is not controlling, but is a matter proper to be considered in determining the legislative intention in employing the language of this section. It is familiar that if the words employed are susceptible of two meanings, that will be adopted which comports with the general public policy of the State, as manifested by its legislation, rather than that which runs counter to such policy. The question at last to be determined is, What was the legislative intent? That must be gathered from the words used, and ordinarily, where technical words are not employed, the language must be construed according to its popular acceptation. *Stuart* v. *Hamilton*, 66 Ill. 253; *Richmond* v. *Moore*, 107 Ill. 429; *Steere* v. *Brownell*, 124 Ill. 27, 12 West. Rep. 591.

The Act provides that if no one shall appear within the time limited, the probate of the will shall be forever binding and conclusive on all parties concerned, and not falling within the saving clause. These provisions are correctly designated "statutes of repose," and are dictated by a wise public policy to put at rest title to property, and prevent stale and vexatious litigation, and, being promotive of the public welfare, exceptions out of or savings from such statutes are to be strictly construed. The word "absent," when used as an adjective, is defined by Worcester literally as "not present." The first definition given by Webster is, "Withdrawn from or not present in a place," and by Anderson (Dict. Law), "Being away; not present; not at one's domicil or usual place of business." The verb "absent" necessarily means to withdraw from or go away from a place. It must be conceded that the definition as given by Worcester would seem to indicate that the word "absent," used as a descriptive adjective, included all persons, whether resident or nonresident. The other standards quoted from, in their definition of the word, convey the idea that there is a withdrawing from, or that the party mentioned is not at the place where he might be expected to be; and this is the sense in which the words "absent from the island" were construed by *Lord* Ellenborough in *Buchanan* v. *Rucker*, 9 East, 194. The judgment was there attempted to be maintained on the ground that it was authorized by local laws of the Island of Tobago where rendered in cases of "persons absent from the island." And it was said: "By 'persons absent from the island' must necessarily be understood persons who have been present within the jurisdiction so as to be subject to the process of the court, but it can never be applied to a person, who, for aught that appears, never was present within or subject to the jurisdiction. 'Absent from the island' must be taken only to apply to persons who have been present there, and were subject to the jurisdiction of the court out of which the process issued." The same construction was given in *Snoddy* v. *Cage*, 5 Tex. 106. It is true that the Act there provided that the action might be brought "after his or their return," etc. But the court holds that a correct definition of the word "absence" requires its application to those who had been within the jurisdiction of the court, and not to persons who had never been within the limits of the State. The definition of the adjective as given by Webster expresses our understanding of its common use and acceptation, and may properly be held to be the sense in which it is employed in the section quoted. It is true that this provision, without the alteration as it was passed in 1829, was carried into the Revisions of 1833, 1845 and 1874; but, as we have seen, the whole spirit of legislation of the State, in respect of the limitation of actions, forbids the supposition that the Legislature deliberately designed to keep open litigation, in respect of the property within the State, for an indefinite period for the benefit of those residing without its limits, who are not subject to its laws, and contribute nothing to the maintenance of its government, while denying the same right to its own citizens. As we have seen, where two constructions can be given with equal facility, that must be adopted which comports with the public policy of the State. And while we recognize the rule as laid down elsewhere by the distinguished tribunals to which we have referred, we feel constrained, in view of the legislation of the State, and the uniform construction thereto given by courts of the State, to adopt a contrary view, and to hold that the

provision of the Statute applies only to those who are residents of the State, and absent therefrom. As a matter of course, the saving provisions to infants, *femes covert*, persons insane, are general, and apply equally to those within and without the State; but the provision saving to persons absent from the State must be construed as meaning those who are subject to its jurisdiction, but who have departed or gone without that jurisdiction for temporary purposes.

We are of opinion that the demurrer was properly sustained, and *the judgment of the Appellate Court will be affirmed.*

KANSAS SUPREME COURT.

STATE of Kansas, *ex rel.* F. P. COCHRAN,
v.
W. H. WINTERS, Impleaded, etc., *Appt.*

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

***Under the decision of the Supreme Court of the United States in the case of Leisy v. Hardin,** 135 U. S. 100, 34 L. ed. 128, an importer of intoxicating liquors into any State from any other State or country could, by himself or agent, prior to the passage of the "Wilson Bill," sell such liquors so long as they remained in the unbroken packages in which they existed during their transportation, without regard to the laws of the State into which such liquors were imported, and without regard to the size of the packages.

(December 6, 1890.)

APPEAL by defendant Winters from an order of the Judge of the Twenty-Fifth Judicial District, made at Chambers in Marion County, sentencing defendant to fine and imprisonment for an alleged contempt in violating an injunction restraining him from selling intoxicating liquors. *Reversed.*

*Head note by VALENTINE, J.

The facts are stated in the opinion.

Messrs. **Madden Brothers** for appellant.

Messrs. **L. B. Kellogg,** *Atty-Gen.*, and **F. P. Cochran,** *County Atty.* of Chase County, for appellee.

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

This is an appeal by the defendant W. H. Winters from an order of the Judge of the Twenty-fifth Judicial District, made at Chambers in Marion County, on July 25, 1889, sentencing the defendant to pay a fine of $100, and to be imprisoned in the county jail of Chase County for the period of thirty days, and to pay costs, for an alleged contempt in violating an order of injunction granted by such judge at chambers in Marion County on July 1, 1890, restraining the defendant from selling intoxicating liquors at Strong City in Chase County. The injunction was allowed and granted without notice to the defendant upon an *ex parte* application by the county attorney of Chase County, and it reads as follows:

"State of Kansas, County of Chase, in the District Court of said County. *State of Kansas* v. *William H. Winters and Mary O'Byrne.*

NOTE.—*Interstate commerce; importations of intoxicating liquors; sale by importer.*

Under the power granted by the Constitution to regulate foreign and interstate commerce, Congress may authorize a person to import intoxicating liquors and to sell the same in the "original packages;" but here the power of Congress ceases and the jurisdiction of the State begins. State v. Robinson, 49 Me. 285; State v. Intoxicating Liquors, 82 Me. 558; Brown v. Maryland, 25 U. S. 12 Wheat. 422, 6 L. ed. 679. See Keith v. State (Ala.) 10 L. R. A. 430.

A state law which forbids common carriers to bring into the State intoxicating liquors from another State without being furnished with a certificate that the consignee was empowered to sell the same is a regulation of commerce among the States and is repugnant to the Federal Constitution. Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700; State v. Stilsing (N. J.) June 5, 1890.

Under the Act of Congress, no one but the importer himself has the right to sell; those who purchase from him have no such right. License Cases, 46 U. S. 5 How. 504, 12 L. ed. 256; State v. Blackwell, 65 Me. 556; State v. Intoxicating Liquors, 69 Me. 524. See Maine Laws 1846, chap. 205, § 2; Act of 1851; Laws 1858, chap. 33, § 25.

"Original package" defined.

Where liquors are imported in small bottles, each wrapped in paper and labeled "Original package," and, for the purpose of facilitating shipment, packed in an open box marked with the number and size of the bottles, the box is the original package; but where the carrier for the purpose of facilitating transportation furnishes the box, the bottle constitutes the original package. Keith v. State (Ala.) 10 L. R. A. 430.

State Prohibitory Laws; conflict of laws.

Under the late decisions of the United States Supreme Court a State cannot, in the absence of legislation on the part of Congress, prohibit the importation of intoxicating beverages from abroad, or from a sister State, or, when so imported, prohibit their sale by the importer in the original package, however small the imported package may be. *Re* Beine, 42 Fed. Rep. 546.

Intoxicating liquor legislation; how far constitutional. See *note* to Tragesser v. Gray (Md.) 9 L. R. A. 780.

Legislative remedy.

The Act of Congress of 1890, known as the "Wilson Bill," which declares that intoxicating liquors shall, on arrival in a State, be subject to the operation of the police powers of the State, is not an unstitutional delegation of power, but a mere declaration of when such imports shall become subject to state law. It gives no power to States to legislate on the subject. *Re* Spickler, 10 L. R. A. 446, 43 Fed. Rep. 653; *Re* VanVliet, 10 L. R. A. 451, 43 Fed. Rep. 761.

Under the "Wilson Bill," the state law remains in full force, and makes liquors imported and remaining in the original packages subject to the state law, and no re-enactment of the Prohibitory

10 L. R. A.

See also 10 L. R. A. 830; 11 L. R. A. 602; 15 L. R. A. 397; 18 L. R. A. 549; 24 L. R. A. 245; 26 L. R. A. 784; 29 L. R. A. 468.

It being shown to me by verified petition of the plaintiff that the defendant Mary O'Byrne is the owner of the certain frame building standing and being on lots 6 and 8 in block 6 in Carter's Addition to the City of Strong City, Chase County, Kansas, and that she authorizes and knowingly permits the defendant William H. Winters to occupy and use the same for the illegal sale, barter and gift of intoxicating liquors, and as the resort of persons for the drinking of intoxicating liquors, and that the defendant Willian H. Winters occupies and uses said premises for all of such illegal purposes, and that neither of said defendants had authority under the law to sell intoxicating liquors, and that, by reason of all such illegal sales and said other illegal practices, the said premises have become and are a common nuisance: It is therefore ordered that the defendants, and each of them, and their agents, clerks, servants and lessees, be enjoined from keeping open, or permitting to be kept open, the said premises for said uses, and from bartering, selling or giving away, or keeping for barter, sale or gift, or permitting to be drunk thereon, any intoxicating liquors without a permit so to do from the probate judge of the said County of Chase. And it is further ordered that, before this order takes effect, the plaintiff execute a bond to said defendants, conditioned according to law, in the sum of $100. Witness my hand, at chambers, in Marion, Marion County, Kansas, this July 1st, 1890. Frank Doster, Judge of the 25th Judicial District."

Afterwards, and on July 10, 1890, said judge, at chambers, in Marion County, upon a letter of the county attorney of Chase County informing him that the defendant was selling intoxicating liquors in Chase County, issued an order to the defendant Winters requiring him to show cause before the judge at his chambers in Marion County on July 12, 1890, why he, the defendant, should not be adjudged guilty of contempt in violating the said order of injunction. The defendant made a special appearance before the judge on the day last above mentioned, and moved to discharge the order requiring him to show cause, for various reasons, including a want of jurisdiction on the part of the judge, which motion was overruled. The judge then required the county attorney of Chase County to file a written complaint, which the county attorney did, and the defendant again moved to be discharged for various reasons, which motion was overruled; and the judge then, over the objections of the defendant, ordered an immediate hearing upon such complaint without any other or further notice, writ, summons or process, and the hearing was then had. Upon this hearing the following facts were agreed to by both the parties as constituting "the facts of this case, and all the facts therein:" "It is agreed and admitted that the property that was sold by the defendant was the property of the Pabst Brewing Company, a corporation duly and legally incorporated under and by virtue of the laws of the State of Wisconsin; that the only sales, and offers to sell, made by the defendant, were made as agent duly and legally appointed for the Pabst Brewing Company; that the only sales, and offers to sell of liquors were in sealed cases, and as the same were manufactured and put up by the Pabst Brewing Company of the State of Wisconsin, and were imported by them upon railways from the State of Wisconsin to the State of Kansas to the defendant, their agent; that no cases or kegs sold or offered for sale were broken or opened upon the premises; that as soon as the same was purchased by parties it was removed from the

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State Statute is necessary in order to give it effect, as to such liquors. *Ibid.* But compare *Re* Rahrer, *ante*, 444, 43 Fed. Rep. 556.

Jurisdiction of United States courts; by habeas corpus.

In the absence of congressional permission to do so, the State has no power to interfere by seizure or any other action in prohibition of importation and sale of intoxicating liquors by the foreign or nonresident importer; and any imprisonment of such importer is in the language of the Habeas Corpus Act "in violation of the Constitution" of the United States, and a United States court has jurisdiction and it is made its duty to discharge any person so illegally held in custody. *Ex parte* Royall, 117 U. S. 241, 29 L. ed. 868; Cunningham v. Neagle, 134 U. S. 1, 33 L. ed. 55; *Ex parte* Kieffer, 40 Fed. Rep. 399; *Re* Barber, 39 Fed. Rep. 641; *Re* Beine, 42 Fed. Rep. 546.

On an application to a United States court for a writ of habeas corpus, by one arrested for violation of a state law regulating and restraining the sale of spirituous liquors, it is within the discretion of such court whether it will discharge the prisoner or not in advance of his trial in the state court. United States v. Fiscus, 42 Fed. Rep. 397; *Ex parte* Royall, 117 U. S. 241, 29 L. ed. 868.

On such an application, the federal court will not doubt that, upon his trial in the state court, that court will recognize the binding force of the decisions of the United States Supreme Court upon the question of the sale of liquors imported into the State in original packages, and may grant or deny the petition in its discretion. United States v. Fiscus, *supra*.

So long as the illegality of the retention of a prisoner under judgment of a state court is a debatable question, a United States circuit court should not discharge him on habeas corpus. *Re* Spickler, *ante*, 446, 43 Fed. Rep. 653.

Equitable jurisdiction in protection of civil rights.

It is elementary law that the subject matter of the jurisdiction of a court of chancery is property, and the maintenance of civil rights, and the court has no jurisdiction in matters merely criminal or merely immoral, but not affecting any property right (Sheridan v. Colvin, 78 Ill. 237, quoted in *Re* Sawyer, 124 U. S. 200, 31 L. ed. 402); yet the rule is otherwise where proceedings, criminal in character, tend to despoil one of his property or other rights. *Ibid.* And see Emperor of Austria v. Day, 3 DeG. F. & J. 217; Springhead Spinning Co. v. Riley, L. R. 6 Eq. 558; Louisiana Lottery Co. v. Fitzpatrick, 3 Woods, 222; Osborn v. Bank of United States, 22 U. S. 9 Wheat. 738, 6 L. ed. 204; Live Stock D. & B. Asso. v. Crescent City L. S. L. & S. H. Co. 1 Abb. (U. S.) 388. And see U. S. Rev. Stat. § 1979, in the title relating to Civil Rights; Terchman v. Welch, 42 Fed. Rep. 548.

Although a court of equity has no jurisdiction to enjoin purely criminal proceedings, yet injunction will lie against proceedings by a prosecuting attorney brought to prevent the agents of a nonresident importer of liquors from selling the same in their original packages. M. Schandler Bottling Co. v. Welch, 42 Fed. Rep. 561.

premises; that none of such sales, or offers to sell, were made to minors or persons in the habit of becoming intoxicated, and that none of said liquors so sold, or offered for sale, were drunk or used upon the premises; that the defendant is a resident of the United States, and made each and all of the sales he did make as the agent and employé of said Pabst Brewing Company aforesaid, and in no other way; that said defendant Mary O'Byrne is the owner of the premises in controversy, and that she has never been served with any injunction in this case; that the defendant, in making the sales that he did make, made the same under the faith and belief that he had a legal right to sell intoxicating liquors, and did not intend by such sales to violate any order of the court, and construed the order of the court to mean a restraint of illegal sales, and not of sales legally made under the law; that all the articles so sold by the defendant were the manufactured articles of intoxicating liquors made and manufactured by said Pabst Brewing Company, and that each of said cases was substantially made of wood, and each of them contained twenty-four quarts of beer, and each bottle of beer corked, and the cork fastened in with a metallic cap wire, bound and covered with tinfoil, and each case was sealed with a metallic seal; that the beer in all of the kegs was corked up firmly in wooden kegs, and transported by railway as aforesaid, and that to open said cases the said metallic seals had to be broken, and to open said kegs of beer aforesaid the same had to be broken or bored with an auger; that the only way and manner that the same was sold by the defendant was in said kegs and cases aforesaid; that in the same car in which the cases of beer referred to were shipped and put up and loaded on the cars and received by the defendant were also single bottles of beer firmly corked and protected as above stated and wrapped in paper, as well as pint, half-pint and quart bottles of whiskey wrapped in paper, each constituting a single package by itself, received as such, and sold as such before and since the injunction was granted, and in no other manner."

The attorney-general, in his brief filed in this court, uses the following among other language: "The substantial question in this case is whether or not the defendant Winters was protected by the decision of the Supreme Court of the United States in *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, in the sales of single bottles of beer and single pint, half-pint and quart bottles of whiskey, in violation of the Prohibitory Laws of the State of Kansas, by reason of the fact that such single bottles of beer and whiskey were imported into the State of Kansas in the same car in which cases of beer, shipped and sold in accordance with the usages of the wholesale liquor trade, were imported. These single bottles of beer and whiskey were simply wrapped in paper, and thus imported and sold by the defendant Winters under the guise of original packages. The sales were made after the decision in the said case of *Leisy* v. *Hardin*, and prior to the passage of the Wilson Bill. The defendant had no druggist's permit, and the sales were not made for medical, scientific or mechanical purposes under the provisions of the Prohibitory Law."

We think the attorney-general is correct with respect to the question to be considered and decided. It has seldom if ever been considered in any civilized country that the same freedom with respect to the traffic in and the use of intoxicating liquors should be allowed as is freely permitted with respect to nearly all the other kinds of property subject to traffic or use. Intoxicating liquors are never considered as coming within the category of the necessaries of life, nor even as good or wholesome food or drink, or proper articles for general consumption. They are never considered like wheat or corn, or boots or shoes, or any of the other harmless articles of traffic or use which need no regulation or restriction. They are considered almost as outlaws. In their unrestricted sale and use they are pernicious, deleterious, baneful. They operate as tempters and seducers, alluring people into vice and crime, and constitute a perpetual menace and threat against the peace and quiet and good order and welfare of society. Their proper classification would rather be with such dangerous articles as dynamite, nitro-glycerine, venomous reptiles, dangerous animals, poisons, articles containing the germs of infectious diseases and "infernal machines," than with any of the harmless or innocuous articles of commerce. Hence, in all civilized countries, they are considered as the proper subjects of regulation, restriction and, to some extent, prohibition; and all this has generally been considered as coming within the proper scope of the police power of the several States or governments. In this State the sale and use of intoxicating liquors are regulated, restricted and, to some extent, prohibited by law; and the Supreme Court of the United States has held such law to be valid. *Foster* v. *Kansas*, 112 U. S. 201, 28 L. ed. 696; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205. But, in a subsequent case from Iowa, that court decided that the liquor laws of the several States will not apply to sales made by the importer or his agent of intoxicating liquors imported from other States or countries, so long as such liquors remain in the unbroken packages in which they existed during their transportation. *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128. This decision was made upon the supposed authority of that provision of the Federal Constitution which gives to Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." United States Const. art. 1, § 8.

This court does not agree with that court upon this question. *State* v. *Fulker*, 43 Kan. 237. But it is our duty to follow that court, and we shall do so. In the *Leisy* v. *Hardin* decision, and in other decisions, the words "original package" are used. These words are not found in the Constitution, but still it is thought necessary that we should ascertain what was really meant or intended by their use. Evidently the "original package" referred to in those decisions was and is the package of the importer as it existed at the time of its transportation from one State into the other. The whole subject has relation to commerce and to interstate commerce, and to nothing else; hence

the words must mean the package as transported by the importer himself, or by his agent, either a common carrier or a private carrier for the purposes of commerce, and therefore it would seem that it is for the importer to determine how large or how small the package should be, and the manner in which the package should be made up, and the materials used in making it up. Certainly an importer has as much right, under the Federal Constitution, to import into a State and sell against its laws a single gill of intoxicating liquor as he has to import into such State and sell against its laws a gallon or a barrel or a hogshead of the same interdicted article. In some cases of interstate commerce it would scarcely seem necessary that any package should be used. For instance, in the transportation of livestock, the individual articles transported might be horses, cows, sheep or hogs, and these articles might be very large or very small, even little pigs, and none of them placed in packages. In the present case the liquors transported and sold we suppose were never in any other packages than the ones in which they were sold; hence, these packages must have been "original packages."

In the *License Cases*, 46 U. S. 5 How., *Mr. Justice* Catron used the following language: "To hold that the state license was void, as respects spirits coming in from other States as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require, the consequence of which would be that the dealers in New Hampshire would sell only spirits produced in other States, and that the products of New Hampshire would find an unrestrained market in the neighboring States having similar license laws to those of New Hampshire." Page 608, 12 L. ed. 303. In the same cases *Mr. Justice* Woodbury used the following language: "If the proposition was maintainable that, without any legislation by Congress as to the trade between the States [except that in coasting, as before explained, to prevent smuggling], anything imported from another State, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or internal regulation of a State, then it is obvious that the whole license system may be evaded and nullified, either from abroad or from a neighboring State. And the more especially can it be done from the latter, as imports may be made in bottles of any size, down to half a pint, of spirits or wines; and, if its sale cannot be interfered with and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuitable persons, with perfect impunity." Pages 625, 626 [12 L. ed. 311].

In the case of *Leisy* v. *Hardin*, 135 U. S. 159, 160, 34 L. ed. 150, *Mr. Justice* Gray, in his dissenting opinion, which was concurred in by *Justices* Harlan and Brewer, used the following language: "If the statutes of a State, restricting or prohibiting the sale of intoxicating liquors within its territory, are to be held inoperative and void as applied to liquors sent or brought from another State, and sold by the importer in what are called 'original packages,' the consequence must be that an inhabitant of any State may, under the pretext of interstate commerce, and without license or supervision of any public authority, carry or send into, and sell in, any or all of the other States of the Union intoxicating liquors of whatever description, in cases or kegs, or even in single bottles or flasks, despite any legislation of those States on the subject, and although his own State should be the only one which had not enacted similar laws."

In the case of *Re Beine*, 42 Fed. Rep. 545, *Judge* Caldwell used the following language: "A question was raised in the argument as to whether the smallness of some of the packages sold by some of the petitioners did not deprive them of the protection given to vendors of original packages. Single bottles of beer and whiskey packed and sealed or nailed up in boxes made of pasteboard or wood, were shipped and sold in that shape. The boxes containing one bottle were not packed in any other box, but shipped singly and separately as so many distinct and separate packages. It is not perceived why, in the absence of a regulation by Congress to the contrary, the importer may not determine for himself the form and size of the packages he puts up for export. The idea that small packages of liquor cannot be treated as original packages, because they are small, springs from the conviction back of it that liquor in any form, or in any sized package, is not a legitimate subject of commerce. That question is put at rest by the decision of the Supreme Court of the United States until Congress shall act. As long as packages of liquor in any form or size may lawfully be sold by the importer or his agent in a prohibition State, the size of the package is not of much consequence. Whether the package be large or small, the practical effect will be to seriously impair the efficacy of all laws intended to protect society from the evils of the liquor traffic." Pages 546, 547. See also, to the same effect, *Collins* v. *Hills*, 77 Iowa, 181, 183.

We know of no opinion or dictum of any court or judge that in the slightest degree conflicts with the foregoing expressions of opinion regarding the size or form of "original packages;" and in all probability there is none. It has also been suggested, but not by the attorney-general, that the district judge in this case intended not only to restrain the defendant from making illegal sales of intoxicating liquors, but also to restrain him from making legal sales thereof. Such a thing can hardly be supposed; but, if it should be, still if a sovereign State through its highest instrumentalities, its Legislature, its executive and its highest courts, has no power or jurisdiction to prevent an importer from selling intoxicating liquors in original packages brought from another State or country, we suppose that a district judge at chambers hardly has such power.

The order and judgment of the judge of the court below will be reversed.

All the Justices concur.

OHIO SUPREME COURT.

Charles STEPHENSON, *Plff. in Err.*,
v.
David W. REPP.

(47 Ohio St. —.)

***Where goods are purchased upon an agreement to give a promissory note** for the price, payable in one year with interest, on a refusal of the purchaser to make and deliver the note after the goods have been delivered the vendor may, without waiting for the expiration of the credit, maintain an action at once for the breach of the agreement, and the measure of damages will be the price of the goods sold and delivered.

(October 28, 1890.)

ERROR to the Circuit Court for Mercer County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for an alleged breach of contract to purchase property.—*Affirmed.*

The facts are fully stated in the opinion.

Messrs. **Armstrong & Johnson,** for plaintiff in error:

Common-law precedents and writers recognize the right of two actions in the vendor under the circumstances of this case: (1) special action on the case for non-delivery of the note, —in which the vendor was required to plead and prove his actual damages peculiar to the breach, as loss of interest; (2) at the expiration of the time for the maturity of the note, he was entitled to recover the agreed value of the goods sold.

Story, Sales, ed. 1871, § 236; *Dutton* v. *Solomonson*, 3 Bos. & P. 582; *Loring* v. *Gurney*, 5 Pick. 15; *Mussen* v. *Price*, 4 East, 147; *Hunneman* v. *Grafton*, 10 Met. 454; *Martin* v. *Tuller*, 16 Vt. 108; *Scott* v. *Montague*, 16 Vt. 164. See also *Eddy* v. *Stafford*, 18 Vt. 235.

Where by the contract of sale the delivery of personal property is concurrent with payment, either by cash or note, as between the parties no title vests in the vendee until the cash is paid or note given, except at the vendor's option.

Hilliard, Sales, 233, 247; *Congar* v. *Galena & C. U. R. Co.* 17 Wis. 477; *Parker* v. *Mitchel*, 5 N. H. 165; *Whitwell* v. *Vincent*, 4 Pick. 449; *Saloman* v. *Hathaway*, 126 Mass. 482.

By the terms of the contract, the sale and delivery of the property are simultaneous to the delivery of the note. The vendor might have declined to invest the vendee with title on his refusal to give the note. He insisted on investing title in vendee notwithstanding his refusal to deliver the note. The vendor thereby waived the delivery of the note and assented to the term of credit without the note.

Messrs. **Archelaus D. Marsh** and **John W. Loree,** for defendant in error:

When the facts entitle a party to relief, the mere form of the action is to be disregarded, for under the Code it is immaterial what the form of action would have been at common law.

*Head note by the COURT.

10 L. R. A.

Neilson v. *Fry*, 16 Ohio St. 553–556; *Jones* v. *Timmons*, 21 Ohio St. 596–603; Ohio Rev. Stat. § 4971.

An agreement to pay $800 by executing and delivering a promissory note for $800, to be due in one year therefrom and to bear interest at the rate of 6 per cent from date, may be and is discharged by the payment of that sum in money, and that sum is the amount of recovery or measure of damages if the note be not executed and delivered.

Trowbridge v. *Holcomb*, 4 Ohio St. 38, 44; *Newman* v. *McGregor*, 5 Ohio, 349, 352; *Morris* v. *Edwards*, 1 Ohio, 189; *Sperry* v. *Johnson*, 11 Ohio, 453, 454.

After request to execute and deliver the note in payment of the mill, etc., a refusal on the part of the vendee will in law constitute the claim a mere money demand.

Pothier, Obligations, No. 497; Chipman, Cont. 35; *Perry* v. *Smith*, 22 Vt. 301; *Smith* v. *Smith*, 2 Johns. 235; *Pinney* v. *Gleason*, 5 Wend. 393; *Brooks* v. *Hubbard*, 3 Conn. 58; *Baker* v. *Mair*, 12 Mass. 121; *Mettler* v. *Moore*, 1 Blackf. 342.

Where the buyer has an option to pay in cash or in some other manner, if he neglects to pay in the special mode at the proper time he may be sued on the common counts for the price.

Stone v. *Nichols*, 43 Mich. 16; *Davis Sewing Mach. Co.* v. *McGinnis*, 45 Iowa, 538; *Childs* v. *Fischer*, 52 Ill. 205; *Jackson County* v. *Hall*, 53 Ill. 440; *Bicknell* v. *Buck*, 58 Ind. 354; *Moore* v. *Kiff*, 78 Pa. 96–100; *Wheeler* v. *Wilkinson*, Wright (Ohio) 365.

If it is also a part of the contract that a note or bill of exchange shall be given immediately, which is to be payable on that future day; if this be not given an action can at once be maintained for it.

3 Parsons, Cont. 6th ed. *211; *Hanna* v. *Mills*, 21 Wend. 90; *Mussen* v. *Price*, 4 East, 147; *Dutton* v. *Solomonson*, 3 Bos. & P. 582; *Hoskins* v. *Duperoy*, 9 East, 498; *Hutchinson* v. *Reid*, 3 Campb. 329.

The damages are the price of the goods.

Rinehart v. *Olwine*, 5 Watts & S. 157; *Manton* v. *Gammon*, 7 Ill. App. 201–208; *Girard* v. *Taggart*, 5 Serg. & R. 19; *Davis Sewing Mach. Co.* v. *McGinnis*, *supra*; *Brooks* v. *Hubbard*, 3 Conn. 58.

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

The suit below was for the breach of a contract that had been entered into between the parties, whereby the plaintiff had sold and delivered to the defendant his half interest in a certain steam saw-mill, engine and boiler, and some other personal property, for the price of $800, which the defendant had agreed to pay by executing his note for that sum payable one year after date, with interest at the rate of 6 per cent. The breach consisted in the refusal of the defendant after the sale and delivery of the property to make and deliver the note. A demurrer to the petition was overruled, and the action of the court in this regard is assigned for error.

The petition is as follows:

"The plaintiff says: That on or about the 15th day of September, A. D. 1886, the plaintiff, David W. Repp, sold and delivered to the defendant, Charles Stephenson, the following personal property, to wit:

"A one-half interest in a certain steam sawmill, engine and boiler, then situated on the farm of the said Charles Stephenson, also, a one-half interest in a lot of old iron, which the plaintiff then had, and the said defendant agreed to pay therefor the sum of $800 by then executing and delivering to plaintiff his promissory note for $800, to be due in one year from the said 15th day of September, 1886, and to bear interest at the rate of 6 per cent per annum, which said note the said defendant refuses to execute and deliver to plaintiff, although often requested so to do. Plaintiff says that by reason of the premises, there is now due and payable from the defendant to plaintiff the sum of $800, with interest from the 15th day of September, A. D. 1886, and for which plaintiff asks judgment."

After the demurrer was overruled, a trial was had upon the issues joined by a general denial, which resulted in a verdict and judgment for the plaintiff for the sum of $820. The ruling upon the demurrer presents the only question for review upon the record.

The plaintiff in error claims that the petition below does not state facts sufficient to constitute a cause of action, for the reason that the time of the credit on which the goods had been sold and delivered had not expired at the bringing of the action, and that he was not, therefore, so indebted to the plaintiff as that an action could be maintained for the price of the property sold and delivered. It will be conceded that under the common-law system of procedure a general assumpsit for goods sold and delivered could not have been maintained upon the facts stated in the petition—the time of the credit not having expired, there would have been no ground for averring an implied assumpsit. But this is not material under our system, where no particular form of action is recognized, and the plaintiff is entitled to recover, if it appears from the facts stated in his petition that he is entitled to any relief.

And it seems well settled that, upon the facts stated in the petition, the plaintiff might have maintained an action on the case in special assumpsit for the damages resulting from the breach of the defendant's promise to make and deliver the note. 3 Parsons, Cont. 7th ed *211. "Not only," as said by this author, "because it is a separate promise, but because by the practice of merchants, this note or bill might be made, by the vendors getting it discounted, the means of present payment." And, in such cases, the measure of damages has always been the price of the goods. No other rule can be adopted, as the law, to discourage multiplicity of suits, recognizes but one suit for the breach of an entire contract. *James* v. *Allen County*, 44 Ohio St. 226, 3 West. Rep. 161.

The law applicable to the case is well stated by Brown, *J.*, in *Hanna* v. *Mills*, 21 Wend. 90: "When goods are sold to be paid for by a note or bill payable at a future day, and the note or bill is not given, the vendor cannot maintain assumpsit on the general count for goods sold and delivered, until the credit has expired; but he can sue immediately for a breach of the special agreement. *Mussen* v. *Price*, 4 East, 147; *Dutton* v. *Solomonson*, 3 Bos. & P. 582; *Hoskins* v. *Duperoy*, 9 East, 498; *Hutchinson* v. *Reid*, 3 Campb. 329. In such an action he will be entitled to recover as damages the whole value of the goods, unless, perhaps, there should be a rebate of interest during the stipulated credit. The cases referred to by the counsel for the plaintiff in error give no countenance to the argument in favor of a different rule of damages. The right of action is as perfect on a neglect or refusal to give the note or bill, as it can be after the credit has expired. The only difference between suing at one time or the other relates to the form of the remedy; in the one case the plaintiff must declare specially, in the other he may declare generally. The remedy itself is the same in both cases. The damages are the price of the goods. The party cannot have two actions for one breach of a single contract; and the contract is no more broken after the credit expires than it was the moment the note or bill was wrongfully withheld."

Here no "rebate" for interest is required, as, by the agreement, the price, $800, was to bear interest for the period of the credit; so that the plaintiff was entitled to the present worth of the interest that had accrued to the time of the recovery.

We see no error in the judgment, and it is therefore affirmed.

MICHIGAN SUPREME COURT.

John ANTCLIFF, *Appt.*,
v.
Randy JUNE *et al.*

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

1. The fact that a court in which an action is instituted has no jurisdiction of the defendant cannot be used as a bar against defendant's remedy for the injury inflicted upon him by such action if it is maliciously prosecuted, where judgment is taken against him by default and an execution taken out which he satisfies in ignorance of the want of such jurisdiction.

2. Damages may be recovered under a declaration which plainly shows a

NOTE.—*Malice in respect to malicious prosecution defined.*

Malice, in respect to a malicious prosecution, means wickedness of purpose, or a spiteful or malevolent design against another, or a design of doing mischief, or any evil design or inclination to do a bad thing, or a reckless disregard of the rights of others, or an intent to do an injury to another. 10 L. R. A.

See also 14 L. R. A. 389; 26 L. R. A. 627; 37 L. R. A. 580.

malicious and actionable wrong accomplished through legal proceedings, where all the averments are supported by cogent proof; and the question as to what the action is named is immaterial.

3. **To entitle one to damages for the malicious prosecution of a civil suit** it is not necessary that his person shall have been molested or his property seized; it is sufficient if the suit was malicious and without probable cause, and that the person seeking redress was injured or damaged thereby.

4. **The taking and collecting a judgment for $300** upon a claim for $50, simply because an attorney says the judgment may as well be for $300 as for $50, shows malice.

5. **It is immaterial in an action to recover damages** for injuries alleged to have been inflicted by the malicious use of judicial proceedings that such proceedings are not shown to have resulted in favor of the person complaining thereof if his declaration sets out a conspiracy to defraud him and that he was defrauded of the money paid under the judgment, which is shown to have been void.

6. **Under How. Stat., § 7317, which permits the process in actions to recover for labor performed to be served in any county** adjoining the one in which the action is commenced, and provides that such service shall be made by a sheriff or constable of the county where the service is to be made, the process must be issued directly to an officer of the county where the service is to be made; process issued to officers of the county where the suit is brought cannot under that Act be served by officers of other counties.

7. **A claim for services rendered to a man in procuring for him a wife** is not valid, it being against public policy to allow marriage brokerage.

8. **The willful use of judicial process** for a purpose not justified by law is an abuse for which an action will lie.

8. **Obtaining a judgment by fraud and perjury** when there has never been any valid claim in favor of the plaintiff against defendant, and taking out execution thereon, when the parties know the judgment to be false and fraudulent, and extorting money under such execution, is an abuse of judicial process.

(June 27, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jackson County in favor of defendants in an action brought to recover damages for an alleged malicious prosecution without probable cause of a civil action, and for abusive use of legal proceedings. *Reversed.*

The facts are stated in the opinion.

Mr. **Austin Blair,** with *Messrs.* **Hewett & Freeman,** for appellant:

The pretended claim for services in getting a wife for Antcliff was illegal and void, and a cause of action could not be maintained on it, and June and Crowell knew it, or were bound to know it; hence there was a want of probable cause for bringing and maintaining the suit.

Eastin v. *Bank of Stockton*, 66 Cal. 123; *Duval* v. *Mellman*, 16 N. Y. S. R. 607.

The summons served on Antcliff did not confer jurisdiction of the defendant on the justice who issued it by reason of it having been served in the County of Washtenaw, and by an officer of Washtenaw County, although directed to any constable of Jackson County.

How. Stat. §§ 6827, 7074; *Rasch* v. *Moore*, 57 Mich. 56; *Union Mut. F. Ins. Co.* v. *Page*, 61 Mich. 72.

The American authorities are tending strongly and increasing rapidly in favor of the maintenance of the suit for malicious prosecution, where no property is seized and the person is not molested.

Brand v. *Hinchman*, 68 Mich. 590; *Whipple* v. *Fuller*, 11 Conn. 582; *Closson* v. *Staples*, 42 Vt. 209; *Eastin* v. *Bank of Stockton*, *supra*. See the discussion of the question by Mr. J. D. Lawson in 21 Am. L. Reg. 281, 353; *McPherson* v. *Runyon*, 41 Minn. 524; *Pope* v. *Pollock*, 4 L. R. A. 255, 46 Ohio St. 367.

If process, either civil or criminal, is willfully made use of for a purpose not justified by the law, this is abuse for which an action will lie.

Cooley, Torts, 189.

An attorney who, with knowledge of the wrong, participates in it, is as liable as any other wrong-doer is.

Cook v. *Hopper*, 23 Mich. 511.

The act of Crowell in suing out the execution was a naked tort.

Foster v. *Wiley*, 27 Mich. 244; Cooley, Torts, 131.

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or absence of legal excuse, or any other motive than that of bringing a party to justice substantially correct. Shannon v. Jones, 76 Tex. 141.

Action for malicious prosecution, when maintainable.

An action for malicious prosecution of a civil suit without probable cause is maintainable, even though there was no interference with the person or property of the defendant. McPherson v. Runyon, 41 Minn. 524, citing Pangburn v. Bull, 1 Wend. 345; Whipple v. Fuller, 11 Conn. 582; Closson v. Staples, 42 Vt. 209; Eastin v. Bank of Stockton, 66 Cal. 123; Allen v. Codman, 139 Mass. 136; Marbourg v. Smith, 11 Kan. 554; Woods v. Finnell, 13 Bush, 629; Pope v. Pollock, 4 L. R. A. 255, 46 Ohio St. 367; McCardle v. McGinley, 86 Ind. 538.

An action may be maintained for the malicious prosecution of an action of replevin, although the defendant in replevin recovered in that action the damages suffered from the taking and detention of his goods. McPherson v. Runyon, *supra*.

Malicious action must have terminated.

The principle which requires the prosecution to have been terminated favorably to the plaintiff before he can maintain an action therefor is that, while the prosecution is pending undetermined, or when it has been determined adversely to the plaintiff in the action, the want of probable cause therefor cannot be shown in a collateral suit. The proceedings in the prosecution are evidence of their own rectitude, until set aside in the due course thereof. Forster v. Orr, 17 Or. 447.

Action for abuse of process.

An action for the abuse of attachment process may be maintained, although the attachment has not been vacated; but an action for procuring and levying an attachment maliciously and without probable cause cannot be maintained unless the attachment has been vacated. Rossiter v. Minnesota B. & S. Paper Co. 37 Minn. 296.

Nature of the action. See *note* to Pope v. Pollock (Ohio) 4 L. R. A. 255.

See also 12 L. R. A. 288.

When the court fails to acquire jurisdiction of the defendant, the defendant is not bound to appear and defend, and by not appearing to defend he loses no legal rights. The law prohibits the prosecution of a suit without having first acquired jurisdiction.

Rasch v. *Moore*, 57 Mich. 56; *Union Mut. F. Ins. Co.* v. *Page*, 61 Mich. 72; *Moore* v. *Hansen*, 75 Mich. 564; *Gadsby* v. *Stimer*, 79 Mich. 260.

Defendants are not entitled to any benefit of their claimed compromise.

Dailey v. *King*, 79 Mich. 868; *Headley* v. *Hackley*, 50 Mich. 45.

Messrs. **Barkworth & Cobb,** for appellees:

The essentials of a proper count, either for malicious prosecution, or for malicious abuse of process, are entirely lacking in either count, and no cause of action is stated. An action for malicious prosecution will not lie when an erroneous judgment has been taken, nor in a civil action in any case where jurisdiction was lacking in the court resorted to.

Vanduzor v. *Linderman*, 10 Johns. 106; *Savil* v. *Roberts*, 1 Salk. 13; *Purton* v. *Honnor*, 1 Bos. & P. 205; *Pangburn* v. *Bull*, 1 Wend. 351; *Closson* v. *Staples*, 42 Vt. 209.

The money paid by Antcliff was a voluntary payment, made with full knowledge of every fact, for the purpose of compromising existing questions and ending litigation. A discount of more than one fourth of the claim was made, and this compromise should not be sustained.

Hull v. *Swarthout*, 29 Mich. 252; *Prichard* v. *Sharp*, 51 Mich. 432.

No case can be found, where the action for malicious prosecution has been sustained, where the pleadings show a determination in the original action adverse to the party claiming damages for malicious prosecution.

See *Sweet* v. *Negus*, 30 Mich. 406.

A malicious abuse of process consists of the malicious misuse or misapplication of that process to accomplish some purpose not warranted nor commanded by the writ, and whereby a result not lawfully or properly attainable under it is secured.

Wood v. *Graves*, 4 New Eng. Rep. 246, 144 Mass. 365; *Bartlett* v. *Christhilf*, 12 Cent. Rep. 852, 69 Md. 219.

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

This record presents the story of a most outrageous and wicked fraud committed upon the plaintiff by an abuse of the processes of the law, and one deserving of severe punishment. The chief defendant, J. Reid Crowell, is said to be an attorney-at-law, and resides at Brooklyn, Jackson County, in this State. The story, briefly told, is this: The defendant Randy June pretended to have a claim of $50 against the plaintiff, an old man over sixty years of age, and a farmer, living in the Township of Manchester, Washtenaw County, which township adjoins the Township of Norvill, in Jackson County, where June, a laborer, resided. In November, 1886, June put his claim in the hands of Crowell for collection. Crowell understood what the claim was for, told June it was collectible and, as he (Crowell) testifies, was to have all he collected over $40. Without attempting to collect it without suit, Crowell went, January 3, 1887, to Joseph M. Griswold, a justice of the peace of the Village of Brooklyn, Columbia Township, Jackson County, and took out a summons in favor of June against Antcliff, who is the plaintiff in this suit. Such summons was made returnable January 11, 1887, and commanded the constable to summon Antcliff, "if he shall be found in your county, to answer to June in a plea of trespass upon the case, upon premises, to his damages $300 or under." This summons was directed to any constable of Jackson County, and was handed by Crowell to one Brenner, a deputy sheriff of Washtenaw County, to serve, claiming that there was a new statute under which Brenner could make service in Washtenaw County. Brenner returned the summons as personally served upon Antcliff in the Township of Manchester, January 4, 1887. The Statute referred to is § 7317, How. Stat. (Act No. 246, Laws 1879, p. 249). Between the day of this service and the return day of the summons, Antcliff received an unsigned letter, stating that he had better not appear. The following is the letter:

Brooklyn, Feb. 3, 1887.

Mr. Antcliff: —

Don't let Mr. Crowell or anyone else fool you into coming into Jackson County. All they serve those kind of papers on you for is to get you into this county; then they will serve another kind of summons on you. Look out for them.

In consequence of this communication, Antcliff did not appear. On the return day June and Crowell were on hand. No one else was present except the justice. His docket shows that plaintiff filed an affidavit on that day, stating in substance that he was a resident of the Township of Napoleon, in Jackson County; that the defendant was a resident of Manchester, Washtenaw County; that the suit was commenced for the recovery of the value of personal services rendered by him for Antcliff at the latter's request; and that Jackson and Washtenaw were adjoining counties. This affidavit was prepared by Crowell. Crowell also filed a declaration upon some of the common counts as follows: "In the sum of $300 for goods, wares and merchandise sold by the plaintiff [June] to defendant [Antcliff] at his request, and a like sum on account stated between them; and in the sum of $300 for work and labor performed by plaintiff for the defendant at his [defendant's] request." No bill of particulars was filed.

The justice docket further shows as follows: "After waiting one hour, and defendant not appearing, I proceeded to hear and try the cause. Plaintiff, being sworn in his own behalf, testified that he was a resident of the Township of Napoleon, Jackson County, Mich; that he was acquainted with John Antcliff, the defendant, who resides in Manchester, Washtenaw County, Mich.; that in the year 1886 he performed personal labor for the defendant at his [defendant's] request, which said personal labor was worth the sum of $300; that the same was now due and unpaid. There being no witnesses on the part of the defense, and no one appearing for the same, and hav-

ing waited one hour therefor, after hearing the testimony of the plaintiff, and in pursuance of a Statute approved May 31, 1879, entitled 'An Act in Relation to the Commencement of Actions Relating to Real Estate, and for Labor or Services, and Service of Process therein,'—which Act, among other things, provides that in all actions wherein the demand shall be principally for labor or services performed by an individual or company, or commenced in any court of competent jurisdiction in the county wherein the lands may be situated, or wherein the labor or services were rendered or performed, or in which the plaintiff or plaintiffs reside, the process or declaration by which such action shall be commenced may be served within any county within this State adjoining that county in which said action shall be commenced, against any individual, company or the proper officer of any corporation, within this State: provided, that if such service shall be made in any other than such county where such action shall be commenced, service shall be made by the sheriff or any other constable of the county where service shall be made, or by any person authorized to make such service. But the officer making such service being only entitled to fees for travel in his own county,—I hereby render judgment forthwith in favor of the plaintiff, Randy June, and against the defendant, John Antcliff, for the sum of three hundred dollars ($300) damages, and $2.60 costs of suit. Joseph M. Griswold, Justice of the Peace. Damages, $300; costs, $2.60,—$302.60."

The justice testified, on the trial of the present suit, that the docket contains a substance of the testimony, and that no explanation or evidence was given before him, showing what the services and labor were, or any part thereof. Crowell asked the questions, and June answered. This Crowell admits. Five days after the rendition of this judgment, Crowell appeared before the justice with a transcript of the judgment made out, and filed an affidavit, stating therein that there is due and owing upon said judgment the sum of $300 exclusive of costs, and that he has good reason to believe, and does believe, that there is not sufficient goods and chattels liable to execution to satisfy said judgment within the County of Jackson, belonging to said John Antcliff. The transcript was procured, and filed by him with the clerk of the Circuit Court of Jackson on the same day. Execution was issued the same day on this transcript, and taken by Crowell to Ann Arbor, and put into the hands of William Walsh, sheriff of Washtenaw County. It was agreed between Crowell and the sheriff that the latter should meet him in the Village of Manchester, on the 27th day of January, 1887, and they two then to go together to the farm of Antcliff to collect the execution. On the last-named day Crowell and his father-in-law, one Charles E. Parker, of Addison, Lenawee County, who is, or claims to be, a lawyer, met the sheriff at Manchester, and from there started to the farm of Antcliff. Upon the way there they met Antcliff and his wife on their way to town. They informed Antcliff of the execution. He denied owing June a cent, but, upon threats of a levy, he and his wife went back to his farm with them. While there Crowell and Parker threatened to have the sheriff levy on the farm if the judgment was not paid, as there was not, as they said, personal property enough to pay it. Antcliff, before going back to the farm, wanted to go on to the village and see an attorney, Mr. Freeman, but he was told by all three of them that, if he did, they should go onto his farm and levy upon it. Considering the fact that Antcliff was a well-to-do farmer, with plenty of property out of which to make this execution, and that it had been in the hands of the sheriff for ten days without any notice to Antcliff, the part played by this official, according to his own showing in his testimony, is not very creditable, to say the least. Finally, under the threats of Crowell and Parker to drive off his stock and to also levy on his farm, and also influenced by his scared wife, he settled the matter up by paying them $240 in cash. Out of this money Crowell paid the sheriff his fees, something (how much he does not tell) to another lawyer, Patchin, and $57 to June. The rest he seems to have put where he thought it would do the most good, in his own pocket. It seems also that he paid $27 of this $57 to June under a sort of duress. He testifies that June kept coming to him, saying: "'Now, if you don't pay me something, Hewett [attorney for Antcliff] has been to see me, and he says he will do the fair thing by me, and you ought to give me a little more out of that.' I can't tell how many times I gave him $10; I gave him $10 twice and I gave him $7 once." Is not this a shameful story, much of it coming from his own lips, to appear in cold print against an attorney-at-law in our State? It is to be hoped that he has never been formally admitted to our courts. If he has, the attention of the bar of Jackson County is respectfully directed to the record in this case, and it is to be hoped that they will take notice of it by instituting the proper proceedings to disbar him; and the prosecuting attorneys of Jackson and Washtenaw Counties should, if possible, find some means by which his conspiracy and fraud against this old man can be adequately punished.

The plaintiff brought this suit in the Circuit Court for the County of Jackson against Randy June and J. Reid Crowell. It was commenced by *capias ad respondendum*, April 5, 1887. May 18, 1887, a motion was made to discharge the defendants, on the ground that the affidavit for the writ did not set out a legal cause of action. December 17, 1887, this motion was denied. February 3, 1888, the plaintiff filed his declaration. It was served upon one of the firm of attorneys who appeared for the defendants in the above motion. The default of the defendants for not pleading was entered April 3, 1888. This default, as to the defendant J. Reid Crowell, was set aside upon stipulation of attorneys, made and filed September 26, 1888, and upon motion of the defendant J. Reid Crowell, in open court, October 2, 1888. The defendant Crowell pleaded the general issue. No plea was ever interposed in behalf of June, and he stands in default for not pleading. It does not appear that he was present on the trial, nor was his testimony obtained by either party. After the testimony was all in, the substance of which has heretofore been

given, the circuit judge, Hon. Erastus Peck, was of the opinion that, upon the pleadings and all the evidence, the plaintiff's action could not be maintained, and directed a verdict for the defendants. This ruling is alleged as error. The declaration contains two counts, the first being, it is claimed by defendant's counsel, in form a count for malicious prosecution of a civil action against the plaintiff. The second count sets up the same state of facts as the first, and further avers that the defendants, in obtaining the summons, falsely and maliciously intended to so use it as to obtain an illegal and fraudulent judgment against the plaintiff for the sum of $300, and to obtain execution on it, and to use the same for the purpose of extorting the said amount of money from the plaintiff. The declaration will be found in full on the margin of this opinion.*

It is claimed by defendants' counsel that the declaration is not good for malicious prosecution, first, because it alleges that an erroneous judgment was taken, and jurisdiction was lacking in the court resorted to, and that the facts show that the plaintiff denied the jurisdiction of the justice, and refused to participate in any manner in the proceedings directly produced by the prosecution; that he was therefore in no wise injured by the commencement of this suit and the taking of this judgment. Also that no case can be found where an action for malicious prosecution has been sustained, where the pleadings show a termination in the original action against the party claiming damages for malicious prosecution. The facts in the case do not show that plaintiff denied the jurisdiction of the justice, and refused to participate in the proceedings on that account. It is true he did not appear because of the letter he received, which was probably sent to him by Crowell, or a confederate, and which the court erred in not admitting in evidence; but afterwards when the parties came to him with an execution issued upon a pretended judgment, docketed in the Circuit Court for the County of Jackson, and he was prevented from seeing an attorney, he was led to believe the judgment was a good one, and acted accordingly, and the purpose of the conspirators was accomplished; and the fact of the court not having jurisdiction, when it was not known by him at the time the injury by such prosecution was inflicted, cannot be used as a bar against his relief or remedy for such injury.

In *Sweet* v. *Negus*, 30 Mich. 406, it was held that, where the want of jurisdiction did not appear upon the face of the warrant, it could not bar the action, and the point whether, when the justice had by law no jurisdiction of the subject matter, or a total want of jurisdiction otherwise appears upon the face of the warrant, the proceedings could properly be called a prosecution, was expressly not passed upon. I am satisfied, however, that if the wrong and injury are done by a malicious suit, it is immaterial, upon principle, whether the court had

*"State of Michigan, Circuit Court for the County of Jackson, of the third day of February, A. D. 1888. Jackson County }ss.: John Antcliff, plaintiff in this suit, by Hewett & Freeman, his attorneys, complains of Randy June and J. Reid Crowell, defendants in this suit, being in custody, etc., of a plea of trespass on the case, for that whereas the said defendants heretofore, to wit, on the third day of January, A. D. 1887, at the Township of Columbia, in said county, went and appeared before one Joseph M. Griswold, then and there being one of the justices of the peace in and for said County of Jackson, and then and there before the said justice falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said justice to issue and grant him certain summons against the said plaintiff, and in favor of the said Randy June as plaintiff therein, as follows, to wit:

"'State of Michigan, County of Jackson, ss.:

"'To any constable of said county, greeting: In the name of the People of the State of Michigan, you are hereby commanded to summon John Antcliff, if he shall be found in your county, to appear before me, one of the justices of the peace in and for said county, at my office in Columbia, on the 11th of January, A. D. 1887, at 10 o'clock in the forenoon, then and there to answer to Randy June in a plea of trespass on the case upon promises, to his damage three hundred dollars or under. Hereof fail not, but of this writ with your doings, make return according to law. Given under my hand at Columbia, Jackson County, this third day of January, A. D. 1887. Joseph Griswold, Justice of the Peace.' And the said defendants afterwards, to wit, on the same day of the date of said summons, delivered the same to one Michael Brenner, who claimed to be a deputy sheriff of the County of Washtenaw, and then and there, without any reasonable cause whatever, caused and procured the pretended deputy sheriff of the County of Washtenaw to serve the said summons, so issued as aforesaid by said justice of the peace, upon the plaintiff in the said County of Washtenaw, he, the said plaintiff, being then and there a resident of the said County of Washtenaw, and not of the County of Jackson, and the said Michael Brenner, as such deputy sheriff as aforesaid, returned the said summons to the said justice on or before the return day thereof, with a return of personal service thereon indorsed by him, and filed the same with the said justice of the peace, and afterwards, to wit, on the 11th day of January, 1887, the said defendants, without any reasonable or probable cause whatsoever, caused and procured the said justice of the peace then and there to give and enter in his docket a judgment in favor of said Randy June, and against this plaintiff, for the sum of $300 damages, and $2.60 costs of suit, they, the said Randy June and J. Reid Crowell, knowing that the said justice had no jurisdiction of the said pretended cause, so pending before him; and thereupon the said defendants afterwards, to wit, on the 17th day of January, A. D. 1887, falsely and maliciously, and without any reasonable or probable cause whatsoever, went and appeared before said justice of the peace, and then and there made and filed with the said justice an affidavit of the said J. Reid Crowell, for the purpose of obtaining a transcript of the said pretended judgment to be filed in the office of the clerk of the Circuit Court for the County of Jackson, and then and there obtained such transcript of said justice, in due form, duly certified by said justice; and afterwards, to wit, on the same day last mentioned, they, the said defendants, caused and procured the said transcript, so obtained as aforesaid, to be filed in the office of the Circuit Court for the County of Jackson, and the same was by the said clerk then and there duly entered and docketed as a judgment of the Circuit Court for the County of Jackson; and, at the same time of entering and docketing said transcript judgment, they, the said defendants, falsely and maliciously and without any reasonable or probable cause whatsoever, caused and procured the said clerk of the Circuit Court for the County of Jackson to issue an execution upon said pretended judgment, in due form, dated the said 17th day of January, and directed to the sheriff of the County of Washtenaw; and afterwards, on the same day last aforesaid, went and delivered the said execution to William Walsh, then sheriff of the said County of Washtenaw, and afterwards, to wit, on the 27th day of January, A. D. 1887, the said defendants caused and procured the said sheriff of Washtenaw County to go and enter upon the premises of the plaintiff, and then and there to demand from said plaintiff payment of the said execution, and then and there threatened the said plaintiff that, if he did not immediately pay the same, then the said sheriff should and would at once levy upon and seize all of the personal property of said plaintiff upon said execu-

jurisdiction or not, to entertain such suit. For every malicious wrong there is certainly in this day and age a remedy, and, under our liberal system of pleading in this State, a plain and clear statement of the facts constituting the wrong is sufficient; and it is but little matter, in actions of trespass on the case, what the action is named or called. The first count of the declaration plainly shows a malicious and actionable wrong, and every averment was supported by cogent proof. It may be that the prosecution of the suit to judgment in the justice court by itself alone did not touch the person or property of the plaintiff, but the writer of this opinion, in *Brand* v. *Hinchman*, held that it was not necessary, in an action for the malicious prosecution of a civil suit, that the person should be molested or property seized, if it appeared that the suit was malicious, and without probable cause, and the party had been injured or damaged thereby. See 68 Mich. 596–598, and cases there cited. I am still of the opinion there expressed, and have been fortified in my position by the facts of this case and the decisions of other courts, not cited in *Brand* v. *Hinchman*. *McPherson* v. *Runyon*, 41 Minn. 524; *Pope* v. *Pollock*, 46 Ohio St. 367, 4 L. R. A. 255; *Allen* v. *Codman*, 139 Mass. 136. See also discussion of this question by J. D. Lawson in 21 Am. Law Reg. 281, 353.

It is true that the general rule is that, to support an action for malicious prosecution, the plaintiff must establish three things: first, the fact of the alleged prosecution, and that it has come to a legal termination in the plaintiff's favor; second, that the defendant had not probable cause; third, that he acted from malicious motives. *Hamilton* v. *Smith*, 39 Mich. 222, 225.

In the case before us, the defendants had not probable cause against Antcliff. It was conclusively shown that June never had any claim against Antcliff except one for $50 for getting him a wife, and never pretended to have any other; and from Crowell's own testimony it is apparent that he knew this. He testifies that June told him of some other items of account, but he cannot remember any except of the $50. The judgment was taken for $300. Witnesses swore that June told them he did this because Crowell told him he might just as well get a judgment for $300 as for $50. Crowell does not deny this in his testimony. The taking and collecting of a judgment for $300, under these circumstances, shows malice. But the defense urged that the other element is wanting; that the proceeding or suit did not terminate in plaintiff's (Antcliff's) favor. In this case, however, the judgment was void upon the face of the justice docket and files. The summons was not issued under § 7317, How. Stat. It was directed to any constable of Jackson County, and could not be served by an officer of Washtenaw County, the same as in any ordinary suit. The making of the affidavit upon the return day of the summons, and the judgment entry attempting to bring the case within section 7317, were futile. When a suit is commenced under this section and the de-

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tion, and sell the same to make the amount thereof; and the said defendant J. Reid Crowell was then and there present with the said sheriff, aiding as the attorney and agent of the defendant Randy June, and assisting and directing the said sheriff, and then and there stated to the plaintiff that said execution was good and valid, and he would have to pay the same, and then and there, by means of said representations last mentioned, and the threats aforesaid, so made by said sheriff to seize and sell the property of said plaintiff, they, the said defendants, falsely and maliciously, and without any reasonable or probable cause whatsoever, procured and forced the said plaintiff to pay to the said defendants, against his will, a large sum of money, to wit, the sum of $240, as satisfaction of said pretended execution, and the pretended judgment upon which the same was issued, and the plaintiff did then and there pay the same to the said William Walsh, sheriff as aforesaid, and the said defendant J. Reid Crowell, attorney for said defendant Randy June, then and there received the same in full satisfaction aforesaid. And whereas, also, the said defendants, without having any reasonable or probable cause for so doing, but contriving and intending to harm, oppress and injure the said plaintiff, falsely and maliciously went and swore out a summons in favor of said defendant Randy June, and against the plaintiff, before Joseph M. Griswold, a justice of the peace of the Township of Columbia, in said County of Jackson, on the 3d day of January, A. D. 1887, and returnable before said justice on the 11th day of said January, 1887, at 10 o'clock in the forenoon of that day, they, the said defendants, then and there well knowing that the said pretended plaintiff in said suit had no just cause of action whatever against the said plaintiff of any kind, and that said plaintiff resided in the County of Washtenaw, and not in said County of Jackson, and they, the defendants, then and there falsely and maliciously intending to so use the said summons, so issued as aforesaid, as to obtain an illegal and fraudulent judgment against the said plaintiff for a large amount of money, to wit, the sum of $300, and to obtain an execution and to use the same for the purpose of extorting the said amount of money from said plaintiff; and such proceedings were thereupon had that afterwards, to wit, on the said 11th day of January, A. D. 1887, the said defendants appeared before the said justice at his office in said Township of Columbia, at the hour mentioned in the said summons for the return thereof, and then and there caused and procured the said justice to enter and docket a judgment in favor of said Randy June, and against the plaintiff, for the sum of $300 damages, and $2.60 costs of suit, which said pretended judgment was illegal, fraudulent and void, as said defendants well knew; and the said defendants afterwards, to wit, on the 17th day of January, 1887, falsely and maliciously caused and procured the said justice to make and issue a transcript of said pretended judgment in due form, and duly certified by said justice, and afterwards, to wit, on the same day last mentioned, filed the said transcript in the office of the clerk of the Circuit Court for the County of Jackson, and then and there caused the said clerk to enter and docket the same as a judgment of the Circuit Court for the County of Jackson; and at the same time of entering and docketing said transcript judgment, the said defendants caused and procured the said clerk of the circuit court to issue an execution upon said pretended judgment in due form, and directed to the sheriff of said County of Washtenaw, and on the same day delivered the said execution to William Walsh, sheriff of said Washtenaw County, and afterwards, to wit, on the 27th day of January, 1887, the said defendants caused and procured the said William Walsh, sheriff as aforesaid, to proceed to collect the said execution from the plaintiff, and force him, the said plaintiff, to pay the same; and the said plaintiff then and there against his will, and protesting that he was not liable to pay the same, or any part thereof, was forced and compelled by said sheriff, in order to protect his property from levy and sale, to pay the same to him, and did pay to him, for said defendants, the sum of $240 in money,—all of which said several grievances in this court mentioned were done and committed by said defendants against the plaintiff, falsely and maliciously, and without any reasonable or probable cause whatsoever. By reason of which said several premises the said plaintiff has been and is greatly injured, and put to large expense and trouble, and to great anxiety, and has been and is otherwise greatly injured in his credit and circumstances to the damage of the plaintiff of $5,000, and therefore he brings this suit.

fendant is not a resident of the county where suit is brought, and it is intended to gain jurisdiction by service in the adjoining county, the process must be issued directed to an officer of that county. He has no power to serve process directed to a constable of another county, unless especially authorized to do so by law. It was not intended by the Legislature that an ordinary justice summons, directed to any constable of the county within which the justice has jurisdiction, could be taken by the plaintiff, and handed to a constable or sheriff of another county for service, without some showing upon the writ that the suit was intended to be brought under section 7317. The Act, if valid, is a special one, and applies only to special cases. The whole thing was a fraud from the beginning. The labor and services spoken of were not a valid claim if performed, as it would be against public policy to allow marriage brokerage. But it is not necessary to determine whether the first count was a good one in an action of malicious prosecution. It sets out fully a conspiracy between the defendants, June and Crowell, to defraud the plaintiff, and that he was defrauded out of the money paid upon this void judgment. It therefore clearly sets out an actionable wrong,—one that can be recovered for in an action upon the case,—and it is immaterial what it is called.

The second count is also good. If process is also willfully made use of for a purpose not justified by the law, this is an abuse for which an action will lie. See Cooley, Torts, 189, 190, and cases cited.

I can conceive of no case of any greater abuse of process than this. There was nothing to base it upon in the beginning, and it was procured in every stage of the proceeding thereafter by fraud and perjury, which ought to be punished by a term in state prison to both of the defendants. It was used for no lawful or legitimate purpose. If "entering upon a judgment and suing out execution after the demand is satisfied" is an abuse of process (*Barnett* v. *Reed*, 51 Pa. 190), then, certainly, obtaining a judgment by fraud and perjury, when there was never any demand in favor of June against Antcliff, and suing out an execution upon such judgment, when the defendants knew it was false and fraudulent, and extorting money under such execution, is also an abuse of process.

The learned judge of the Jackson Circuit was in error in directing a verdict for the defendants. *The judgment of the court below is reversed, and a new trial granted the plaintiff, with costs of this court.*

The other Justices concurred.

CALIFORNIA SUPREME COURT.

Theodore A. HAVEMEYER *et al.*, Partners as Havemeyers & Elder, *Petitioners*,
v.
SUPERIOR COURT of the City and County of San Francisco.

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

1. A rule of court that a petition for a writ in which a judge or an officer discharging public duties is named as respondent shall disclose the names of the real parties in interest upon whom a copy of the petition and writ must be served does not require such parties to be made formal parties to the proceeding by being named as defendants in the petition or writ. A failure, therefore, to serve such parties will not cause an abatement of the whole proceeding.

2. A receiver of a dissolved corporation is only to be appointed when necessary for the purpose of preserving and distributing the property, and only on application of a party interested, viz., a creditor or stockholder.

3. The forfeiture of the charter of a corporation does not, under Code Civ. Proc., § 564, *et seq.*, authorize the appointment of a receiver on application of the State, as a part of the penalty of forfeiture.

4. An order appointing a receiver for a dissolved corporation is suspended, under Code Civ. Proc., § 949, by an appeal from the judgment declaring the forfeiture, where the requisite undertaking is given.

5. A corporation, to dissolve which proceedings have been instituted on behalf of the State, has, at any time prior to the decree of dissolution, the same power to dispose of its property honestly and in good faith that any other corporation has.

6. Stockholders of a corporation have the same right that strangers would have to purchase its property, and take possession thereof during the pendency of a suit to forfeit its charter.

7. Persons purchasing the property of a corporation pending a suit to dissolve it are not bound by a decree appointing a receiver of the property, because in their character as stockholders they made opposition to the appointment of the receiver on the ground that no party in interest asked or desired a receiver.

8. A court cannot authorize a receiver to take property from the possession of a stranger to the action without giving the latter a hearing as to his title thereto.

9. A writ of prohibition commanding a court and its receiver to desist from acting in pursuance of an order appointing the receiver for property of a corporation, will not be denied on the ground that the order is made and executed, where by its very terms the receiver is to hold the property subject to further orders of the court.

10. Where everything necessary to sustain an objection to jurisdiction has been shown, and the objection strenuously argued and maturely considered, such objection has been sufficiently submitted to the court to justify an application to a higher court for a writ of prohibition.

11. Where a receiver has taken possession of property under a void commission and the future acts of the court with reference thereto, *i. e.*, its sale and the distribution of

NOTE.—As to power to issue writs of prohibition, see Walcott v. Wells (Nev.) 9 L. R. A. 59.

jurisdiction or not, to entertain such suit. For every malicious wrong there is certainly in this day and age a remedy, and, under our liberal system of pleading in this State, a plain and clear statement of the facts constituting the wrong is sufficient; and it is but little matter, in actions of trespass on the case, what the action is named or called. The first count of the declaration plainly shows a malicious and actionable wrong, and every averment was supported by cogent proof. It may be that the prosecution of the suit to judgment in the justice court by itself alone did not touch the person or property of the plaintiff, but the writer of this opinion, in *Brand* v. *Hinchman*, held that it was not necessary, in an action for the malicious prosecution of a civil suit, that the person should be molested or property seized, if it appeared that the suit was malicious, and without probable cause, and the party had been injured or damaged thereby. See 68 Mich. 596–598, and cases there cited. I am still of the opinion there expressed, and have been fortified in my position by the facts of this case and the decisions of other courts, not cited in *Brand* v. *Hinchman*. *McPherson* v. *Runyon*, 41 Minn. 524; *Pope* v. *Pollock*, 46 Ohio St. 367, 4 L. R. A. 255; *Allen* v. *Codman*, 139 Mass. 136. See also discussion of this question by J. D. Lawson in 21 Am. Law Reg. 281, 353.

It is true that the general rule is that, to support an action for malicious prosecution, the plaintiff must establish three things: first, the fact of the alleged prosecution, and that it has come to a legal termination in the plaintiff's favor; second, that the defendant had not probable cause; third, that he acted from malicious motives. *Hamilton* v. *Smith*, 39 Mich. 222, 225.

In the case before us, the defendants had not probable cause against Antcliff. It was conclusively shown that June never had any claim against Antcliff except one for $50 for getting him a wife, and never pretended to have any other; and from Crowell's own testimony it is apparent that he knew this. He testifies that June told him of some other items of account, but he cannot remember any except of the $50. The judgment was taken for $300. Witnesses swore that June told them he did this because Crowell told him he might just as well get a judgment for $300 as for $50. Crowell does not deny this in his testimony. The taking and collecting of a judgment for $300, under these circumstances, shows malice. But the defense urged that the other element is wanting; that the proceeding or suit did not terminate in plaintiff's (Antcliff's) favor. In this case, however, the judgment was void upon the face of the justice docket and files. The summons was not issued under § 7317, How. Stat. It was directed to any constable of Jackson County, and could not be served by an officer of Washtenaw County, the same as in any ordinary suit. The making of the affidavit upon the return day of the summons, and the judgment entry attempting to bring the case within section 7317, were futile. When a suit is commenced under this section and the de-

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The second count is also good. If process is also willfully made use of for a purpose not justified by the law, this is an abuse for which an action will lie. See Cooley, Torts, 189, 190, and cases cited.

I can conceive of no case of any greater abuse of process than this. There was nothing to base it upon in the beginning, and it was procured in every stage of the proceeding thereafter by fraud and perjury, which ought to be punished by a term in state prison to both of the defendants. It was used for no lawful or legitimate purpose. If "entering upon a judgment and suing out execution after the demand is satisfied" is an abuse of process (*Barnett* v. *Reed*, 51 Pa. 190), then, certainly, obtaining a judgment by fraud and perjury, when there was never any demand in favor of June against Antcliff, and suing out an execution upon such judgment, when the defendants knew it was false and fraudulent, and extorting money under such execution, is also an abuse of process.

The learned judge of the Jackson Circuit was in error in directing a verdict for the defendants. *The judgment of the court below is reversed, and a new trial granted the plaintiff, with costs of this court.*

The other Justices concurred.

CALIFORNIA SUPREME COURT.

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1. A rule of court that a petition for a writ in which a judge or an officer discharging public duties is named as respondent shall disclose the names of the real parties in interest upon whom a copy of the petition and writ must be served does not require such parties to be made formal parties to the proceeding by being named as defendants in the petition or writ. A failure, therefore, to serve such parties will not cause an abatement of the whole proceeding.

2. A receiver of a dissolved corporation is only to be appointed when necessary for the purpose of preserving and distributing the property, and only on application of a party interested, viz., a creditor or stockholder.

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the proceeds, are arrested by prohibition, the writ will also require a restoration of the property to petitioner.

12. **Adequate remedies at law,** such as to defeat a right to a writ of prohibition against the enforcement of an order appointing a receiver, which is in excess of the court's jurisdiction, are not furnished by motion to withdraw the order or for leave to sue the receiver in ejectment, or by appeal from the order.

13. **The rule that title to property cannot be tried by a** writ of prohibition does not preclude the issuance of such writ to prevent a receiver from proceeding, under an order appointing him to take possession of property claimed by, and in the possession of, strangers to the proceeding in which he was appointed.

14. **A party aggrieved is entitled to relief** by writ of prohibition *ex debito justitiæ*, if he suffer by the usurpation of jurisdiction by a court. In such case the writ is not discretionary.

15. **A formal plea or a formal motion to raise the question of the jurisdiction of a court** to appoint a receiver of a corporation is not required before applying for a writ of prohibition, where petitioners owning property claimed by the receiver are informed by the court that their application will not be considered, unless full and complete possession is first delivered to the receiver.

(June 7, 1890.)

APPLICATION for a writ of prohibition to prevent the Superior Court for the City and County of San Francisco from taking possession, and disposing, of certain property through its receiver. *Granted.*

The facts are fully stated in the opinion.

Messrs. **Wilson & Wilson** and **Garber, Boalt & Bishop,** for petitioners:

The appeal caused a suspension of the judgment below for all purposes, and it is not even evidence of any fact between the parties. *Woodbury* v. *Bowman*, 13 Cal. 634; *Thornton* v. *Mahoney*, 24 Cal. 569; *McGarrahan* v. *Maxwell*, 28 Cal. 89; *McGarrahan* v. *New Idria Min. Co.* 49 Cal. 331, 336; *Murray* v. *Green*, 64 Cal. 369; Freeman, Judgm. 328.

Directors of a corporation at the time of its dissolution shall remain trustees.

2 Kent. Com. p. 308, *note; Owen* v. *Smith*, 31 Barb. 641; *Heath* v. *Barmore*, 50 N. Y. 302; *Re Pontius*, 26 Hun, 232; Code Civ. Proc. § 565.

When the property of the dissolved corporation has once vested in its trustees upon a dissolution, it cannot be subsequently devested. *People* v. *O'Brien*, 2 L. R. A. 255, 111 N. Y. 55, 58, 63.

The judgment in *quo warranto* must be limited to a seizure of the franchise of the corporation, and cannot be extended to the seizure of its property.

Vincennes Bank v. *State*, 1 Blackf. 268, 281; Morawetz, Priv. Corp. 1033, 1104, and cases cited; *State* v. *Ashley*, 1 Ark. 304, 305.

The party applying for the appointment of a receiver must have an interest in the property which is the subject of the receivership. Beach, Receivers, § 51; High, Receivers, § 11; *Atty-Gen.* v. *Day*, 2 Madd. Ch. 470; *Smith* v. *Wells*, 20 How. Pr. 158; *O'Mahoney* v. *Belmont*, 62 N. Y. 133, 143.

Courts will not interfere with assets in the hands of trustees who have a right of administration unless cause is shown to fear that the property will be squandered to the injury of a claimant having a present or future fixed title thereto, or lien thereupon.

Dougherty v. *McDougald*, 10 Ga. 125; *Haines* v. *Carpenter*, 1 Woods, 265; 2 Story, Eq. § 826; *Mays* v. *Rose*, 1 Freem. Ch. (Miss.) 718; *Overton* v. *Memphis & L. R. R. Co.* 10 Fed. Rep. 836; *Voshell* v. *Hynson*, 26 Md. 92; *Speights* v. *Peters*, 9 Gill, 472; *Chicago & A. Oil & Min. Co.* v. *United States Petroleum Co.* 57 Pa. 83, 91; Beach, Receivers, § 123; High, Receivers, §§ 83, 84, 88, 89.

The proceeding for the appointment of a receiver is not a continuation of the *quo warranto*, but is an original proceeding in the Superior Court as a court of equity, in which the presentation of the bill or application of a stockholder or creditor is the first step, and is the act which confers jurisdiction.

Bangs v. *McIntosh*, 23 Barb. 591.

In the absence of any petitioner or complainant having such an interest as entitled him to sue or to intervene, and in the absence of all allegation and proof of facts vital and essential to call the jurisdiction into operation, the order in this case is absolutely null and void.

Windsor v. *McVeigh*, 93 U. S. 282, 23 L. ed. 917; *Sabariego* v. *Maverick*, 124 U. S. 292, 31 L. ed. 442; *Smith* v. *Woolfolk*, 115 U. S. 148, 29 L. ed. 359; *United States* v. *Walker*, 109 U. S. 266, 27 L. ed. 929; *The J. W. French*, 13 Fed. Rep. 923; *Eureka C. Min. Co.* v. *Richmond Min. Co.* 5 Sawy. 121; *Hardy* v. *McClellan*, 53 Miss. 512; *Thayer* v. *Hart*, 24 Fed. Rep. 558; *Wilburn* v. *McCollom*, 7 Heisk. 271; *Justice* v. *McBroom*, 1 Lea, 555, 558.

A fortiori did the Court exceed its jurisdiction in authorizing the receiver to wrest from these petitioners property in their possession under claim of right for a long period before the receiver was even applied for. There is no place here for the application of any doctrine or rule of *lis pendens*.

Paine v. *Root*, 9 West. Rep. 752, 121 Ill. 82; Wade, Notice, § 351; *Andreas* v. *Paschen*, 67 Wis. 414; *San José* v. *Fulton*, 45 Cal. 319; Freeman, Judgm. 2d ed. § 196; *Houston* v. *Timmerman*, 4 L. R. A. 716, 17 Or. 499; Bennett, Lis Pendens §§ 91, 94; *Miller* v. *Sherry*, 69 U. S. 2 Wall. 237, 17 L. ed. 827; *Lewis* v. *Mew*, 1 Strobh. Eq. 180; *Hamlin* v. *Bevans*, 7 Ohio, 161; *Jaffray* v. *Brown*, 17 Hun, 575; *Brightman* v. *Brightman*, 1 R. I. 113; *Dorcy's App.* 97 Pa. 153; *Russell* v. *Kirkbride*, 62 Tex. 455; *Feigley* v. *Feigley*, 7 Md. 563; *Low* v. *Pratt*, 53 Ill. 438; *Badger* v. *Daniel*, 77 N. C. 251.

The order appointing a receiver cannot, as against third persons, relate back beyond its date.

Artisans Bank v. *Treadwell*, 34 Barb. 559; *Van Alstyne* v. *Cook*, 25 N. Y. 495, 496; High, Receivers, § 136; Beach, Receivers, § 168; *McCombs* v. *Merryhew*, 40 Mich. 725; *Salling* v. *Johnson*, 25 Mich. 491; *State* v. *Mitchell*, 2 Bail. L. 225; *Reg.* v. *Judge of County Ct.* L. R. 20 Q. B. Div. 167; *White* v. *Gates*, 42 Ohio St. 111; *Mays* v. *Wherry*, 3 Tenn. Ch. 34; *Sea Ins. Co.* v. *Stebbins*, 8 Paige, 567, 4 N. Y. Ch. L. ed. 545; *Higgins* v. *Bailey*, 7 Robt. 613; *Bostwick* v. *Isbell*, 41 Conn. 305; *People* v. *O'Brien*, 2 L.

R. A. 255, 111 N. Y. 62; *Ex parte Hollis*, 59 Cal. 405; *Ex parte Casey*, 71 Cal. 270; *Searles* v. *Jacksonville, P. & M. R. Co.* 2 Woods, 626; *Gravenstein's App.* 49 Pa. 321; *Jones* v. *Schall*, 45 Mich. 380; *Arnold* v. *Bright*, 41 Mich. 210; *Watson* v. *Dowling*, 26 Cal. 125; *Teris* v. *Ellis*, 25 Cal. 515; *Long* v. *Neville*, 29 Cal. 131; *Mayor* v. *Sprout*, 45 Cal. 99; *Baker* v. *Backus*, 32 Ill. 80; *Olmsted* v. *Rochester & P. R. Co.* 46 Hun, 552.

Prohibition is the proper and appropriate remedy under the circumstances of this case.

Quimbo Appo's Case, 20 N. Y. 540; Fitzherbert, Natura Brevium, pp. 45, 46; 2 Harris, Entries, pp. 450, 451; 2 Chitty, Pr. 354, 355; *Ex parte Smith*, 23 Ala. 94; *Jones* v. *Owen*, 5 Dowl. & L. 669; *Marsden* v. *Wardle*, 3 El. & Bl. 695.

There was no opportunity of moving for a prohibition before judgment; and, unless the motion is allowed after judgment, the excess of jurisdiction will be without redress.

See *Jones* v. *Owen*, *supra*; *Thompson* v. *Ingham*, 14 Q. B. 710.

In *Wadsworth* v. *Queen of Spain*, 17 Q. B. 171, it was decided (page 214) that it was unnecessary to plead to the jurisdiction in the court below.

See also *Serjeant* v. *Dale*, L. R. 2 Q. B. Div. 558; *Reg.* v. *Judge of County Ct. supra*; *Worthington* v. *Jeffries*, L. R. 10 C. P. 379; *London* v. *Cox*, L. R. 2 H. L. 239; *White* v. *Steele*, 12 C. B. N. S. 383; *French* v. *Noel*, 22 Gratt. 454; *Hutson* v. *Lowry*, 2 Va. Cas. 42; *Hein* v. *Smith*, 13 W. Va. 371; *McConiha* v. *Guthrie*, 21 W. Va. 134, 152; Comyn, Dig. *Prohibition*, citing *Darby* v. *Cosens*, 1 T. R. 552; *Shotter* v. *Friend*, 2 Salk. 547; *Gist* v. *Cole*, 2 Nott & McC. 461, 462; *Zylstra* v. *Charleston Corp.* 1 Bay, 385. See *Ramsay* v. *Court of Wardens*, 2 Bay, 180; *Ingersoll* v. *Buchanan*, 1 W. Va 184; *State* v. *Mitchell*, 2 Bail. L. 225.

The writ lies for excess as well as for want of jurisdiction.

People v. *Carrington*, 5 Utah, 531; *Mackonochie* v. *Lord Penzance*, L. R. 6 App. Cas. 444; *Ensign Mfg. Co.* v. *Carroll*, 30 W. Va. 532; *Croucher* v. *Collins*, 1 Saund. 140, *note 2*.

A receiver ought not to be appointed without notice to the party in possession, though a defendant in the action, unless the necessity is of the most stringent character.

Nusbaum v. *Stein*, 12 Md. 315; *Mays* v. *Rose*, Freem. Ch. (Miss.) 703; *Crowder* v. *Moone*, 52 Ala. 220; *Tibbals* v. *Sargeant*, 14 N. J. Eq. 449; *Cincinnati, H. & D. R. Co.* v. *Jewett*, 37 Ohio St. 649; *Verplanck* v. *Mercantile Ins. Co.* 2 Paige, 450, 2 N. Y. Ch. L. ed. 984; *Sandford* v. *Sinclair*, 8 Paige, 373, 4 N. Y. Ch. L. ed. 467; *French* v. *Gifford*, 30 Iowa, 160; *Gibson* v. *Martin*, 8 Paige, 481, 4 N. Y. Ch. L. ed. 511; *Oil Run Petroleum Co.* v. *Gale*, 6 W. Va. 527; *Fricker* v. *Peters*, 21 Fla. 254; *Moyers* v. *Coiner*, 22 Fla. 422; *State* v. *Jacksonville, P. & M. R. Co.* 15 Fla. 201; *Arnold* v. *Bright*, 41 Mich. 210; *Jones* v. *Schall*, 45 Mich. 379.

As to the power of the supreme court to award restitution, especially where the acts are continuing wrongs actively committed under an order or judgment in itself void for want of jurisdiction,—

See *Hulme* v. *San Francisco Super. Ct.* 63 Cal. 340; *Baker* v. *Backus*, 32 Ill. 96; *Chandler* v. *Brown*, 77 Ill. 333.

Mr. **William M. Pierson,** for respondent.

An application to the Court below by plea to the jurisdiction, or by affidavit, was necessary before the application to this court.

High, Extr. Legal Rem. § 773; Rule 28 Supreme Court; *Ex parte Hamilton*, 51 Ala. 62; *Barnes* v. *Gottschalk*, 3 Mo. App. 111; *Ex parte McMeechen*, 12 Ark. 70; *Ex parte Little Rock*, 26 Ark. 52; *Ex parte Williams*, 4 Ark. 537; Wells, Jurisdiction, §§ 111, 502; *State* v. *Judge*, 29 La. Ann. 806, 808; Shortt, Prohibition, *pp. 486, 487; *Chester* v. *Colby*, 52 Cal. 517; *Southern P. R. Co.* v. *Kern County Super. Ct.* 59 Cal. 476.

Only jurisdiction can be inquired into on prohibition.

Code Civ. Proc. § 1102; *People* v. *Kern County Suprs.* 47 Cal. 81; *People* v. *Whitney*, Id. 584; *Kulloch* v. *San Francisco Super. Ct.* 56 Cal. 229; *Murphy* v. *Colusa County Super. Ct.* 58 Cal. 520; *Spect* v. *Colusa County Super. Ct.* 59 Cal. 319; *Thomson* v. *Tracy*, 60 N. Y. 39; *Ex parte Braudlacht*, 2 Hill, 367.

The Court had the power to appoint a receiver of a dissolved corporation, and it was its duty to do it.

Code Civ. Proc. § 564, subsecs. 4, 5; Civil Code, § 400; *French Bank Case*, 53 Cal. 527, 541, 550, 553; *Folger* v. *Columbian Ins. Co.* 99 Mass. 267; *Miami Exporting Co.* v. *Gano*, 13 Ohio, 269; *Columbian Book Co.* v. *De Golyer*, 115 Mass. 69; *Hubbell* v. *Syracuse Iron Works*, 42 Hun, 182; *Atty-Gen.* v. *Guardian Mut. L. Ins. Co.* 77 N. Y. 275; *Vermont & C. R. Co.* v. *Vermont Cent. R. Co.* 46 Vt. 792; *People* v. *North River Sugar Ref. Co.* 5 L. R. A. 386, 54 Hun, 354; *Sword* v. *Wickersham*, 29 Kan. 748; *People* v. *Northern R. Co.* 42 N. Y. 217; *Bacon* v. *Robertson*, 59 U. S. 18 How. 488, 15 L. ed. 503; *Lum* v. *Robertson*, 73 U. S. 6 Wall. 277, 18 L. ed. 743; *note* to *State Bank* v. *State* (Ind.) 13 Am. Dec. 243; *First Nat. Bank of Selma* v. *Colby*, 88 U. S. 21 Wall. 614, 22 L. ed. 688.

Of what avail a forfeiture if the corporators could continue the use of the corporate assets in the very illegal acts for which they had just been convicted?

Field, Corp. § 488; *Atty-Gen.* v. *Guardian Mut. L. Ins. Co. supra*; High, Receivers, § 203. See especially *East Line R. Co.* v. *State*, 75 Tex. 434.

The Court had the jurisdiction and power to define in the order appointing the receiver the property which the receiver was to take.

Crow v. *Wood*, 13 Beav. 271; High, Receivers, § 87; Edwards, Receivers, pp. 79–81; *O'Mahoney* v. *Belmont*, 62 N. Y. 148; *Curran* v. *Craig*, 22 Fed. Rep. 101; *Ex parte Cohen*, 5 Cal. 494.

The Court had the jurisdiction and power to decide whether the petitioners herein in possession were in such possession as agents or trustees of the corporation. Being stockholders in the corporation they were prima facie in possession as such, and not in their own right.

Ex parte Cohen, *supra*; *Parker* v. *Browning*, 8 Paige, 388, 4 N. Y. Ch. L. ed. 473; Edwards, Receivers, 2d ed. p. 145; *Howell* v. *Ripley*, 10 Paige, 46, 4 N. Y. Ch. L. ed. 880; High, Receivers, §§ 129, 145; *Geisse* v. *Beall*, 5 Wis. 230;

United States v. *Church of Jesus Christ*, 5 Utah, 538.

The stockholders are bound by the judgment against the corporation and its consequences—the compulsory winding up.

Hedges v. *Yuba County Super. Ct.* 67 Cal. 405; High, Receivers, § 140; *Clapp* v. *Peterson*, 104 Ill. 31; *Wetherbee* v. *Baker*, 35 N. J. Eq. 501, 507; Morawetz, Priv. Corp. § 886; Bigelow, Estoppel, 4th ed. p. 129, *note 8; Great Western Teleg. Co.* v. *Gray*, 11 West. Rep. 739, 122 Ill. 637; *State* v. *Atchison & N. R. Co.* 24 Neb. 143.

When duly appointed, the receiver became a ministerial officer. He has and can exercise no judicial function. He is merely an executive officer of the Court. Prohibition will not lie against him.

Haile v. *San Bernadino County Super. Ct.* 78 Cal. 418; *Hobart* v. *Tillson*, 66 Cal. 210; *People* v. *Board of Election*, 54 Cal. 404; *Le Conte* v. *Berkeley*, 57 Cal. 269; *Spring Valley Water Works Co.* v. *San Francisco*, 52 Cal. 111; *Maurer* v. *Mitchell*, 53 Cal. 289; *Ex parte Braudlacht*, 2 Hill, 367; *Arnold* v. *Shields*, 5 Dana, 18; *Barnes* v. *Gottschalk*, 3 Mo. App. 222.

The writ of prohibition cannot have any retroactive effect.

Hull v. *Shasta County Super. Ct.* 63 Cal. 179; *United States* v. *Hoffman*, 71 U. S. 4 Wall. 158–163, 18 L. ed. 354, 355; *Dayton* v. *Paine*, 13 Minn. 493; *Brooks* v. *Warren*, 5 Utah, 89.

Petitioners had a plain, speedy and adequate remedy at law by application to the lower Court by certiorari, by summary proceeding for a trespass, or by appeal. Having such, prohibition does not lie.

Haile v. *San Bernadino County Super. Ct. supra;* High, Receivers, § 139; *Jasper County Comrs.* v. *Spitler*, 13 Ind. 235; *Ex parte Smith*, 34 Ala. 455; *Kemp* v. *Ventulett*, 58 Ga. 419; *State* v. *Burton*, 11 Wis. 50; *State* v. *Braun*, 31 Wis. 600; *People* v. *Clute*, 42 How. Pr. 157; *Sasseen* v. *Hammond*, 18 B. Mon. 673; *Bedford Supvrs.* v. *Wingfield*, 27 Gratt. 329.

Messrs. **William T. Wallace,** *in propria persona,* **Sullivan & Sullivan** and **W. H. Metson,** also for respondent.

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

This is an original application for a writ of prohibition to the Superior Court of the City and County of San Francisco, Department No. 6, William T. Wallace, Judge, commanding and directing said Court and judge, and the receiver of said Court, Patrick Reddy, Esq., to desist and refrain from proceeding or acting upon or in pursuance of a certain order appointing said receiver. The importance of the case, not only as regards the interests at stake, but also in respect to the questions of law and practice which it involves, will justify, if it does not require, a somewhat detailed statement of the facts out of which it arises.

It appears that in the month of November, 1888, the People of the State of California, on the relation of the attorney-general, commenced an action in said Superior Court against the American Sugar Refinery Company, a California corporation, for the purpose of forfeiting its charter. The corporation appeared and answered the complaint, and after trial the judgment of said Superior Court was pronounced, declaring the forfeiture, and imposing upon the corporation defendant a fine of $5,000 and costs of suit. The judgment was rendered January 8, 1890, and on the same day, at the instance of the attorneys representing the State, a rule was issued and served requiring said corporation and its attorneys to show cause on the 10th of January why a receiver should not be appointed "to take charge of the estate and effects of the said defendant corporation, and to distribute the same according to law, or to preserve the same pending an appeal herein, if such appeal be taken herein, on the ground that said defendant corporation has been dissolved, and has forfeited its corporate rights." On the return day of the rule, the corporation appeared, and the hearing was continued until January 20. Meantime, on January 18, the corporation duly served and filed its notice of appeal to this court from the judgment against it, and at the same time filed in due form a bond in the penal sum of $12,000 to stay proceedings on said judgment. After hearing the motion for a receiver, the judge of the Superior Court held the matter under advisement until February 17, on which day he made an order as follows (after reciting the previous proceedings): "It is ordered that Patrick Reddy, a resident of the City and County of San Francisco, State of California, be, and he hereby is, appointed receiver of the property and effects of the defendant, wherever the same may be situate, including the American Sugar Refinery, situate at the southwest corner of Union and Battery Streets, in this city and county, and its appurtenances. It is further ordered that the defendant, its officers, agents, attorneys, servants and employés, and all persons and corporations, associations or firms, holding any of the defendant's property in trust for said defendant or its stockholders, do immediately, upon the production of this order, surrender into the possession of said receiver all the said property, real, personal and mixed, wherever situate, belonging to said defendant, including all its books, records and papers. And it is further ordered that said receiver do immediately take into his exclusive possession all the books, records and papers of said defendant, and all the said property, real, personal and mixed, of the said defendant, including the said American Sugar Refinery, so as aforesaid situate in said city and county, and hold the same pending the appeal from the judgment herein, and the final determination of the motion for new trial, and until the further order of this Court; and that said receiver at once close the said refinery, and do not dispose of any of the said property of the said defendant until the further order of this Court. It is further ordered, and I hereby direct, that the said receiver execute to the State of California an undertaking, with two sufficient sureties to be approved by me, in the sum of $10,000, to the effect that he will faithfully discharge the duties of receiver in the above-entitled action. Dated February 17, 1890. Wm. T. Wallace, Judge."

On the same day a second order was made, which, after reciting the one above quoted, and the fact that the receiver had executed and

filed a sufficient undertaking as therein required, and had taken the oath of office, concludes as follows: "Now, therefore, it is hereby ordered that said receiver be, and he is hereby, invested with all the power and authority mentioned and conferred in said order hereinabove recited, to the same extent as if the same were again here repeated and recited at length. Dated February 17, 1890. William T. Wallace, Judge."

Immediately upon the issuance of this order, Mr. Reddy proceeded to the sugar refinery therein mentioned, which he found in full operation under the direction and control of a superintendent, foreman and others, in the pay and employment of the petitioners herein, who claim to have purchased the property, and to have received a conveyance thereof from the American Sugar Refinery Company in the month of March, 1889, since which time they assert that they have been in full and complete possession, as absolute owners, in their own exclusive right. Mr. Reddy, however, demanded of those in charge that they should immediately transfer the possession of the premises, and everything connected with and contained in the refinery, to him, as receiver; and he claims that on the evening of the 17th he had succeeded in obtaining full and absolute possession and control of the entire establishment. This claim is disputed by the petitioners, and whether it is true or not is one of the principal questions in the case. The facts upon which its solution depends will be reviewed when the question is reached. Meantime, and for the purposes of this preliminary statement, it is sufficient to say that the petitioners and the receiver each claim to have had possession of the refinery on the 17th of February, and on the following day. The receiver claims that his possession was complete and absolute from and after the evening of the 17th. The petitioners contend that, at most, there was a mere scramble for possession by the receiver up to the time when he was served with notice of the alternative writ of prohibition herein, on the afternoon of February 18.

The first notice that the petitioners or their employés had of the order appointing the receiver, and directing him to take possession of the sugar refinery, was Mr. Reddy's demand for possession, and proclamation of his authority. The agents in charge of the refinery, before yielding to his demands, asked to be allowed an opportunity of obtaining legal advice as to their rights and duties in the matter. This was conceded by Mr. Reddy, upon the understanding that the superintendent of the refinery would notify him at 10 o'clock next morning what course he had decided to take. Availing themselves of this respite, the agents of petitioners consulted counsel, and during the night of February 17 affidavits were prepared upon which to base an application to *Judge* Wallace for a suspension or modification of his order. Prior to 10 o'clock on the following morning Mr. Reddy was notified of this intended application, and at about the hour of 10 o'clock he and his counsel, and counsel for petitioners, met *Judge* Wallace at his chambers, where, at least, an informal application was made to the judge for a stay of proceedings pending a motion to set aside or modify his previous order directing the receiver to take possession of and close the refinery. What occurred at this interview is one of the principal points of controversy in the case, as involving a question of practice or procedure. The facts will be stated, so far as necessary, when we come to consider that question.

For the present, it is sufficient to say that *Judge* Wallace refused to grant any stay of proceedings for even an hour, unless the petitioners would at once desist from all opposition to the receiver, and yield instant and absolute possession of the refinery and other property. This condition was not assented to, and it was then agreed between Mr. Reddy and his counsel upon one side and counsel for petitioners on the other, that at the hour of 12 o'clock on that day counsel for Mr. Reddy should be informed what further steps the petitioners had decided to take, and whether they would further oppose his claims as receiver to the possession of the refinery. At 12 o'clock counsel for Mr. Reddy was notified, in substance, that his right to the possession could not be admitted, and that his taking possession would be opposed, so far as it could be done without a resort to actual force or violence. Meantime, Mr. Reddy had again attempted to assert and enforce his possession and authority at the refinery, and had met with such resistance that he felt it necessary to resort to the court for its aid. He therefore made and filed an affidavit entitled in the action against the American Sugar Refinery Company, in which, after reciting the various proceedings and orders therein, including his appointment and qualification as receiver, he proceeded as follows: "That deponent, as such receiver, entered into possession of the American Sugar Refinery, and the property therein situate, in the City and County of San Francisco. That H. C. Mott and R. H. Sprague impede, hinder and delay this deponent in the discharge of his duties as such receiver, and refuse to allow deponent to take into his possession and control certain property situate on the premises aforesaid. That said parties last above named, notwithstanding the receiver's possession of said premises, dispute his right to said possession, and resist the full enforcement of the order and judgment of this court and especially of the order hereinabove set forth. Wherefore this deponent prays this honorable court to give its order and direction to the sheriff of said City and County of San Francisco to enforce the orders and direction of this court as duly given and made, in and by the order hereinabove set forth, and to do and perform all acts which may be necessary to place said receiver in complete possession of said American Sugar Refinery, and all and singular the property therein situated, and the property of said defendant of whatever character, and wherever situated."

Immediately upon the filing of this affidavit of the receiver, and at about the hour of 1:30 P. M. of February 18, *Judge* Wallace made and filed an order, which, after reciting the previous proceedings, concludes as follows: "Now, you, the said sheriff, are hereby required to execute and enforce each and every, all and singular, the matters in said order appointing a receiver contained, in so far as may be necessary to place said receiver in posses-

sion, and to do and perform all acts which may be necessary to place Patrick Reddy, said receiver, in exclusive, full and complete possession of the land and premises known as the American Sugar Refinery, situated at the southwest corner of Union and Battery Streets, in said City and County of San Francisco, and of all and singular the property, real and personal, of said American Sugar Refinery Company, in said City and County of San Francisco. And you, said sheriff, are directed to make return of said order appointing a receiver, and of this order, within ten days after your receipt hereof, with what you have done indorsed thereon. Wm. T. Wallace, Judge."

This order, which the superior judge and sheriff denominate a writ, was afterwards, on February 28, 1890, filed by the sheriff with the following return indorsed thereon: "I, C. S. Laumeister, sheriff of the City and County of San Francisco, State of California, certify that the annexed and accompanying orders and writs, issued out of the Superior Court of the City and County of San Francisco, were placed in my hands at 1:45 P. M. on Tuesday, February 18, 1890. In obedience to the said orders and writ, I proceeded to the premises designated therein, and found Patrick Reddy, who had theretofore been appointed by said honorable Court as receiver in said action, in possession of said premises in said orders and writ mentioned and described. That I found upon said premises certain persons who, I was informed, were interfering with the possession and enjoyment of said premises by said receiver. That I thereupon exhibited said order, and requested said persons to retire from said premises, and that said persons thereupon retired from said premises described in said writ and order, and thereupon left said Patrick Reddy in the peaceful and undisturbed and undisputed possession of the land and premises known as the American Sugar Refinery, situated at the southwest corner of Union and Battery Streets in said city and county, with the appurtenances thereto belonging and the fixtures therein, and all property, real and personal, appertaining thereto. That I also found said receiver in possession of the office of the American Sugar Refinery Company at No. 220 California Street, and I left him in possession thereof. That I also found said receiver in possession of an office and premises situated in the second story of a building, No. 124 California Street, which said office and premises were designated with the name 'The American Sugar Refinery Company,' and I left said receiver in absolute possession of said premises last above described, and all of the premises and property hereinabove mentioned and described. That all of said actions and proceedings done, had and performed by me, under and in obedience to said orders and writ, were done, had and performed and completed at and before the hour of 3 o'clock P. M. of said eighteenth day of February, 1890."

While these proceedings, by and on behalf of the receiver, were in progress, the petitioners were applying here for a writ of prohibition, and about the hour of 2 o'clock P. M. February 18, an order for the issuance of an alternative writ was made and filed. The writ issued in pursuance of our order was served on the receiver about 3:30 o'clock P. M. and upon *Judge* Wallace about 6 o'clock P. M. In their petition for the writ, the petitioners set out the whole proceedings in the case of *People* v. *American Sugar Refinery Company* down to and including the order appointing the receiver, and the order supplementary thereto. They allege that ever since the 21st day of March, 1889, they have been the owners in fee simple in their own right of the several tracts and parcels of land in San Francisco which they specifically describe, and upon which are situate the sugar refinery, and the various shops and offices appertaining; that ever since said date they have been carrying on in said buildings the business of refining sugars for sale in the markets of California and elsewhere; that they also have offices, furniture, books and other personal property used by them in and about said business; that they do not use, hold or possess said property, or any part thereof, in trust for the use or benefit of the American Sugar Refinery Company, the defendant in the action referred to, or any of its directors, trustees, creditors or stockholders, but solely for themselves, and for their own exclusive use and benefit, and have ever since said 31st day of March, 1889, been in the quiet and peaceable possession of the same, claiming title thereto, and the exclusive ownership thereof; that since September, 1889, Henry C. Mott has been the general agent and attorney in fact of the petitioners, in actual charge and custody of all of said property, and duly authorized to conduct said business. They then allege the demands of Reddy to be let into the possession of said property, their refusal and resistance, the damage that would result from a stoppage of the works, and that Reddy is threatening to cause the arrest of said agent and the superintendent of the works for contempt of the Superior Court in resisting the said order. They further allege that they have, through their said agent, Henry C. Mott, respectfully presented the foregoing facts to said Superior Court, and called its attention to the excess of jurisdiction by it committed in making said order, and in directing said receiver to enter upon and take possession and control of their said property; and that they have requested said Court to modify its said order so as to direct him to bring a proper action for the recovery of said property, instead of taking possession without action, which request they say said Superior Court has denied. They further allege that said orders, so far as they authorize the receiver to take the property in their possession and claimed by them, are beyond the power and jurisdiction of the Court, and in violation of their rights; that they were not parties to said action of the People against said American Sugar Refinery Company, nor did they make any appearance or participate in any respect in said action. They further allege that, after said judgment against the Sugar Refinery Company, said company, on the 18th of January, 1890, had taken and perfected an appeal therefrom to this court, and had filed an undertaking sufficient to stay the execution thereof. And, averring that they have no plain, speedy or adequate remedy against said proceedings of the Superior Court in ordinary course of law, they pray: "That a writ of prohibition

herein may be issued to said Superior Court of the City and County of San Francisco, Department No. 6, and the judge thereof, commanding and directing said Court, and said judge, and also its said receiver, Patrick Reddy, to desist and refrain from further proceedings upon the said order aforesaid appointing its said receiver, and from exercising any of the powers in said order granted with regard to any property in the possession of said Havemeyers & Elder, through their agents or employés, and especially said sugar refinery, and from interfering with or disturbing the possession and control of the said Havemeyers & Elder of the said sugar refinery, or any other property by them possessed and claimed in their own right."

The order made by us upon the filing of this petition directed the issuance of an alternative writ of prohibition to Department No. 6 of the Superior Court of the City and County of San Francisco, and to *Hon.* W. T. Wallace, judge of said Court, in accordance with the prayer of the petition, "commanding said Court and judge, either through said Patrick Reddy, receiver, or otherwise, from taking possession of or interfering with the possession or control by said Havemeyers & Elder, through their agents or otherwise, of any property, real or personal, in their possession, and claimed by them in their own right, and especially of the said property situate on the southwest corner of Union and Battery Streets, in said City and County, and the refinery situate thereon, or from interfering with the agents and employés of said Havemeyers & Elder in the conduct of the business of the same, or from exercising any of the powers granted to said receiver in the order appointing him, so far as enforcing the same is concerned against said Havemeyers & Elder." Said order further directed said Court and judge to show cause on March 3 why said prohibition should not be made absolute and perpetual, and that in the meantime, until further ordered, "all proceedings in said action upon the said order so appointing said receiver be stayed so far as the said Havemeyers & Elder and the property, real and personal, in their possession at the time said order was made appointing said receiver are concerned." The writ issued in pursuance of this order in the name of the People and under the seal of the court, was, in substance, a repetition of the order, with some amplification of its terms, and not only the writ, but copies of the order and petition upon which it was founded, were served at the hours above mentioned on *Judge* Wallace and Mr. Reddy.

On February 25, which was prior to the day upon which the respondent was required to show cause against the prohibition, affidavits were filed on behalf of the petitioners, alleging that the respondent and the receiver had committed a contempt of this court in proceeding under said order appointing the receiver contrary to the injunction contained in our order for the writ of prohibition; whereupon we made and directed to be served upon *Judge* Wallace and Mr. Reddy another order, in which, after reciting the substance of the charge contained in said affidavits, we commanded them to show cause on March 3 why they should not be adjudged guilty of contempt, and why the receiver should not be compelled to withdraw and retire from the sugar refinery, and make restitution of the personal property which he had taken into his possession. On March 3, 1890, *Judge* Wallace and Mr. Reddy appeared and answered in both proceedings,—the prohibition and the contempt,—and they were heard, argued and submitted together.

It is not necessary, in this connection, to set forth in detail the matters contained in the answers of the respondent and the receiver. It is sufficient to say that the answer of *Judge* Wallace contains denials and averments upon which he claims that his power and jurisdiction to appoint a receiver of the property of the American Sugar Refinery is complete, and also that he had the like power and jurisdiction in the action against the corporation to command and authorize the receiver to take the specific property described in his order, notwithstanding it was in possession of the petitioners, under claim of exclusive ownership.

As to the matter of contempt, *Judge* Wallace takes the position that the effect of our order for and writ of prohibition was simply to tie his hands and shut his mouth, so that he could not, without a violation of its terms, give any order or direction to the receiver whatsoever, or in any manner interfere with his proceedings; and he shows that he strictly adhered to this rule of inaction. Mr. Reddy says that he and his counsel construed our order and writ in the same way, so far as it affected *Judge* Wallace, and therefore that he refrained from seeking any advice or direction from the Superior Court as to his own duties in the premises, relying in that matter wholly upon the advice of counsel, which he followed in good faith. He says that he was advised—and that such was his own opinion—that the effect of the writ and order upon him was to confine him to the exact position in which they found him at the moment they were served. He contends that when the writ and order were served on him he was in complete and absolute possession, to the exclusion of petitioners, of the sugar refinery, offices, shops, machinery and supplies, books, papers, etc., engaged in working up about $50,000 worth of sugar then in solution preparatory to shutting down the works, and that he did nothing except to retain the possession which he had, and to shut down the works as soon as possible.

From this general statement of the case, the nature of the questions to be decided is sufficiently shown. We have nothing whatever to do with any question as to the validity, correctness or propriety of the judgment of fine and forfeiture pronounced against the American Sugar Refinery Company in the action instituted by the attorney-general in behalf of the People of the State. For all the purposes of this case, that judgment is assumed to be absolutely just and valid, though suspended by the appeal. But, conceding the perfect validity of that judgment, the question remains whether the Superior Court had any jurisdiction to make the order appointing the receiver, and directing him to take specific

property from the possession of the petitioners, who were not parties to the action, and were claiming said property in their own right. Subordinate to this main question are a variety of others, which have been elaborately discussed by counsel, as, for instance, whether prohibition is the proper remedy when the Court has exceeded its jurisdiction in appointing a receiver; whether, conceding it to be the proper remedy in such case, the petitioners have complied with the necessary conditions of its issuance; whether the court should not, in the exercise of its discretion, refuse its aid to these petitioners, even if they have proceeded correctly in the matter of practice, and this not only because they have other plain, speedy and adequate remedies, in the ordinary course of law, but principally because they are *particeps criminis* with the corporation in the misconduct for which its charter has been forfeited. There are still other questions involved in the matter of the prohibition, and then there are the questions arising in the proceeding for contempt.

We shall proceed to discuss such of these points as we deem material, in about the order in which they have been stated. And, first, as to the power of the Superior Court to make the order complained of. The appointment of receivers, and their powers and duties, are regulated by section 564 *et seq.* of the Code of Civil Procedure. It is therein provided that a receiver may be appointed by the court in which an action is pending, or by the judge thereof, in various cases, and, among others: "*Five.* In the cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights."

It is not necessary to refer to other grounds for the exercise of the power of appointment, because it is distinctly admitted by respondent and his counsel that the order here in question finds its sole support in the clause just quoted. The learned judge of the Superior Court, respondent here, in ruling upon the motion for a receiver, prepared and filed a written opinion, to which we have been referred as containing the essence of the argument on his behalf respecting the question under consideration, and we know of no better way to state the position for which he contends than to quote the opinion in full. It is as follows:

"It was lately decided here that the corporation defendant had grossly abused its corporate franchise, united itself with 'the Sugar Refineries Company' in maintaining a monopoly of the article of refined sugar, destroying competition in its production, deteriorating its quality, and arbitrarily increasing its cost to consumers. Judgment of forfeiture of its corporate charter and the imposition of a fine of $5,000 followed. The attorney-general now applies for the appointment of a receiver of the corporate estate and effects.

"(1) It is to be observed, *in limine*, that the application for a receiver in a case of this impression is not to be dealt with as one made to a court of equity in the exercise of its preventive jurisdiction. The proceeding is for a forfeiture. That circumstance would, of itself, be fatal to an application made to a court of equity for a receiver; for equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either. As observed by *Chancellor* Kent in *Livingston* v. *Tompkins:* 'It may be laid down as a fundamental doctrine of the court that equity does not assist the recovery of a penalty or forfeiture, or anything of the nature of a forfeiture.' 4 Johns. Ch. 431 [1 N. Y. Ch. L. ed. 892]. The proceeding is now, as in its inception, distinctively a law, and, as observed by the learned counsel for the defendant, 'without a single incident of a court of equity connected with it.' The information in the nature of *quo warranto* with which it began, the judgment which followed, and the present application for a receiver, are but the successive steps taken in an action at law, and therefore to be governed by rules of mere law, and wholly irrespective of equitable consideration. Whether the receiver shall be appointed is dependent upon a statutory condition of fact,—the fact that the corporation has forfeited its corporate rights. The Code of Civil Procedure (§ 564), so far as pertinent to the case, is as follows: 'A receiver may be appointed . . . when a corporation . . . has forfeited its corporate rights.' And that the defendant is precisely in that category is the purport of the decision already rendered. Under the New York Code (§§ 1798, 1801), a receiver is provided for in the judgment itself; under the California Code, by an order entered subsequent to judgment. The difference is practically but one of sequence. The principle common to both Statutes is that an ascertained forfeiture implies a receiver. So it was substantially ruled in New York in 1865,—the Statute of that State being then much the same as ours,—in *People* v. *Washington Ice Co.*, that an application for a receiver made by the attorney-general before forfeiture ascertained was premature, and not to be entertained by the court. 18 Abb. Pr. 383. Recurring, then, to the Statute of this State (§ 564, *supra*), the language is that upon forfeiture a receiver may be appointed, etc. Now, though the word 'may' is but permissive in ordinary signification, it here means 'must,'—a receiver 'must' be appointed, etc. That this is the settled rule of interpretation is pointed out in Potter's Dwar. Stat., text and *note*, p. 220. It is there said as follows: '"May" in a statute means "must", whenever . . . the public have an interest in having the act done which is authorized by such permissive language.' Again: 'Words of permission shall, in certain cases, be obligatory. Where a statute directs the doing of a thing for the sake of justice, the word "may" means "shall."' So in *Newburgh & C. Turnp. Co.* v. *Miller*, *Chancellor* Kent observed as follows: 'And in respect to statutes, the rule of construction seems to be that the word "may" means "must" or "shall" only in cases where the public interest and rights are concerned, and where the public . . . have a claim *de jure* that the power shall be exercised.' 5 Johns. Ch. 113 [1 N. Y. Ch. L. ed. 1027]. That the public have an 'interest;' that the doing of a particular thing is 'for the sake of justice,'—change 'may' to 'must,' convert a word of permission to one of obligation. This principle is peculiarly applicable to the circumstances of this case. To

guard the public interest and vindicate justice is the distinctive purpose of this proceeding by the attorney-general; to maintain that a corporation, as being but a creature of the law, must obey the law,—cannot be permitted to violate it with impunity; that its stockholders must respect the obligation they assume to the public when they sought and accepted their franchise at the hands of that public; that they must observe the policy upon which the commercial police power of the State proceeds,—the policy which, notoriously disfavoring restraint of trade, absolutely forbids corporations to embark in monopoly in an article classed among the necessaries of human life,—these features characterize this as a case of grave public interest, and one in the vindication of which the Court is bound to employ all the powers provided by the law, one of which is the power to appoint a receiver of the estate and effects of the delinquent corporation.

"(2) Nor is this conclusion, founded, as it is, upon the text of the Code of Civil Procedure, already referred to, inconsistent with the Civil Code (§ 400), to the effect that stockholders in a dissolved corporation may, in the discretion of the court, be permitted to administer and wind up its business affairs. In my judgment, this provision has reference only to cases of voluntary corporate dissolution. A similar provision is found in the Revised Statutes of the State of New York (5th ed. vol. 3, p. 769, § 77), and is there limited to cases of voluntary dissolution, as in the nature of things it ought to be here, under the true construction of our Statute. In cases of voluntary corporate dissolution the stockholders are without fault, or may be. Therefore, the court has a discretion to permit them to hold and distribute the corporate assets. But this is not such a case. Here the corporate franchise has not been voluntarily surrendered, but has been forfeited because of the misconduct of the entire body of the stockholders, already ascertained,—in fact become the distinct ground upon which the forfeiture proceeds. For, as pointed out in my opinion heretofore filed in this case, the judgment in this action, though in form one against the corporation, is in fact against the stockholders, who, as there said, were the actual owners of the corporate franchise a forfeiture of which was adjudged. The misconduct by which the corporate charter was lost was therefore the misconduct of the stockholders sued, and making defense here by their corporate name, 'American Sugar Refinery Company.' As observed by *Mr. Chief Justice* Nelson in *People* v. *Kingston & M. Turnp. Road Co.*: 'Though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court. The powers and privileges are conferred and the conditions enjoined upon them; they obtain the grant, and engage to perform the conditions,' etc. 23 Wend. 205. Upon this view, it would indeed have been somewhat singular had the Civil Code conferred upon stockholders, thus convicted of the breach of one important trust, the immediate exercise of another trust, and one in itself of no slight importance,—the trust of administering and distributing the assets of the dissolved corporation. Such inconsistency is not to be attributed to that Code. Besides, it will be seen, upon looking into the decisions at large, that such a practice has never been pursued by the court. Stockholders whose ascertained misconduct has already operated a forfeiture of the corporate franchise have never been permitted to assume the administration of the corporate assets, even in cases of voluntary dissolution,—cases in which no malfeasance of the stockholders appeared. Inquiry has often been made by the court as to whether the dissolution had in point of fact been brought about by the misfeasance or mismanagement of the particular person seeking to become a trustee of the corporate affairs. I must therefore decline to permit the offending stockholders here, or their nominees, to become the trustees of the corporate assets.

"(3) But one other question remains to be considered, which will now be stated: An appeal from the judgment of forfeiture has been taken—taken and perfected in such a form as to stay the judgment, pending the appeal, if that be possible. The judgment was rendered here on the 6th day of January. On the 8th, this application for a receiver was made, and set down for hearing on the 10th, was actually heard on the 20th day of January; the appeal was taken on the 18th, while the application was yet pending, and some two days before it was submitted for decision. It is now claimed that the judgment is stayed by the appeal, and that, as a consequence of such stay, the power of the Court to appoint a receiver has ceased. But, in my opinion, no appeal, in whatever form it be taken, can operate a present stay of a judgment of the character of the one rendered in this case. To hold that it can is to imply that a corporation already dissolved for ascertained corporate abuses may, by this means, practically rehabilitate itself at pleasure,—resume its proper corporate existence,—despite the judgment, and so continue its misemployment of its franchise for an indefinite period of time. The correctness of a construction leading to such results may well be doubted.

"But, waiving this, and assuming that the judgment has been stayed by the appeal taken, it would not follow that the authority to appoint has been superseded because of the appeal. The subject of appeals, as well as their effect when taken, is governed by the Code of Civil Procedure (§ 946). An appeal 'stays all further proceedings . . . upon the judgment, . . . or upon the matters embraced therein, . . . but the court below may proceed upon any other matter embraced in the action,' etc. That the appointment of a receiver is a matter 'embraced in the action' has already been pointed out in connection with section 564 of the same Code. The appeal from the judgment does not suspend the power to appoint, unless the appointment be a matter embraced in the judgment, which it is not (as upon inspection of the judgment will appear), or is itself distinctively a proceeding 'upon the judgment.' That the appointment of a receiver in a cause is not a proceeding upon the judgment in that cause, but is merely ancillary in character, is understood to have

been often ruled in our courts. It is not necessary for me, however, to cite the cases, nor to enter now upon an analysis of the text of the Statute, because I consider the recent ruling in *Baughman's Case*, 72 Cal. 572, as directly in point in support of the power. An appeal from the judgment had been taken in that case, yet the authority of the court over the general subject of receivership appears to have been upheld, notwithstanding the pending appeal from the judgment. In that case it was the power to remove which was immediately in question; here, it is the power to appoint. But these powers must co-exist; any construction of the Statute which would uphold either must necessarily uphold the other. The conclusion reached is that the application must be granted and a receiver appointed. An order to that effect will now be entered. Wm. T. Wallace, Judge.

"Dated February 17, 1890."

As we cannot accept the conclusions reached in this opinion, we will state as briefly as possible in what we think their unsoundness consists. The assumption which forms the basis of the entire argument is that the appointment of a receiver to administer its assets is one of the penalties designed, and in effect prescribed, by the Legislature as part of the punishment to be visited upon the stockholders of a corporation which by any misconduct of its own has incurred a forfeiture of its charter. There is, in our opinion, little to justify this assumption, even in the Statutes of New York, upon the supposed construction of which so much reliance is placed. But, if such were the declared or plainly implied policy of that State, the significant fact remains that our Statutes not only contain no semblance of such a declaration, but that our Legislature, in framing the law of this State, while looking to the Statutes and Codes of New York for a model and guide, has deliberately rejected every provision from which such an implication might arise, and in place thereof has substituted one of opposite import. In order to a due appreciation of the force and meaning of these Statutes, it is necessary to consider, for a moment, the subject with which they deal.

When a corporation ceases to exist from whatever cause, whether from lapse of time, voluntary dissolution or judgment of forfeiture for neglect or abuse of its powers, it necessarily results that its property is left to be disposed of according to law. Even in those times when the doctrine prevailed that such of its property as did not revert to its grantors was forfeited or escheated to the crown, some officer exercising a general authority under the common law or statutes, or invested with a special authority for the occasion, was charged with the duty of collecting the assets for the benefit of the king or his donee; and since it has come to be recognized everywhere that upon the dissolution of a trading corporation its property neither reverts to its grantors nor escheats to the State, but belongs, after payment of its debts, to those who were stockholders at the date of dissolution, the appointment of some officer, with the same or more minutely defined authority, is a recognized necessity. Some means must be provided for winding up the corporation and distributing its assets according to the equitable rights of those interested. In the absence of any statute regulating the matter, a court of equity would have the undoubted right, in a proper proceeding instituted by a creditor or a stockholder, to appoint a receiver to administer the property. But in many of the States statutes have been passed expressly providing for the appointment of receivers, or trustees exercising the same function, though sometimes called by other names. In all cases it is made their duty to collect the assets, pay the debts and distribute the surplus *pro rata* to the stockholders. As this is precisely what a court of equity would have done in the absence of a statute, it is to be inferred that the motive of such legislation has been to accomplish some other object,—some object, that is to say, for which express legislation was necessary. This inference is fully justified and amply borne out by reference to the different statutes. They seem to have been enacted with the object, in some instances, of abrogating the old law of forfeiture and reversion; in others, of committing the administration to other courts than courts of equity; in others, to provide general and uniform rules of procedure, as to giving notice to creditors, etc., to take the place of rules of court and specific orders to be made by the chancellor in each particular case; in others, to keep the matter out of the courts altogether, as by allowing the dissolved corporation to continue its existence for a term for purposes of liquidation, but for no other purpose. The whole mass of this legislation seems to be pervaded by the one idea of simplifying, expediting and cheapening the means of accomplishing the one object of transferring to the stockholders of a defunct corporation their full share of its surplus assets. There is from beginning to end no suggestion of added penalties or punishment after death.

Now, to revert to the New York Statutes in force at the date of the decision in *People* v. *Washington Ice Co.*, cited in the opinion of *Judge* Wallace: They provided, as ours do, for both voluntary and involuntary dissolution of corporations, and in express terms directed the appointment of receivers in all cases, whether voluntary or involuntary. They also contained minute and specific directions as to the duties of receivers, notice to creditors, fees and commissions, settlement of accounts, etc., very similar to our Statutes regulating the proceedings of executors and administrators. The object of such legislation is apparent, and clearly it is not the infliction of penalties, but merely the conservation of rights. In view of these provisions of the New York Statute, it is difficult to see how the general principle can be deduced from the decision referred to, that "an ascertained forfeiture implies a receiver." That was not the question litigated in the case, and was not decided. The point decided was that, in an action to forfeit a charter, a receiver could not be appointed until after judgment dissolving the corporation; in other words, that there is no forfeiture, in the sense of the Statute, until the judgment of dissolution is entered. All that this implies is that after judgment a receiver may, not that he must, be appointed, and therefore the implication falls short of what the Statute under consideration expressly

enjoined, viz., that it should be "the duty of the attorney-general, immediately after the rendition of such judgment (of forfeiture), to institute proceedings for that purpose" (the appointment of a receiver). Voorhies' Code, § 444. Nothing, therefore, can be gained for the argument by reference to this decision. It merely construes the New York Statute on a point not in controversy here. And, even if it had been otherwise, the question would have remained whether our law is the same, in substance, as the law of New York. The opinion of the Superior Court assumes that it was "much the same as ours." We think, on the contrary, that the points of difference between our law and that of New York are much more striking and manifest than the points of resemblance. The laws of New York, it is true, recognize, as our laws do, and as in the nature of things every law on the subject must, the necessity of providing some means of administering the assets of a defunct corporation, and the propriety, in the absence of other provision, of appointing a receiver for that purpose; but there the resemblance ends. In New York, as we have seen, there was no other provision, and the appointment of a receiver was made obligatory in all cases of dissolution, whether voluntary or involuntary. That was the rule, to which there was no exception. Under our Codes, on the contrary, the rule is not to appoint a receiver, but to leave the whole matter of liquidation and distribution to the exclusive control of the directors of the corporation in office at the date of dissolution. The appointment of a receiver is the exception, not the rule, and is not to be made unless some party interested, either a creditor or a stockholder, can show that, for the protection of his rights, the appointment of a receiver, and the administration of the assets under the control and superintendence of a court of equity, is necessary; and, even then, no receiver will be appointed upon his *ex parte* application without requiring ample security by his undertaking, with sufficient sureties for all damages that may be caused by the appointment, if it shall turn out that it was made without sufficient cause.

In support of this statement, we refer to the following provisions of the Codes: Sections 399 and 400 of the Civil Code are as follows: "Sec. 399. The dissolution of corporations is provided for: (1) If involuntary, in chapter 5 of title 10, part 2, of the Code of Civil Procedure. [Sections 802–810.] (2) If voluntary, in title 6, part 3, of the Code of Civil Procedure. [Sections 1227–1233.] Sec. 400. Unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation." Sections 565 and 566 of the Code of Civil Procedure are as follows: "Section 565. Upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members. Sec. 566. No party or attorney or person interested in an action can be appointed receiver therein without the written consent of the parties, filed with the clerk. If a receiver be appointed upon an *ex parte* application, the court, before making the order, may require from the applicant an undertaking with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking."

It will be observed that section 399 of the Civil Code refers to those parts of the Code of Civil Procedure which provide for involuntary as well as voluntary dissolutions, and that section 400 by its terms applies as well to one kind of dissolution as to the other. By its own unaided force, without the intervention or any necessity for the intervention of a court, it makes the directors managers of the affairs of the corporation, and trustees for the creditors and stockholders, with full power of settlement. These trustees, like trustees in general, are, of course, amenable to the jurisdiction of a court of equity, and may be called to account there for any neglect of duty or abuse of power. But, until they are so called to account in an independent action or proceeding by a party in interest, no court has any excuse for interference; and if they are sued and brought into court without sufficient cause, even by a creditor or stockholder, they will recover costs.

But in the opinion of the Superior Court these provisions of our statutes are, upon their true construction, to be limited to cases of voluntary dissolution. It seems to us that the terms of the law are too plain in an opposite sense to admit of construction, and, even if it were otherwise, that the reasons given for the construction adopted are wholly insufficient. In section 399 of the Civil Code, separate reference is made: *first*, to cases of involuntary dissolution; and, *second*, to cases of voluntary dissolution. Then, right on the heels of this reference, follows the provision for the settlement of the affairs of "such corporation." If it was the intention of the Legislature to limit this provision to cases of voluntary dissolution, nothing could have been easier or more natural than to say so. And if it were true that this section of our Code is similar to the section cited from the Revised Statutes of New York (vol. 3, p. 769, § 77), and that that section is limited to cases of voluntary dissolution, the fact that our Legislature has adopted the provision, without the limitation, would be a strong circumstance indicative of an intention to make its operation general.

But, in truth, the two sections are not substantially the same. Section 400 of our Civil Code, as is apparent, provides means for a set-

tlement of the affairs of a dissolved corporation without the intervention of a court, unless such intervention is specially invoked, and that is its whole scope. The section cited from the Revised Statutes of New York is part of a scheme in which the rule is to appoint a receiver in all cases; and it merely provides that any of the directors, trustees or other officers of such corporation, or any of its stockholders, may be appointed receivers. It is not by any means clear, moreover, that this provision was limited to cases of voluntary dissolution. It is true that it is found in an article relating to voluntary dissolutions, but that article is by reference made part of the law of involuntary dissolution. The very section of the New York Code of Procedure (§ 444) which enjoins upon the attorney-general the duty of applying for a receiver whenever the charter of a corporation has been forfeited at the suit of the State makes the article relating to voluntary dissolutions the measure and limit of the power of the court "to restrain the corporation, to appoint a receiver of its property, and to take an account, and to make distribution thereof among its creditors;" from which it is perfectly evident that the Legislature of New York intended no discrimination against the stockholders of a corporation which had forfeited its charter by misconduct; for, if they were to enjoy every advantage, in the management and distribution of their property, that the law afforded to stockholders in corporations voluntarily dissolved, how can it be claimed that the law was framed with a view to punishment in one case unless that was its object and effect in all cases? It is therefore plain that, if any foundation exists for the notion that the appointment of a receiver in case of a forfeited charter is part of the punishment prescribed for the offenses of the corporation, that foundation must be sought elsewhere than in the statutes and decisions of the State of New York. Where, then, is it to be found?

The first general consideration suggested in the opinion of the Superior Court is that "it would, indeed, have been somewhat singular had the Civil Code conferred upon stockholders, thus convicted of the breach of one important trust, the immediate exercise of another trust, and one in itself of no slight importance, —the trust of administering and distributing the assets of the dissolved corporation; such inconsistency is not to be attributed to that Code." We admit that no inconsistency should be attributed to the law, but, before we construe a section of the Code contrary to its obvious meaning, we should be very certain that such construction is necessary in order to prevent a conflict with some other provision of controlling force, or some legal principle of general application. It is not pretended that the literal purport of section 400 of the Civil Code, and section 565 of the Code of Civil Procedure, conflicts with any other statutory provision; but the idea seems to be that it is absurd to suppose that the Legislature would have left to the directors of a corporation convicted of violating their duty to the people of the State, the power and discretion to pay their own debts and divide their own property, subject to the right of a court of equity to interfere and compel them to proceed properly, if any occasion for such interference should arise. We confess that there does not appear to us to be any absurdity in this supposition. Because a corporation has violated its duty to the public, it does not follow that its members cannot be trusted to look out for their own interests. Quite the contrary, for it is usually a too exclusive regard for their own interests that constitutes their dereliction to the public. As to creditors, their interests must in most cases be opposed to the appointment of a receiver. They will be paid more quickly and more certainly without a receiver than with one. If there is any one thing more certain than another, it is that the appointment of a receiver implies a material diminution of the fund out of which creditors are to be paid; for, in the first place, the fees of the receiver, his counsel and assistants, are to be subtracted. Then the estate must in many cases, as it has been in this case, be condemned to unproductive idleness and disuse, and exposed to danger of loss and dilapidation from rust and decay during the long and tedious progress of the legal proceedings that are necessarily entailed. And all this time the creditors must wait and look on while the fund upon which they rely for payment is being depleted by the processes above referred to. On the other hand, supposing the affairs of the defunct corporation to be under the control of its late directors as trustees for its creditors and stockholders, the creditors have nothing to do but present their demands and receive payment in the ordinary course of business, or, if payment is refused or delayed, they may proceed to enforce their demands. How much better this is for the creditors than to have to wait upon the motions of a receiver and the court, under whose order he acts, everyone knows who has had any experience of the two methods of settling the business of a partnership or a corporation. And then it is, as we have seen, always at the option of a creditor or stockholder to have a receiver, if they can allege facts showing that a receiver is necessary.

So far, therefore, as the rights and interests of the sole beneficiaries of the trust are concerned, there is no need to construe section 400 of the Civil Code and section 565 of the Code of Civil Procedure contrary to their express terms, in order to rescue the Legislature from the imputation of having enacted an absurdity. On the contrary, the rule which they prescribe, according to their natural and obvious construction,—by which they apply as well to cases of forfeiture of charter as to cases of voluntary dissolution,—is most salutary, so far as the beneficiaries are concerned, and such construction must prevail, unless, indeed, it be true that the paramount interests of the people of the State demand a different construction.

This proposition, that the people of the State have an interest in the appointment of a receiver whenever the charter of a corporation has been forfeited, was decided adversely to the contention of the respondent at an early stage of these proceedings, in ruling upon a preliminary objection made by counsel for the State, who appeared specially for that purpose,—an objection founded upon a clause of the 28th Rule of this court, which reads as follows: " . . . In case any court judge or other officer, or any

board or other tribunal in the discharge of duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the name or names of the real party or parties, if any, in interest or whose interest would be directly affected by the proceedings; and in such case it shall be the duty of the applicant obtaining an order for any such writ to serve or cause to be served upon such party or parties in interest a true copy of the affidavit or petition, and of the writ issued thereon, in like manner as the same is required to be served upon the respondent named in the application and proceedings, and to produce and file in the office of the clerk of this court the like evidence of such service." Neither the petition nor the writ herein was served upon the State or its attorneys, and the objection made on behalf of the State was that the hearing could not proceed, and that the alternative writ must be quashed, for the reason that it appeared on the face of the petition that the State was the real party in interest, or whose interest would be directly affected by the proceedings. The court, however, were unanimously of the opinion, and so decided, that the State had no interest to be affected, and that the only persons interested were the creditors and stockholders of the corporation. It must be confessed, however, that when this ruling was made we did not understand, and, of course, did not consider, the real position of respondent with respect to this matter. It did not occur to us, and if the point was suggested in the course of the argument upon this preliminary objection it failed to impress us at the time, that any person could have an interest in the appointment or removal of a receiver except those who would be entitled to share in the distribution of the fund committed to his control; and, as it was conceded that the State had no interest in the fund, we naturally concluded that the interests of the State could not possibly be affected by any result of these proceedings, and ruled accordingly. But in the light of the fuller argument made at and since the hearing, we perceive that the real claim of the State remains to be stated and considered.

Before, however, proceeding to this discussion, we take occasion to say a few words as to the proper construction of the rule of court above cited. It does not, as counsel seem to suppose, require that the State should have been made a formal party to this proceeding, by being named as a defendant in the petition or writ, but only that the names of the parties really interested should be disclosed by the petition, and that service of a copy of the petition and writ should be made upon them. *Baker v. Shasta County Super. Ct.* 71 Cal. 583. The effect, therefore, of a failure to serve such parties would not be an abatement of the whole proceeding, but, at most, to require a postponement of the hearing or trial until they could be served, and have a reasonable time to appear.

On the face of the petition in this case, it did not seem to us that the State could have an interest in the controversy over the appointment of the receiver. If it had been otherwise, it would perhaps have been our duty in advance to order service of the petition and writ upon the representatives of the State, and certainly we should have been bound, of our own motion, to require proof of such service before proceeding with the hearing of the rule to show cause; or if, on the hearing, the fact had been developed that a party not named or served had an interest to be affected, it would have been our duty to suspend the proceeding until such party was served and brought in. As it was, however, we were proceeding properly with the hearing when the objection of the State was interposed. The motion made to quash the alternative writ was not sustainable upon any view of the State's rights or interest in the matter, and after listening to the argument then advanced in support of the State's claim of interest, and its right to the benefit of the rule, we decided that the claim was unfounded, and that the rule did not apply. But if we had then understood, as we now understand, the ground upon which the State bases its claim of interest, we should probably have ordered service of the petition and writ on the attorneys of the State, and should have allowed them in that capacity to take part in the subsequent proceedings. No harm, however, has resulted from our misconception of the State's position. Although there was no service of notice upon its attorneys *eo nomine*, such service was made upon the judge of the Superior Court, who has been formally represented throughout these proceedings by one of the attorneys of the State, and actually by both of them. The whole object of the rule, therefore, has been fulfilled so far as the State is concerned; the only difference being that its attorneys have had only one copy of the writ and petition instead of two, and that they have been compelled to speak in the name of the superior judge, instead of that of the State. But in his name, and upon his behalf, they have presented every argument and raised every issue which could have been made in behalf of the State if it had even been a formal party to the proceedings, which, as we have seen, the rule does not require.

We will now return from this digression to consider what those arguments are. It will be seen, by reference to the opinion of the Superior Court, above quoted, that the provision of section 564 of the Code of Civil Procedure, to the effect that a receiver may be appointed when a corporation has forfeited its charter, is construed to mean that in such case a receiver must be appointed, and this because the public has an interest that the power should be exercised. To our minds it is perfectly clear that the true construction of this clause of section 564 is found in the very next section of the Code, wherein it is specifically enacted that "upon the dissolution of any corporation, the Superior Court of the County in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation or of any stockholder or member thereof, may appoint one or more persons to be receivers," etc. Here is an express enumeration of the parties, and the only parties (*expressio unius est exclusio alterius*), whose interest demands that "may" should be read "must," and, considering this language in connection with section 400 of the Civil Code, which, as we have seen, provides that the directors in office at the date of its dis-

solution shall settle the affairs of a corporation, unless some other persons are appointed, we should never have thought of looking further for a definition of the circumstances under which a receiver could be appointed. In terms, both sections apply as well to cases of involuntary as to cases of voluntary dissolution, and they do in fact provide a most salutary rule for the protection of all persons interested in the property. But it is held that they must be construed out of their obvious sense, and limited in their application to cases of voluntary dissolution, because, and only because, in cases of forfeiture for corporate misconduct, the stockholders cannot be adequately punished or restrained without the intervention of a receiver, and, consequently, that the interest of the public, in the imposition of such punishment and restraint, requires the conversion of "may" into "must," thus making the appointment of a receiver obligatory in all cases of forfeiture.

This proposition, which is, in effect, stated in the opinion above quoted, is much more plainly and directly put in the argument made by the respondent here. He asks if it is possible that this controversy between the State and a concern with millions of capital is limited to the imposition of a fine of $5,000, and the cancellation of a charter, the duplicate of which can be obtained while we are talking here; and he answers his own question as follows: "I understand the great interest of the State is to break down the monopoly. To do that it seizes the means and utensils—the business—with which the monopoly has been proceeding. It scatters it. It divides it up. A receiver is appointed for that purpose. That is part of the penalty. That is a part of the penalty provided by law, because they have forfeited their corporate rights—no other reason." Translated into terms specifically applicable to the case before us, the meaning of this is that, if a corporation organized for the purpose of refining sugar enters into a combination with other corporations, through the medium of what is called a "trust," for the purpose of limiting the production and keeping up the price of refined sugar, the courts will not forfeit its charter and impose the utmost fine which the law prescribes for such offenses, but they must go further, and, by the hands of a receiver, seize into their possession all the property of the defunct corporation, and especially its sugar refining plant, not for the purpose of preserving and protecting it, and as speedily and economically as possible distributing it to those who are equitably entitled, viz., creditors and stockholders, but for the quite opposite purpose, of shutting it up and condemning it to rust and idleness, until such time as it can be unfitted completely for the purpose to which it is best adapted by dividing it up and scattering it. We confess that this is to us a novel doctrine, and one which does not, upon any ground, commend itself to our judgment. It may not be the rule in this State to construe penal legislation strictly; but even here, when a court is asked to impose a penalty for infraction of a law, the first inquiry is, What penalty does the law prescribe? The answer to this question is sought, not in labored construction of other statutes, but in the express term of the Act defining the offense.

Now, what is the case here? In section 803 of the Code of Civil Procedure, the Legislature has enjoined upon the attorney-general the duty of bringing actions for the forfeiture of corporate franchises whenever he has reason to believe that they are unlawfully held or exercised. This was his sole authority for bringing his *quo warranto* against the American Sugar Refinery Company, and it is upon this chapter of the Code that the judgment of forfeiture depends. Section 809, in the same chapter, defines the character of the judgment that must be rendered when the defendant is found guilty, viz., that the defendant be excluded from the franchise it has abused; and "the court may also, in its discretion, impose upon the defendant a fine not exceeding $5,000, which fine, when collected, must be paid into the treasury of the State." This is absolutely all the punishment that the Legislature has in terms prescribed, and if any other was intended—especially if such other punishment was designed to be severe beyond comparison with that expressly defined—it is passing strange that the courts should have been left to work it out by a doubtful construction of other parts of the Codes.

But, to our minds, the gravest objection to the doctrine lies in the consequences which it involves. Obviously, there is no measure or limit to the punishment which may be inflicted in the manner indicated, except in the discretion of the court and the moderation of its receiver. The duty of the receiver is not conservation, but destruction. In whatever business the offending corporation may have been engaged, his first step must be to shut up its works; however vast the capital invested, it must be condemned to lie idle and unproductive until it can be divided up and scattered. It must not be sold as a whole, complete and adapted to the work for which it was designed, and for which alone it possesses any considerable value. To do so would defeat the whole object of the receivership; for not only would the offending stockholders get off without adequate punishment, but there would be nothing to prevent them from buying in their own property, and again putting it into the combination. It must therefore be divided up and scattered, and its value in great measure destroyed. The stockholders, when they finally realize upon their property, must be content to receive, not the proceeds of a well-appointed manufactory, in complete running order, but the price of a lot of old iron and second-hand machinery, sold in lots according to the discretion of a receiver acting with a view, not to their interest as stockholders, but solely with a view to the interest of the public in punishing them. We cannot assent to a doctrine involving such consequences. If it is really true that our laws, as they are written, provide no adequate punishment for corporate transgressions, let the Legislature take the matter in hand. It is no part of the function of a court to supply the want of penal legislation. Its judgments in such case, besides being wholly unauthorized, would always operate as bills of attainder or *ex post facto* laws, both of which are not only abhorrent to our ideas of justice.

but are expressly forbidden by our charters of government.

But perhaps it is not fair to regard the doctrine under discussion as implying that the primary object of the laws, as it construes them, is the punishment of the stockholders. It may be said that the real purpose is only to break up the monopoly, and that the punishment involved is merely incidental and unavoidable; that it is right to break up the monopoly, and if, unfortunately for them, the stockholders suffer in the process, they have themselves alone to blame. Regarded from this point of view, it seems to us that the doctrine is still wholly indefensible. When a corporation is dissolved, its property, as we have seen, vests in its stockholders subject only to the claims of creditors, and is thereafter held upon the same tenure, and subject to the same conditions, as similar property owned by other natural persons. What others may do, they may do. They owe no further or higher duty to the public, and are under no other restraints. Therefore, unless some ground can be shown upon which the State can take a sugar refinery away from a private citizen who has inherited it, or bought it, or built it, and can shut it up, preparatory to dividing and scattering it, upon the ground that he has entered into an agreement with some other private citizen, owning another refinery, to limit the output of both establishments with a view to keeping up the price of the refined product, no ground can be shown which will warrant the State in taking similar property from natural persons who have succeeded thereto on the death of a corporation. Confessedly, there is no warrant to be found for such a proceeding in case of a natural person. That contracts in restraint of trade are unlawful, or at least opposed to the policy of the law, is conceded, but the only penalty they entail is that courts refuse to enforce them, just as they refuse to enforce any contract which is opposed to public policy or good morals; but no one ever heard of a proceeding to confiscate or destroy, either wholly or partially, the property which is the subject of such a contract. So far the Legislature has seen fit to attach no other punishments to contracts of natural persons in restraint of trade than to make them non-enforceable; and, where the Legislature has stopped, it is not only becoming but necessary that the courts should stop. As to the property of a corporation, the Legislature has given no indication of an intention to forfeit it or take it away from the stockholders, except to the extent of a fine of $5,000, which the court is authorized, in its discretion, to impose. What is forfeited to the State, and all that is forfeited, is the charter,—the right to be a corporation; and this is resumed solely upon the ground that the condition upon which it was granted has been violated. The doctrine is that corporate charters are granted upon the implied condition that the privileges conferred will be used for the advantage, or at least not to the disadvantage, of the State. If this condition is broken, the charter which the State has given is taken back by the State; but the property which the corporation has acquired, with its own means, goes to those who have paid for it, and they have the right to deal with it just as others similarly situated may deal with their property. Whatever the law prevents other natural persons from doing, they are prevented from doing; nothing more. This doctrine is plainly enough indicated in the case of *People* v. *North River Sugar Ref. Co.*, 22 Abb. N. C. 164, 2 L. R. A. 33, cited and relied upon by respondent, and in the cases therein referred to; and it is shown, moreover, in those cases, that the privileges and powers of a corporation are essential to membership of the trust, and to any effective monopoly. To become a member of the trust, the sugar refiner must be a corporation; and, the corporation being dissolved, it is impossible that its stockholders should keep up the arrangement. And so, as to monopolies in general, they are only dangerous when corporations are the parties to the agreement by which they are attempted. *Leslie* v. *Lorillard*, 110 N. Y. 519, 1 L. R. A. 456. At least this is the opinion of some courts, and it suggests a reason why the Legislature has omitted to prescribe any penalty beyond non-enforcement in case of such agreements between natural persons. But we need not speculate upon these matters. The law being plain, we are not concerned with its expediency.

The conclusion which inevitably follows from these views is that, in an action under section 802 *et seq.* of the Code of Civil Procedure, the rendition of the judgment authorized by section 809 ends the proceedings so far as the Superior Court is concerned, and that no receiver of the corporate property can be appointed unless a new and distinct proceeding is commenced by a creditor or stockholder of the corporation. Code Civil Proc. § 565. Such new and distinct proceeding upon the part of the beneficiaries, or some of them, is the essential condition of any jurisdiction in the court to take the property out of the control of the trustees designated by law. Civil Code, § 400. An order appointing a receiver without such application is therefore void, not only as to strangers to the *quo warranto*, but is even void as to the corporation and its stockholders and vendees. We have no doubt of the correctness of this conclusion; but, if we were wholly mistaken in our views, and if it were true, as held by the respondent, that the appointment of a receiver for the purpose of inflicting one of the penalties designed by the law, and essential to its efficacy, is obligatory, we cannot see how it is possible to avoid the conclusion that the enforcement of this as well as other parts of the penalty was suspended by the appeal from the judgment. According to the plain and unambiguous terms of the Statute, proceedings upon any appealable judgment or order may be stayed by the filing of a sufficient undertaking except in a few enumerated cases, of which this is not one. Code Civil Proc. § 949. Confessedly a sufficient undertaking was filed in this case to stay the judgment, if that was possible. Opinion of *Judge* Wallace, *supra*.

But it is held, in the face of the Statute, that a stay was not possible; and this, again, upon the plea of necessity, in order to prevent an apprehended abuse. We do not think the reason suggested is sufficient to override the law. The allowance of an appeal in such cases implies the right of the corporation to question the validity of a judgment of forfeiture until

it has been affirmed here, and it is not correct to say that a stay of proceedings would operate a rehabilitation of a dissolved corporation when the sole object of the appeal is to determine the question whether there has been a valid judgment of dissolution. But evidently the respondent was unwilling to stand upon the proposition that a stay was not possible. Waiving that, and assuming that the judgment has been stayed, he concludes that the power to appoint a receiver is nevertheless not suspended, because the order of appointment is not embraced in the judgment, and is not a proceeding upon the judgment. It is true that the order of appointment is not embraced in the judgment, but that is not the test. An execution is not embraced in the judgment, but an appeal duly perfected stays execution. In truth, it is not correct to say that a judgment, or matters embraced in a judgment, are stayed by the appeal, and the Statute does not say so. What it says is that proceedings upon the judgment and matters embraced therein are stayed by the perfecting of an appeal. Id. § 946. That is to say, the execution—the enforcement—of the judgment is suspended. Now, here it is conceded that no receiver of the corporation could be appointed until after judgment, and that the only purpose of his appointment is to carry the judgment into effect, by taking away the property of the corporation, and scattering and dividing it. How, then, is it possible that this is not a proceeding upon the judgment? According to the argument, the things to be done by the receiver constitute the only substantial and effective punishment which it is in the power of the State to inflict. The rest is a mere trifle. But it is nevertheless held that this ruinous penalty which follows the judgment, and but for the judgment could never be inflicted, is not a proceeding upon the judgment, and therefore is not stayed by the appeal; and this conclusion is rested upon the authority of rulings which, it is said, have often been made by our courts. Undoubtedly, it has often been held that the appointment of a receiver is merely ancillary, and undoubtedly his appointment often is merely ancillary; that is to say, he is appointed before judgment for the purpose of protecting, pending the litigation, property which is the subject of the litigation. But sometimes he is appointed after judgment for the purpose of carrying the judgment into effect, in which case his appointment, and his proceedings thereunder, are not merely ancillary. In the former case, his functions are not necessarily suspended during the appeal, and neither is the power of the court to remove him or control him suspended by the appeal. But in the latter case—as, for instance, where a receiver has been appointed to sell mortgaged premises under decree of foreclosure—his proceedings are suspended by the appeal.

The only case cited by respondent—a case supposed to cover the whole ground, and to conclude the question—is that of *Baughman* v. *Calaveras County Super. Ct.*, 72 Cal. 572, which was of the former class. There the litigation was about the right to certain grain described in the pleadings. Upon the filing of the complaint, and upon the *ex parte* application of the plaintiff, the court appointed a receiver to take charge of the grain, pending the action, to preserve it for the benefit of the party who might prove to be entitled to it. The defendant demurred to the complaint. His demurrer was sustained, and final judgment entered in his favor, from which plaintiff appealed to this court. After the appeal was perfected the superior court discharged the receiver, and this court decided that the power of the superior court to do so was not suspended by the appeal. We do not doubt the correctness of that decision; but we are unable to see the resemblance between the case where a receiver is appointed before judgment to preserve property pending the litigation, and one in which he is appointed after judgment to dispose of the property in order to make the judgment effective. We know of no case that comes nearer supporting the proposition to which it was cited than this case, and we feel certain that there is as little to support it in the rulings of our courts as in the text of the Codes. As to considerations of expediency, they should not weigh when the law is plain, but, if we were to look to the consequences of the doctrine contended for, we should find therein nothing to commend it.

We assume, for every purpose of this decision, that the judgment of forfeiture in this case was not only just but legal—correct not only in substance but in form—free from error. But it does not follow that all similar cases will be equally well decided. It is possible—the Constitution and the laws assume the possibility—that some case may arise in which the judgment of forfeiture will be not only erroneous, but unjust, and that it will be reversed on appeal. But the rule applied in this case must also be applied in that case. If this judgment must be executed in the manner indicated, so must that. A receiver must be appointed. He must seize all the property. He must shut up the factories, discharge the employés, prevent the fulfillment of contracts, subject the corporation to every sort of loss and damages that can be inflicted by the stoppage of a great and complicated industry having its ramifications throughout the business centers of the entire coast. And not only this; for, if he must go to this extent—if nothing the corporation or its stockholders can do will stop him—then nothing but the forbearance of the superior judge will prevent the completion of the process. For this injury caused by an erroneous judgment, a reversal on appeal affords no redress, for no security has been given, by the undertaking of sureties or otherwise, to indemnify the corporation or its stockholders. The sureties of the receiver merely undertake that he will faithfully execute the orders of the court; and, according to the precedent in this case, they are bound in a trifling amount. If the receiver obeys orders, they are exonerated; and, if his orders contemplate the infliction of punishment by the indirect and partial destruction of the property, the more completely they are exonerated, the greater the damage inflicted for which there is no redress. Unless it is to be assumed that such results as these comport with the justice and policy of a great State, the inevitable consequences of the doctrine contended for utterly condemn it. If, therefore, the State could demand the appointment of a

receiver upon the ground and for the purposes stated, the appeal operated as a stay of such proceedings, and for that reason the appointment in this case would have been an excess of authority. But we do not rest our decision on this ground. We rely upon the proposition that a receiver of a dissolved corporation is only to be appointed when necessary for the purpose of preserving and distributing the property, and only upon application of a party interested, viz., a creditor or stockholder. This conclusion relieves us of the necessity of dwelling at length upon other objections to the validity of the order of the Superior Court. If it was totally void as to all the world, it was, of course, void as to these petitioners, without regard to the special manner in which they were affected by it.

It is proper, however, to add that we think these objections urged by petitioners in their character as purchasers of the refinery are well founded. They were not parties to the *quo warranto*, in their character of purchasers. It may be true that the stockholders of a corporation are in a certain sense parties to an action to forfeit its franchise, but they are not parties in any other sense than that they are bound by the consequences of such judgment as the court in that action has power to give. If the court goes outside of the issues in the action, and renders a judgment or makes an order embracing matters entirely foreign to such issues, certainly the stockholders are not bound by such judgment or order. Even conceding, then, for the sake of the argument, that the order of the Superior Court would have been valid if confined to property of the corporation, it cannot be claimed that it was valid if it embraced the property of vendees of the corporation. There does, indeed, seem to be a sort of claim, hinted at rather than directly asserted, in one of the briefs, that a purchase *pendente lite* is in fraud of the rights of the State in such cases as this, and therefore void. But there appears to be no foundation for this claim. The State, by its action, acquired no lien on any of the property of the corporation, and it is difficult to understand upon what ground it can attack a sale *pendente lite*. Up to the date of its dissolution, the corporation had the same power of disposing of its property honestly and in good faith that any corporation has, and, like any other corporation, it could sell to its stockholders. It matters not, therefore, that these petitioners were stockholders. They had the right to purchase; and if they did so, and entered into possession of the property, they had the same rights in their character of purchasers that any stranger would have had.

It is claimed by respondent that the evidence in the *quo warranto* case showed that the transfer to the petitioners was a sham. This may be so, but the petitioners were not parties to that proceeding for the purpose of defending their purchase. Its validity was not in issue in that action, and could not by any legal possibility have been tried and determined therein. If any evidence came out in relation to the transfer, it was but incidental to other issues, and the petitioners could have no opportunity of rebutting it. If the bona fides of their purchase was to be attacked, and the validity of the transfer drawn in question, they were entitled to their day in court, and an opportunity of adducing testimony to sustain their claim of ownership. But it is said these petitioners did appear, did submit themselves to the jurisdiction of the court and did have an opportunity to contest the making of this order, and consequently that the order, even though erroneous, is binding on them until reversed. The foundation for this assertion is that, in response to the rule to show cause why a receiver should not be appointed, these petitioners, in common with all the other stockholders of the corporation, filed an affidavit showing that there were no creditors, and a request that the trustees of the corporation might be allowed to settle its business. In other words, they opposed the appointment of a receiver upon the ground that no party in interest asked or desired a receiver. This is all that can be said. They opposed the appointment of a receiver of the property of the corporation. There was not a word in the pleadings or judgment in the original action, or in the rule to show cause, about any specific property, and of course no issue or opportunity to try the validity of the transfer of the refinery to the petitioners. The order, therefore, assumed to determine a question that was never tried, and never anywhere put in issue. But the form of the order is defended on the ground that "the rule is well settled that the order should describe with sufficient certainty the property which the receiver is to take, and unless this is done he cannot hold it." Of course the property must be described with sufficient certainty; but it is sufficient, in appointing the receiver or assignee of an insolvent or a corporation or partnership, or the executor or administrator of a decedent, to mention generally all the property of the insolvent, the corporation, the partnership or the decedent. If a specific description was necessary, what would justify the receiver in this case, or in any of the cases supposed, in taking property not specifically described? The truth is, in all such cases the receiver justifies and defends his possession by showing title in the person under whom he claims. Of course, when a litigation concerns some specific property described in the pleadings, it is proper, in appointing a receiver, to so describe the property in the order. But such is not the case here; and, even in cases where a specific description is appropriate, it gives the receiver no right to take the property from the possession of a stranger to the action.

The case of *Re Cohen*, 5 Cal. 494, is cited to sustain the proposition that the court had power and jurisdiction to decide whether the petitioners herein were in possession as agents or trustees of the corporation. The case does not sustain the proposition. It merely holds that a court may in a proper case order not only the party, but his agents and servants, to deliver property to a receiver. But it does not decide that when a third party is in possession, claiming to be the owner in his own right, a court may determine without a hearing that he is a mere agent or servant. To say that a court may make an order binding upon the servant or agent of a party to the action does not mean that a court or the receiver may take property out of the possession of a stranger claiming it

as a purchaser in good faith, and throw upon him the burden of proving that he is not an agent or servant.

Another objection urged by counsel for respondent is that these petitioners, having tried the *quo warranto* case in the Superior Court on the theory that the corporation was carrying on the business of the refinery, are estopped from asserting here that they are the owners. There are many answers to this objection, but we deem it sufficient to say that we can look only to the pleadings, findings and judgment in the *quo warranto* case to find what was tried, or what was the theory of the trial. The issues in that case all related to the conduct of the corporation prior to the filing of the information by the attorney-general, while the claim of the petitioners is that they purchased the property after all the pleadings were filed, and just before the trial. Besides, the evidence to which we have been referred shows very clearly that the transfer to petitioners was disclosed on the trial, and it cannot be said that they practiced any concealment or deception as to their claim, even if their purchase, pending the action, had been material. We do not see how it was material; but, whether it was or not, it cannot be doubted that the Superior Court was fully advised of their claims before the receiver was appointed. How else, indeed, could it have been concluded that the transfer was a sham?

We have thus gone cursorily over the propositions most strongly pressed by counsel in the attempt to sustain this order. They all rest upon the assumption that the court was authorized, without any application by a creditor or stockholder, to appoint a receiver. That assumption being shown to be unfounded, all the propositions resting upon it necessarily fall; but nevertheless we thought it proper to notice them. We also desire, before taking leave of this branch of the case, to say a word as to the decision in *East Line R. Co.* v. *State*, 75 Tex. 434, cited in an *addendum* to respondent's brief as "decisive of the whole question raised by petitioners." We cannot see that it decides anything in point. It merely holds that a Texas statute which directs the appointment of a receiver in cases of forfeiture of corporate franchises is constitutional. There is no question here as to the constitutionality of a statute. We have no such statute.

We come now to the questions as to the remedy. Prohibition arrests the proceedings of an inferior judicial tribunal or officer when such proceedings are without or in excess of the jurisdiction of such tribunal or officer, and the writ issues in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. Code Civil Proc. §§ 1102, 1103. We have shown that the Superior Court, in appointing the receiver, exceeded its jurisdiction, and there is no question that the petitioners are seriously injured by the enforcement of the order. If, then, they have no plain, speedy and adequate remedy in ordinary course of law, they are clearly entitled to the benefit of the writ of prohibition to arrest the proceedings under the void order. It is claimed, however, that, so far as the Superior Court is concerned, there is nothing to arrest; that its order was made and executed before the alternative writ was issued, that the receiver alone is now acting, and that the writ does not run against him. It is true the writ does not run against ministerial officers, and it is also true that its operation is preventive, rather than remedial. But property in the hands of a receiver is in the hands of the court. The receiver is the mere instrument of the court, and what he does the court does. It is the court, therefore, and not the receiver, which holds, administers and disposes of the property in his hands; and, so long as the property remains undisposed of, action by the court is necessary. In such case there is judicial action to be arrested, injury to be prevented, and a writ of prohibition is appropriate for that purpose. The writ runs to the court, and operates directly upon the court, but indirectly upon the receiver. If it is served upon the receiver, it is only that he may have timely notice that the proceedings of the court are arrested, and may stay his hand, as he is bound to do, having no power to act independently of the court, from which he derives all his authority. In this case, when the petition was filed, and our alternative writ directed to issue, the receiver, as we shall see, was still striving to gain complete possession of the refinery and other property claimed by the petitioners; and even if he had been in complete control, that would have been but the first of a series of steps to be taken in carrying out the purpose of his appointment. The keeping of the property in such a case is a continuous wrong. The closing down of the works is an independent wrong. The use of a portion of the property to preserve the rest is an unlawful interference with the rights of those lawfully in possession. Besides all this, there remained to be carried out the sale and final distribution of the property. By the very terms of the order appointing the receiver, he is to hold the property subject to the further orders of the court concerning it; and the necessity of such further orders would be implied, if it had not been expressly indicated. As we understand the authorities on this point, the operation of the writ of prohibition is excluded only in cases where the action of the inferior tribunal is completed, and nothing remains to be done in pursuance of its void order. If its action is not completed and ended, its further proceedings may be stayed; and, if it is necessary for the purpose of affording complete and adequate relief, what has been done will be undone. If this were not so, the inferior court, by proceeding expeditiously and arbitrarily, could defeat the remedy.

Great reliance is placed by counsel for respondent upon the decisions of this court, such as *Chester* v. *Colby*, 32 Cal. 517, and *Southern P. R. Co.* v. *Kern County Super. Ct.*, 59 Cal. 476, to the effect that, when an inferior court or tribunal is proceeding, or threatening to proceed, in excess of its jurisdiction, the objection to its want of jurisdiction must be first submitted to such inferior court or tribunal, and by it overruled, before resort is had to a higher court for a writ of prohibition; and, undoubtedly, such is the established rule of practice in this State. But, if this is the law, it must inevitably happen in every case, as it would probably happen in many cases under any rule, that

the lower court will make its ruling on the question of jurisdiction before any prohibition can be sued out; and, if it holds that it has jurisdiction, and makes orders in consonance with that view, the writ of prohibition will be of no avail unless it affords the means, not only of arresting future action, but of undoing past action. In other words, the two positions contended for would practically abolish the remedy. No better illustration of the working of this theory can be found than is afforded by the present case. When the order to show cause why a receiver should not be appointed was served, neither these petitioners, nor the defendant corporation, nor its stockholders, could have got a writ to prohibit the appointment of a receiver without first objecting in the Superior Court to its want of jurisdiction. Such objection, as we have seen, was made. It would have been sufficient to have objected that there was no application by a creditor or stockholder for a receiver, and no grounds alleged for such appointment; but the defendant corporation, or its stockholders, went further. They showed affirmatively that there were no creditors, and that all the stockholders desired the statutory trustees to settle the business of the corporation. They showed everything, in short, necessary to sustain their objection to the jurisdiction; and the opinion of the superior judge, *supra*, shows that their objections were strenuously argued and maturely considered. But what happened? After holding the matter under advisement for nearly a month, the respondent filed an opinion overruling the objections to his jurisdiction, and on the same day appointed a receiver, who on the same day qualified by taking the oath and filing his bond, procured an order approving his bond and confirming his powers, and actually, according to his own views, had possession of the vast property in controversy, before the agent of the petitioners or their attorneys had any notice that their objections to the jurisdiction had been overruled. If such proceedings, conducted with such precipitate haste, can deprive the injured party of a remedy to which he is clearly entitled, then our law must be lame and impotent indeed. But happily there is no foundation for the claim that an inferior court can, by mere haste and precipitancy, defeat the appropriate remedy for excesses of jurisdiction, at least in a case where it may be intercepted before its action is fully completed.

We are referred by counsel for respondent to a number of decisions of this court which are supposed to sustain their position on this point, but we do not find them at all in conflict with our views. Not one of them related to a case like this, and the general expressions to be found in the opinions must of course be construed with reference to the facts of the particular case.

In *Hull* v. *Shasta County Super. Ct.*, 63 Cal. 179, it was said that prohibition was not available to prevent the acts of a *de facto* ministerial officer, nor to prevent judicial acts already done. The attempt in that case was to try the right to the office of sheriff. It was decided that this could not be done by prohibition, and what was said as to judicial acts already done had reference to the acts of the superior judge recognizing the official character of the incumbent *de facto* of the office. Such acts must of necessity have been complete and ended past remedy.

In *More* v. *San Francisco Super. Ct.*, 64 Cal. 345, it was held that the order of the superior court was not in excess of its jurisdiction, which was a sufficient reason for dismissing the proceeding, and it was in fact dismissed on that ground. What else was said in the opinion seems to have been in answer to a claim that the court had power to undo something that the receiver had done in excess of his authority. It ought not to be necessary to point out the distinction between that case and this. Here the order of the Court is in excess of its jurisdiction, and the Court, through its receiver, is doing and continuing to do, and threatening to complete, a series of proceedings which are a wrong and injury to the petitioners. In that case the order of the court was regular and valid. The court, to which the writ alone runs, had done nothing in excess of its jurisdiction; but the receiver, as was claimed, was doing or had done something which as a receiver he had no right to do. Of course the writ of prohibition was not the proper remedy in such a case.

The case of *Coker* v. *Colusa County Super. Ct.*, 58 Cal. 177, does not touch the point, the decision being that the superior court had not exceeded its jurisdiction. Other decisions, cited from the reports of other States, are equally inapplicable, but we have no time to review them. We will, however, refer to the language quoted by counsel from High, Extr. Legal Rem., § 766. He quotes the following: "Another distinguishing feature of the writ is that it is a preventive rather than a corrective remedy, and issues only to prevent the commission of a future act, and not to undo an act already performed." To show what this means he should have quoted what follows in the next sentence: "When, therefore, the proceedings which it is sought to prohibit have already been disposed of by the court, and nothing remains to be done either by the court or the parties, the cause having been absolutely dismissed by the inferior tribunal, prohibition will not lie," etc.

This is really the whole extent of the rule. Where the proceeding in the lower court has ended, and the court has nothing further to do in pursuance or in completion of its order, or where it has dismissed the proceeding, prohibition is no remedy; but, where anything remains to be done by the court, prohibition not only prevents what remains to be done, but gives complete relief by undoing what has been done. See forms of writs cited, 2 Chitty, Pr. 354, 355; *Ex parte Smith*, 23 Ala. 94; *Jones* v. *Owen*, 5 Dowl. & L. 669; *Marsden* v. *Wardle*, 3 El. & Bl. 695, and cases therein cited; *Serjeant* v. *Dale*, L. R. 2 Q. B. 558.

In *White* v. *Steele*, 12 C. B. N. S. 383, the court says (p. 412): "The writs in the register and elsewhere which concluded with a mandamus to the Court Christian to recall an excommunication already erroneously fulminated, or a sequestration wrongly issued, are all, as to the prohibitory part, peremptory, and the mandamus to revoke the unauthorized proceeding only accessory to the peremptory prohibition, and necessary to give it effect." Here is a clear indication of the

extent of the remedial office of the writ. It is primarily and principally preventive. Its office is to arrest proceedings; but, when a case arises in which there are proceedings to be stayed or prevented, it will also annul such prior proceedings as may be necessary to make the remedy complete. The principle is that which prevails in equity. When there is jurisdiction the court will afford complete relief. A party will not be compelled to resort to more than one proceeding, or more than one court, for redress of one injury. See also *French* v. *Noel*, 22 Gratt. 454.

Many other cases are cited in the brief of counsel for petitioners to this point, and might be cited here, but it is unnecessary. In the nature of things, it must be true that when a receiver has got possession of property under a void commission, and the future acts of the court, *i. e.*, the sale of the property and distribution of its proceeds are arrested by prohibition, the writ will also require a restoration of the property to the petitioner; for otherwise prohibition would be worse than no remedy at all. It would prevent the owner from getting either the property or its proceeds. The receiver would continue to hold it discharged of the duty of accounting for it.

We will next consider the objection that prohibition will not lie because the petitioners had other plain, speedy and adequate remedies in due course of law. It is suggested that they might have moved the Court below to withdraw its order for a receiver. But suppose the Court insisted that everything should be absolutely given over to the possession of the receiver before he would listen to any application for a revocation or modification of his order. Can it be said that a motion only to be considered on such conditions afforded an adequate remedy, or any remedy? And suppose the motion had been heard and denied. Would that have helped them? After all, it would have been necessary to appeal to some other court for relief. But surely counsel can scarcely be serious in contending that, because a party can move a court to set aside an invalid order, therefore he cannot have a writ of prohibition; for, if this were so, there never could be a writ of prohibition. Such a motion would always be possible. The most that can be claimed is that an application should be made to the lower court before moving for the writ. But this is another point to which we shall refer hereafter.

It is also suggested that the petitioners might have bowed to the authority of the receiver, given him possession of everything, and then obtained leave from the Superior Court to sue him in ejectment, or that they might have sued him in forcible entry. It is true the petitioners might have done this, but the remedy would have been neither speedy nor adequate. They had the right, not merely to get their property back after a long and expensive litigation; they had a right to keep it. The wrong with which they were threatened when they applied for the writ, and when the writ issued, was the deprivation of the possession and the use of their property. To give the property up in the hope of being allowed by the Superior Court to sue for it, and recover it after years of litigation, was neither an adequate nor a speedy remedy. It would be as reasonable to say that an injunction should never issue to restrain a threatened injury, because the party injured may always have his action for damages. But there is a distinction affecting this question which counsel seem to have wholly overlooked, —a distinction, that is to say, between acts of the receiver and acts of the court. When a receiver holds by a valid appointment containing no directions in excess of the jurisdiction of the court, so long as he acts in pursuance of the orders of the court, he cannot ordinarily invade the rights of parties or strangers to the litigation. If he does an injury, he does it by exceeding his authority. In such case the fault is his, and his alone. If he attempts to take property lawfully in the possession of another, and to which he is not entitled, his attempt may be resisted just as any other trespasser may be resisted, and the person defending his lawful possession is not brought in conflict with the court. If he by any means gains possession of the property claimed by a stranger, the court will either order him to restore it, or, if the title is in doubt, permit an action to be brought against him to try the title. But, when the court has exceeded its jurisdiction in appointing a receiver, or in directing him to take specific property out of the possession of a stranger, the injury that results is directly due to the action of the court. The wrong is in the order of the court, not in the receiver's transgression of the order. In such case, it seems clear that the appropriate remedy is in some writ or proceeding which operates upon the court, as such, to restrain its judicial action, and not in the sort of resistance that may be opposed to an ordinary wrong-doer, or in such an action as may be brought against a private person who has committed a trespass. However confident he may be of his right to resist, no prudent man will take the risk of resisting the plain terms of an order of court; and no rule of practice should be laid down which will compel a man in that situation to defend his possession by force in order to avoid the necessity of resorting to an action to recover it. On the contrary, all men should be encouraged to avoid forcible resistance to orders of courts, no matter how plainly in excess of jurisdiction, by firmly upholding and freely administering the remedies provided for the summary correction of such excesses.

But it is said that the order appointing the receiver was appealable, and therefore prohibition will not lie. The Statute does not say that the writ will not issue in any case where there is an appeal. There must not only be a right of appeal, but the appeal must furnish an adequate remedy, in order to prevent the issuance of the writ. A number of cases have been decided in this court in which writs of prohibition have been refused because there was a right of appeal, but in all of those cases the appeal afforded a complete and adequate remedy for the threatened excess of jurisdiction.

In *Childs* v. *Edmunds* (Cal.), 10 Pac. Rep. 130, the petitioner had a right to appeal, and by his appeal he could stay the enforcement of the writ of assistance. More than this, it does not appear that any excess of jurisdiction had been permitted in ordering the writ of assistance; and, if so, appeal was the only remedy.

In *Mancello* v. *Bellrude* (Cal.), 11 Pac. Rep. 501, and *Levy* v. *Wilson*, 69 Cal. 105, appeal was a complete and adequate remedy.

In *Clark* v. *Lassen County Super. Ct.*, 55 Cal. 199, and *Wreden* v. *Stanislaus County Super. Ct.*, Id. 504, there was no excess of jurisdiction, and appeal was the only remedy. The same is true of the case of *Powelson* v. *Lockwood*, 82 Cal. 613.

The difference between this case and all those referred to is that here an appeal would have afforded no remedy for the wrong with which the petitioners were threatened. By means of an appeal, at the end of about a year and a half, in the ordinary course, they could have procured a reversal of the order,—if, indeed, as strangers to the action in which it was made they had any right to appeal; but in the mean time they would have been irreparably damaged, unless upon the taking of the appeal the Court would have suspended action under the order. But the Court had already decided that no appeal could by any possibility stay the appointment of a receiver, and the seizure of the property by him; and so it would have been necessary to make a motion to suspend the order, and for a restoration of the property or a withdrawal of the receiver,—wait until that order was overruled, and a bill of exceptions settled, and take another appeal from that order, as was done in *Lee Chuck* v. *Quan Wo Chong Co.*, 81 Cal. 222. Or some other proceeding would have been necessary, involving ruinous delay; for in the mean time the receiver would have gained complete possession of the refinery and other property, the refinery would have been closed, stock injured, contracts broken, employés discharged or kept in idleness, and every possible damage inflicted, without any security for the loss. In such a case, there was no adequate remedy except by a proceeding which would prevent the receiver from taking possession of the property; and the writ of prohibition was, as has been shown, the appropriate remedy for that purpose. It has, it is true, been in great measure shorn of its efficacy by the precipitate haste of the receiver in proceeding under the order of the Superior Court; but the propriety of the course pursued by the petitioners is to be judged, not by the consequences of what the receiver has done, but by the case upon which their petition was founded and our writ awarded. The fact, therefore, if it be a fact, that the petitioners could have appealed from the order appointing a receiver, does not preclude them from having the writ of prohibition.

The case of *Haile* v. *San Bernardino County Super. Ct.*, 78 Cal. 418, so much relied on by counsel at the oral judgment, and cited again with emphasis in the briefs since filed, is, as we pointed out at the hearing, radically different from this case. There the order of the superior court was in no respect in excess of its jurisdiction. The receiver was regularly appointed, in a proper case, to take charge of the estate of a voluntary insolvent. He was not directed to take any specific property. The court had decided nothing against the claims of the petitioner, and was not assuming to decide anything with respect to his claims. The court, in short, had done nothing which could have been prohibited. But it was feared by the petitioner that the receiver might sell property previously assigned to him by the insolvent, and he wanted such action by the receiver restrained. He feared, in other words, that the receiver would exceed his authority, and commit a trespass. We said, in vacating the alternative writ, that, if the receiver had taken any property belonging to the petitioner under the order of the superior court, he had done so without authority, and was a mere trespasser, for which plaintiff had a remedy by action, and that he could not resort to the extraordinary remedy of prohibition. What bearing this decision can be supposed to have upon a case where the order of the court is in excess of its jurisdiction, and where the object of the proceeding is primarily to restrain the court in its judicial action, and only indirectly affects the receiver, who has done nothing except what the court has commanded him to do, we have thus far failed to comprehend. We have pointed out in another connection the reasons for allowing a summary remedy to arrest judicial action in excess of jurisdiction, and the difference between the situation of a person wronged by such action and one threatened by a private trespasser. In the one case the party threatened has a right to resist the trespass by force, if necessary. In the other, though he may have the right to resist, it is against the policy of the law to encourage such resistance, and a summary remedy is given to arrest the proceeding.

It is next urged in behalf of respondent that prohibition will not lie to try title to property, which means, in its application to this case, that the petitioners cannot be allowed to show in this proceeding that they are the owners of the refinery. But we think counsel have misapprehended the bearing of the proposition which they lay down, and to which we assent. It is true the title to the property cannot be tried in this proceeding; but what this means is that when a court, by its order, has taken property out of the actual possession of a stranger to the proceeding, who claims it as his own, the order is in excess of jurisdiction, irrespective of the actual state of the title. Whether the party in possession really held the title or not, the order is void, because no man can be deprived of his property without due process of law. A court cannot take property from his possession without a hearing, and compel him to prove title in order to regain it.

It is next suggested that the writ of prohibition does not issue *ex debito justitiæ*, but is to be granted or withheld in the sound discretion of the court, and that in this case it ought not to be allowed in favor of these petitioners, because they are members of the sugar trust, monopolists, and are the tempters who seduced the American Sugar Refinery into the combination. There is no competent proof before us of these facts; but, assuming them to be so, the law is not such as counsel claim it to be. A decision may be found here and there saying in a loose way that the issuance of the writ is in the discretion of the court, and a statement in general terms to the same effect may be cited from text-writers who merely echo the decisions; but it never was the law that a court having jurisdiction to issue the writ had any discretion to refuse it when demanded by the real party in

interest bringing himself clearly within the law. If such an idea has obtained anywhere, it has been in consequence of a misunderstanding of the English cases. In England the practice in prohibition was analogous to the practice in other actions at law. An original writ (of prohibition) issued for the purpose of securing an appearance, and after appearance the pleadings followed; that is, the plaintiff declared, the defendant pleaded or demurred, and so on. But there was this difference between the writ of prohibition and other original writs; that, whereas the writs in ordinary actions issued of course on application of the plaintiff, the writ of prohibition did not issue of course, but only upon affidavits showing grounds for its issuance. Another difference was that not only the party injuriously affected by the proceedings of the inferior court, but any subject of the king, was allowed to interfere to prevent an excess of jurisdiction; and, in case of suit by a stranger to the proceeding to be stayed, the superior courts exercised a discretion in granting or withholding the writ, but never when the party affected was the plaintiff. This whole subject is reviewed exhaustively in the case of *London* v. *Cox*, L. R. 2 H. L. 278, 280.

The following quotation from an opinion of *Lord Chief Justice* Cockburn therein cited (p. 280) shows what the law on this point is: "I entirely concur in the proposition that, although the court will listen to a person who is a stranger, and who interferes to point out that some other court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that it is not *ex debito justitiæ*, but a matter upon which the court may properly exercise its discretion, as distinguished from the case of a party aggrieved, who is entitled to relief *ex debito justitiæ* if he suffers from the usurpation of jurisdiction by another court." *Re Forster*, 4 Best & S. 187.

In this State, it is always the party aggrieved who sues; and, if he shows a case for the issuance of the writ, the court cannot refuse it on the ground that he is a bad man and deserves the punishment he is threatened with, or upon any other consideration which appeals to the mere discretion of the judge.

We come finally to the proposition upon which counsel for respondent insists most strenuously, viz.: that the jurisdiction of the court to grant a peremptory writ of prohibition depends absolutely upon the allegation and proof by petitioners that, before filing their petition here, they had pleaded to the jurisdiction of the Superior Court, and that their plea had been overruled. To sustain this proposition, they cite the decisions of this court above referred to (*Chester* v. *Colby*, 52 Cal. 517, and *Southern P. R. Co.* v. *Kern County Super. Ct.* 59 Cal. 476); and they cite a number of decisions from the courts of other States. It is clear that the California cases do not support the contention of respondent. In each of them a party to the proceeding in the lower court was the petitioner for the writ, and all that was held in the first case was that, an objection to the jurisdiction of the lower court having been taken by demurrer, and being undecided there, this court would not interfere by prohibition before that court had overruled the objection. In the second case, it was held that the party must in some form object to the want of jurisdiction of the lower court before the writ of prohibition would issue. In neither case was the failure to make such objection held to be jurisdictional, but the refusal to issue the writ was put upon the ground that prohibition is a prerogative writ, and consequently that the court had, and ought to exercise, the right to make its issuance subject to reasonable conditions, and that it was reasonable to give the lower court an opportunity to correct itself before calling the judge to answer here. We have no doubt that both decisions are correct in all that they decided and in all that was said in the opinions on this point. To the extent that its issuance may be made subject to reasonable conditions, applicable equally to all cases and all suitors, the writ of prohibition is no doubt a "prerogative" writ, though it may be doubted if that is a correct term of description; for in the same sense all writs may be called prerogative writs. And we are satisfied that the rule of practice established by these decisions is a proper and wholesome rule, recommended by important considerations of expediency. When a party has an opportunity of objecting in the lower court that it is proceeding, or is asked to proceed, in a matter without or in a manner exceeding its jurisdiction, he ought to make the objection there. It is only fair to the court that the objection should be brought to its attention in some proper form. If no objection is made, the party having every opportunity to object, the court may reasonably infer that no ground of objection exists; and not only is the court entitled to the advice and suggestions of the party with reference to objections apparent on the record,—there are many cases in which the ground of objection would not appear unless set forth by plea in some form, and it is to be presumed that any valid objection, properly brought to the attention of the court, would generally prevail, and that all necessity for a writ of prohibition would be obviated; therefore the interest of the public in preventing unnecessary litigation, as well as consideration for the judge of the lower court, demand that the objection should be made at the first opportunity. These are the reasons of the rule, and they indicate its scope and the extent of its application, as the authorities very fully show.

We have not time to review the cases other than those cited from the reports of the State; but we refer to the case of *London* v. *Cox*, *supra*, in which the learning of the subject is exhausted. That was a case appealed from the court of exchequer to the exchequer chamber, and finally to the House of Lords. Before deciding it, the lords requested the opinion of the justices of the queen's bench on two questions, the second being as follows: "Whether the garnishees in the Lord Mayor's Court could maintain an action for a prohibition without having pleaded in the Lord Mayor's Court;" to which the justices unanimously responded that they could. This was in accordance with the unanimous decision both of the court of exchequer and exchequer chamber, which was accordingly affirmed in the House of Lords. The answer of the justices, prepared by *Justice* Willes, contains a full review of all the cases, showing that even in England

the subject had not been clearly understood, and that some inconsistent and erroneous decisions had been made. It is not surprising, therefore, that in some of the United States the same confusion has arisen and that some cases have been erroneously decided, to the effect, for instance, that the issuance of the writ is in the discretion of the court, and that a formal plea to the jurisdiction of the lower court is an essential prerequisite to its issuance. Fortunately, no such decisions have been made in this court, though in deciding *Chester* v. *Colby*, *supra*, an Arkansas case (*Ex parte Little Rock*, 26 Ark. 52) is cited with approval, which apparently does go to the extent claimed by respondent. But we are fully at liberty, without questioning the authority of any case decided in this court, to adopt the correct rule and doctrine as expounded and laid down in the case of *London* v. *Cox*. Without going into the niceties of the subject, it may be said that the following propositions, applicable to this case, are fully supported by the decision in that case: (1) If a want of jurisdiction is apparent on the face of the proceeding in the lower court, no plea or preliminary objection is necessary before suing out the writ of prohibition. (2) If the proceeding in the lower court is not on its face without the jurisdiction of such court, but is so in fact by reason of the existence of some matter not disclosed, such matter ought to be averred in some proper form in order to make the want of jurisdiction appear. (3) But this is not essential to the jurisdiction of the Superior Court to grant prohibition. It is only laches, which may or may not be excused, according to circumstances. Accordingly, we find that frequently a failure to plead in the lower court was excused for the reason that it appeared that the plea would have been rejected if made. The whole question, in fact, was one of practice merely, not of jurisdiction; and the objection which most frequently prevailed to the granting of the writ was not that the application came too early, but that it came too late. The rule which we have adopted is founded upon the same considerations and directed to the same end. Our jurisdiction is ample to arrest by prohibition any proceeding without or in excess of the jurisdiction of the superior court, but by statute we are forbidden to do so when there is a plain, speedy and adequate remedy in ordinary course of law; and by the practice which we have adopted and prescribed for ourselves, we will not issue the writ until the objection to its want or excess of jurisdiction has in some form been made in and overruled by the lower court; the whole foundation of the rule being the respect and consideration due to the lower court and the expediency of preventing unnecessary litigation.

Applying these principles to the present case, we find that the petitioners were not, in their character of purchasers of the specific property described in the order appointing the receiver, parties to the *quo warranto*, or the rule to show cause why the receiver should not be appointed, and in that character they had no opportunity to object until after Mr. Reddy appeared at the refinery armed with an order of court authorizing him to take it into his possession. As stockholders of the corporation, however, it is contended, and may be conceded, that they were virtually defendants in the *quo warranto*, and parties affected by the rule to show cause. But it clearly appears that in that character they made every objection that could be made to the order asked, which did not refer to any specific property. They filed an affidavit showing that there were no creditors of the corporation, and a certificate showing that all the stockholders had requested the directors to close up the business of the corporation. They also brought to the attention of the Court the fact that an appeal from the judgment of forfeiture had been taken and perfected. All these objections went to the jurisdiction. They were all argued, all maturely considered and all overruled in a carefully prepared opinion in writing. What more could possibly be necessary in order to authorize us, under any rule prevailing anywhere, to examine and decide upon the objections so made and so overruled? Certainly nothing that has ever been decided by this court, and nothing in the reason of the rule. Even as to the objections to the order as made, upon grounds peculiarly affecting the petitioners as purchasers of the specific property therein described, they did everything which the reason of the rule requires. It is objected that they did not file a formal plea, make a formal motion and await a decision of the Superior Court before moving here. But what opportunity were they allowed to take these steps? The first notice they had of the order empowering the receiver to take the property claimed by them was his appearance at the refinery, demanding immediate possession and asserting his authority and control. In the short respite of one night which was granted them, they prepared affidavits setting forth their claims upon which to base an application for such a stay as would enable them to move for a suspension or modification of the order. Their attorney sought the respondent at his chambers at the earliest possible moment, stated to him the substance of the affidavits and the nature of his application. He also stated that there was a scramble for the possession of the refinery between the receiver and the agents and employés of the petitioners. Thereupon the respondent distinctly informed him that his application would not be considered unless full and complete possession of the property was first delivered to the receiver. To have yielded to this condition would have been to give up the whole controversy and submit to the very wrong which it was their object to prevent. They were not bound, therefore, to move upon such terms; and being advised, and fully believing—what the event proved to be the fact—that the respondent and the receiver would proceed with all expedition to enforce the invalid order, they were justified in filing their petition without further delay.

It is unnecessary, in this view, to determine whether the affidavit of Mr. Mott was actually read to *Judge* Wallace or not; and we shall not attempt to reconcile the conflict in the testimony upon that point. In any event it is certain that our jurisdiction to issue a peremptory writ is complete, and equally certain that the respondent has no reason to complain that objections to his order were not submitted to

his decision before this proceeding was instituted. It is also unnecessary to enter into any detailed discussion of the testimony as to the extent or completeness of Mr. Reddy's possession at the time the writ was served. It is the time when the writ is ordered, not the time when it is served, that fixes the extent of our power to interfere with the proceeding in the lower court. But even this is immaterial in this case; for we have shown that so long as property in the hands of a receiver remains subject to further judicial action, which may be arrested by the prohibition, the remedy will be made complete by ordering its restoration. So far, therefore, as the prohibition is concerned, it makes no difference if we assume that Mr. Reddy had complete possession at the time we ordered the alternative writ. It is only with respect to the proceeding for contempt that the facts relating to the possession of the receiver are material. In considering the question of contempt, it will be necessary to examine with some care the evidence on this point; and, as this will necessarily occupy some time, and as it is important that the petitioners should have as speedy relief as possible, we will make that matter the subject of a separate opinion, to be filed at our earliest convenience. In the mean time, *an absolute and peremptory writ of prohibition will issue*, in accordance with the views herein expressed.

We concur: **Sharpstein,** *J.;* **McFarland,** *J.;* **Paterson,** *J.;* **Works,** *J.;* **Fox,** *J.*

Mr. Justice **Thornton,** being absent from the State, did not participate in the decision.

Petition for new trial denied.

Theodore A. HAVEMEYER *et al.*, Partners as Havemeyers & Elder, *Petitioners*,
v.
SUPERIOR COURT of the City and County of San Francisco.

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

1. Both a court and its receiver are bound by a writ of prohibition addressed to the former enjoining interference with certain property. It is the duty of the judge to see that the receiver obeys the writ, and he will be answerable in contempt proceedings if he knowingly permits a violation of its terms by the latter without exercising his authority to prevent it.

2. Merely going upon premises and compelling the superintendent in charge to acknowledge his authority will not give a receiver, acting under a void commission, such full and complete possession of them as to justify his maintaining it after the service upon him of a writ directing the suspension of proceedings against the property, where the person in control of the business and all employés continue resistance, and the workmen on the premises have not received or obeyed orders from the receiver, but have continued in the service and pay of their employers. The possession being mixed and scrambling, the legal seisin attaches itself to the right of possession.

3. The service upon a receiver, whose possession of property is mixed and scrambling, of a writ directing the suspension of proceedings against such property, together with the petition and order therefor, from which it appears that his authority is questioned because of absence of jurisdiction in the court appointing him,—compels him to decide at his peril whether or not his authority is valid, and if not he must relinquish his claim to possession or answer for contempt of the writ.

(*Thornton, J., dissents.*)

(December 22, 1890.)

PROCEEDINGS to punish for contempt a court and its receiver because of their alleged disobedience of a writ enjoining the suspension of proceedings against certain property. *Fine imposed.*

The facts are stated in the opinions to this and the preceding case.

Messrs. **Wilson & Wilson** and **Garber, Boalt & Bishop,** for petitioners:

A writ of possession is not executed so as to prevent a stay of proceedings from operating, until the party in possession is fully dispossessed.

Lee Chuck v. *Quan Wo Chong Co.* 81 Cal. 222.

Where a receiver attempts a forcible entry upon the possession of a stranger to the suit, he ought not to be held to have consummated the entry, until he has acquired such an actual, peaceable and exclusive possession as would entitle him in turn to maintain an action of forcible entry and detainer against an intruder. But that action will not lie in favor of one who has a mere scrambling, interrupted and disputed possession or control.

House v. *Keiser*, 8 Cal. 500; *Hoag* v. *Pierce*, 28 Cal. 188; *Voll* v. *Butler*, 49 Cal. 74; *Bowers* v. *Cherokee Bob*, 45 Cal. 496; *Conroy* v. *Duane* 45 Cal. 597; *Tivnen* v. *Monahan*, 76 Cal. 131. *Anderson* v. *Mills*, 40 Ark. 194; *Johnson* v. *West*, 41 Ark. 535; *Blake* v. *McCray*, 65 Miss. 443; *Page* v. *O'Brien*, 36 Cal. 559.

In cases of mixed possession the legal seisin is according to title.

Codman v. *Winslow*, 10 Mass. 146, and cases cited; *Hall* v. *Powell*, 4 Serg. & R. 465; *Cheney* v. *Ringgold*, 2 Har. & J. 87; *Hall* v. *Gittings*, Id. 112; *Mather* v. *Ministers of Trinity Church*, 3 Serg. & R. 509; Adams, Ejectment (Tillinghast), 54, and *notes; Davidson* v. *Beatty*, 3 Har. & McH. 621; *Hunt* v. *Wickliffe*, 27 U. S. 2 Pet. 201, 7 L. ed. 397; *Green* v. *Liter*, 12 U. S. 8 Cranch, 229, 3 L. ed. 545.

When by his own negligence and inattention, one who has been enjoined permits his agents to do the prohibited act, he may be punished for contempt in disregarding the injunction.

2 High, Inj. 2d ed. §§ 1428, 1438; *Poertner* v. *Russell*, 33 Wis. 193; *Safford* v. *People*, 85 Ill. 558.

The receiver as well as the judge of the Court below was guilty of a violation of the restraining order. The advice of counsel was no defense.

2 High, Inj. § 1420.

An officer becomes a trespasser *ab initio* by going on to the completion of his acts where the injunction is served after he commences.

2 High, Inj. § 1444; *Turner* v. *Gatewood*, 8 B. Mon. 613; *Atlantic Giant Powder Co.* v. *Dittmar Powder Mfg. Co.* 9 Fed. Rep. 316; *Wells, Fargo & Co.* v. *Oregon R. & Nav. Co.* 19 Fed. Rep. 20; *Craig* v. *Fisher*, 2 Sawy. 345.

Mr. **William M. Pierson,** for respondent:

A scrambling possession of a receiver is something unheard of in the literature of jurisprudence. His possession was complete when he went upon the premises and exhibited his authority. The law was then in possession. Those who refused to recognize him were simply in contempt, whether the order was valid or not.

Ames v. *Birkenhead Docks Trustees*, 20 Beav. 332; High, Receivers, § 143; *Ex parte Cochrane*, L. R. 20 Eq. Cas. 286; *Maynard* v. *Bond*, 67 Mo. 318; *Moore* v. *Mercer Wire Co.* (N. J.) Oct. 26, 1888; *Edrington* v. *Pridkam*, 65 Tex. 612; *Vermont & C. R. Co.* v. *Vermont Cent. R. Co.* 46 Vt. 792.

Messrs. **William T. Wallace** *in propria persona*, **Sullivan & Sullivan** and **W. H. Metson** also for respondent.

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

The application for a peremptory writ of prohibition herein, and the charge that the judge of the Superior Court and his receiver had violated the injunction contained in the preliminary or alternative writ, and had thereby committed a contempt, were heard and submitted together. In our opinion filed at the time of deciding the cause (see 84 Cal. 327) we stated very fully all the facts necessary to be considered in deciding upon the charge of contempt, excepting only those relating to the character and extent of Mr. Reddy's possession of the refinery, etc., at the time he was served with the alternative writ. Avoiding, as far as possible, any repetition of that statement, we proceed to consider whether the charge of contempt has been made out. That Mr. Reddy did interfere with the possession and control by petitioners of the refinery and other property claimed by them in their own right, and described in our writ; that he did interfere with the conduct and business of the same and that he did continue to exercise with respect thereto all the powers granted in the order appointing him receiver, after service of our writ, —is conceded; and it is also conceded that the judge of the Superior Court, after like notice, entirely and purposely abstained from any interference with his proceedings. But it is contended in behalf of the receiver that before he had any notice of our order he was in complete and absolute possession of all the property claimed by the respondents, and that his subsequent dealings with it were only such as were necessarily incumbent upon him by reason of such possession. In behalf of the judge it is claimed that the effect of our writ was to deprive him of all control and direction of the receiver, and, consequently, to absolve him from any responsibility for his acts. This claim of exemption from responsibility on the part of the judge cannot be allowed. The object and purpose of our order and writ, expressed in the plainest terms (84 Cal. 351), was to restrain the action of the Court. It was addressed directly to the judge, and only indirectly, through him, to the receiver. Both were bound by it, but it was nevertheless the duty of the principal to see that the agent obeyed it, and, whatever the receiver did in violation of its terms the judge must answer for, if, with knowledge of his agent's proceedings, he refrained from exercising his undoubted power to control them. And such, as we have seen, is the case. The whole matter to be determined, therefore, is the correctness of the receiver's position; *i. e.*, that he was in full possession before he had any notice of the injunction, and that he did nothing thereafter except to preserve things *in statu quo*. He contends that from the afternoon of February 17th he was in full, complete and absolute possession of the refinery, shops and offices, and was only impeded and interrupted in his control of some of the personal property therein. The assumption, however, upon which he builds his entire argument is that he was acting under a valid appointment, and had a lawful right to do everything that he attempted to do; and, since its basis is swept away, there is little left of the argument. We have decided —and we have no doubt of the correctness of that decision—that the appointment of Mr. Reddy, and all the proceedings in the matter of the receivership, were void. Therefore, when he entered into the refinery, shops and offices, he did so as a mere trespasser, without any lawful warrant whatsoever, and all his acts in attempting to obtain possession must be viewed in that light.

We do not wish to be understood as conceding that Mr. Reddy's acts, even if his appointment had been valid, would have been entirely justifiable. We are not called upon to decide how summarily a receiver lawfully appointed may proceed in wresting the possession of property, specifically described in the order appointing him, out of the hands of strangers to the action claiming it in their own right. We had supposed that in such case it would be his duty to abstain from the exercise of anything like force; that, if he found the claim of ownership and possession by a third party to be made in good faith, he would report the matter to the court, and, if he proceeded further, do so only by an action for the recovery of the property; if he was satisfied that such claim was a sham, and the possession by such stranger held by collusion with (or as a mere agent or servant of) a party bound by the order, that he would still report the facts to the court, and have the persons resisting his authority cited to answer for contempt; and that after a hearing upon the citation the court would not, unless in a plain case, order a writ of assistance to dispossess such parties, but would direct an action to be brought so that their rights might be fully and fairly litigated. But, as we have said, these are matters which we are not called upon to decide here, and we have given this very general expression of our views only in order not to seem to acquiesce in the proposition so strenuously urged by counsel to the effect that in the case supposed it is the right and duty of the receiver to take the property regardless of the claims and possession of third parties; and it is their duty to yield unquestioning obedience to his commands, surrender possession of the property and petition the court for leave to sue for its recovery. The question here is much simpler. It is whether Mr. Reddy and his men, regarded as mere naked trespassers, entering without any sort of lawful warrant, had, prior to the hour of 3

o'clock P. M., on February 18, succeeded in ousting the petitioners from their lawful possession of the refinery, shops, etc., and in gaining so full and complete a possession themselves as to justify their subsequent proceedings. The testimony bearing upon this point is quite voluminous, and to some extent conflicting, though not more so than might naturally have been expected, considering the opposite points of view from which the occurrences at the refinery were viewed by those who participated in and have testified regarding them. It appears that Mr. Reddy, armed with the commission from the Superior Court, and attended by a number of men, acting in obedience to his orders, entered the refinery on the afternoon of February 17, stated the authority under which he assumed to act, declared himself in possession, ordered the superintendent of the works to shut them down, disposed his men about the building, and stopped the delivery of sugar then in progress. The superintendent, however, refused to take any orders from Mr. Reddy, referred him to Mr. Mott, the general agent of the petitioners, and asserted their claims to the property. There is no doubt that the superintendent and his foreman were, to some extent, intimidated by the sudden irruption of Mr. Reddy and his men, and the threat of arrest and punishment if they refused to submit, and, no doubt, they did make use of various temporizing expedients in order to maintain their ground without resorting to open and violent resistance, but they neither left the building nor acknowledged Mr. Reddy's authority. The dispute ended at last in a sort of truce for the night, both parties remaining on the ground, the superintendent being allowed until next day to take legal advice and determine whether he would yield the possession or not. Acting upon the advice he received, the superintendent notified Mr. Reddy the next day that he would continue to resist him by all means short of force, whereupon Mr. Reddy applied to the Court for the assistance of the sheriff. In the affidavit which he presented to the Court for that purpose, and which was, as is evident, framed upon his theory as to the validity of his appointment, and the entire regularity of his proceedings, he states that he has entered into possession of the refinery, but that H. C. Mott and R. H. Sprague (the general agent and superintendent of petitioners) are impeding, hindering and delaying him in the discharge of his duties as receiver, and are refusing to allow him to take into his possession and control certain property situate on the premises. This affidavit, as an assertion of possession, is almost *felo de se* in itself, and would have been quite so if it had disclosed the further and undisputed fact that Mott and Sprague were really impeding and hindering the receiver by their assertion of and their attempt to uphold the possession and right of the petitioners. Evidently, too, the superior judge attached less importance to the legal conclusion stated in the affidavit than to the facts by which it was qualified; for, by the terms of his order to the sheriff, that officer was commanded to do what was necessary to place Mr. Reddy in exclusive, full and complete possession. The sheriff, in the return which he subsequently made of this order, seems to have fallen back on the theory of the affidavit, that Mr. Reddy was in possession of the refinery, though impeded and interfered with by certain persons whom he found on the premises, and who at his request retired therefrom, leaving Mr. Reddy in peaceful, undisturbed and undisputed possession. He does not disclose who these persons were, but the testimony shows that the superintendent and foreman of the refinery were meant. When Mr. Reddy and the sheriff came back on the 18th, armed with a new order, Mr. Sprague and his foreman did retire from the building in obedience to their demand, but almost immediately returned. There is a conflict of testimony as to the terms upon which they re-entered. Mr. Reddy's testimony, in which he is corroborated by others, is that they came back at his request to take care of the large amount of sugar then in solution, under a promise to obey his orders, and shut down the works as speedily as that could be done without too serious loss. They, on the other hand, claimed that they only promised not to oppose Mr. Reddy's orders, and declared their purpose to remain on the premises in the interest of the petitioners, and in their pay. It is not necessary, in our opinion, to reconcile this conflict in the testimony, which in all probability is mainly due to the different construction given by the two parties to what was actually said. We will assume that the arrangement was such as Mr. Reddy states it to have been, for even then he did not get complete possession. The only two persons removed from the premises, or who acknowledged Mr. Reddy's authority, were Mr. Sprague and his foreman. Mr. Mott, the general agent, was in a position of authority over them, and over more than a hundred other employés then on the premises, none of whom were removed, and none of whom ever received or obeyed any order from Mr. Reddy before he was enjoined, and all of whom continued thereafter in the pay and service of the petitioners. Mr. Mott, it is true, was not at the refinery while the sheriff was there, but he had been there before, resisting Mr. Reddy, and he returned afterwards, and renewed his resistance, so that Mr. Reddy was compelled to remove him by force—a very gentle force, it is true, but it would no doubt have been greater if there had been greater resistance. In the meantime Mr. Reddy had been served with our writ, and Mr. Sprague had disclaimed his authority, and contrary to his orders had put a large additional amount of sugar in solution. These being the facts, it is clear that there was, in the best view for the respondents, a mixed and scrambling possession of the refinery, in which case the legal seisin, as it always does, attached itself to the right of possession. The result was that Mr. Reddy found himself in the position of being obliged to decide, at his peril, whether his authority was valid or not, and, as soon as service was made upon the superior judge, at a later hour on the same day, he was placed in the same position. A copy of the petition for the writ of prohibition, our order for the writ and the writ itself, were all served together, and by them the respondents were fully advised that the validity of their proceedings was challenged upon jurisdictional grounds, and that until our further order they must suspend their proceedings

against the property described in the writ. Their claim to be in possession of the refinery, and especially their right to discharge the superintendent of the petitioners, and put another in his place, stop the delivery of sugar and close down the works depended upon the jurisdiction to appoint a receiver. If that proceeding was void, they were bound to withdraw from the refinery, shops, office, etc., and leave the petitioners unmolested. If, on the other hand, the appointment of the receiver was valid, they might maintain the *status quo*, and perhaps were justified in doing the other things above mentioned. Being in this situation, they did right in taking legal advice, but the fact that they did so, and acted upon it in good faith, does not wholly relieve them from the consequences of the actual disobedience of which they were guilty. They were advised that the possession of the receiver was lawful and complete, and that he must do all that he subsequently did. They were also advised that the superior judge could not interfere with or control the acts of the receiver pending the hearing of the cause. This advice was erroneous, but we have no doubt that it was given, accepted and acted upon in good faith, and therefore that the respondents, though technically guilty of contempt, did not intend any disrespect to the court, or any infraction of its orders, and that they should not be punished otherwise than by a nominal fine. The finding of the court is that William T. Wallace, judge of the Superior Court, and Patrick Reddy, Esq., did on the 18th day of February, 1890, and on various days thereafter, violate our injunction herein issued and served on said 18th day of February, 1890, by continuing in and about the refinery and other property in said writ described, and by interfering with the petitioners in the conduct of their business therein, and did thereby disobey our lawful order and writ, and were therein guilty of a contempt of this court. Wherefore it is ordered that said William T. Wallace and Patrick Reddy be, and each of them is, hereby fined in the sum of $10.

We concur: **Fox, J.**; **Sharpstein, J.**; **McFarland, J.**; **Paterson, J.**

Thornton, J.: I dissent. There is no evidence of contempt committed by either party in this case.

MASSACHUSETTS SUPREME JUDICIAL COURT.

William SLATTERY, Admr., etc., of Robert Healy, Deceased,
v.
Daniel O'CONNELL.

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

1. The care which parents must have exercised over their child, in order to avoid the defense of contributory negligence in an action to recover damages for the negligent killing of such child by a third person, is such as was reasonable having regard to all the circumstances of the case; and the question whether or not such care was exercised is for the jury.

2. Evidence will be sufficient to carry to the jury the question of the exercise of due care by parents in the custody of their minor child, who was run over and killed by defendant, in an action to recover damages

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NOTE.—*Obligation of parents to protect their children from danger.*

Parents are bound to protect their infant children from danger, by the exercise of care and prudence, but only to such a degree of care as is reasonable under all the circumstances. Weil v. Dry Dock, E. B. & B. R. Co. 119 N. Y. 147, citing Birkett v. Knickerbocker Ice Co. 110 N. Y. 506; Kunz v. Troy, 6 Cent. Rep. 493, 104 N. Y. 344; Stackus v. New York Cent. & H. R. R. Co. 79 N. Y. 464.

Negligence of parent a question of fact.

The question whether a certain line of conduct on the part of parents in permitting their child to go upon a railroad track was negligence, is a question of fact for the jury upon consideration of the circumstances, and not a question of law for the court. Payne v. Humeston & S. R. Co. 70 Iowa, 584. Compare Whitsett v. Chicago, R. I. & P. R. Co. 67 Iowa, 150.

Whether a father is guilty of negligence in leaving his child at the door of a store while he goes in to make change is a question for the jury. Kunz v. Troy, 6 Cent. Rep. 493, 104 N. Y. 344; Birkett v. Knickerbocker Ice Co. 110 N. Y. 506. See Cosgrove v. Ogden, 49 N. Y. 255.

Contributory negligence of parents defeats recovery in action for damages.

Permitting a child three years old to go upon a public street crowded with vehicles to await the coming home of its father, accompanied only by its brother between seven and eight years old and its sister about five years old, is such negligence as will preclude a recovery in case it is run over and injured by a third person, the circumstances being such that an adult in its place would have escaped unhurt. Casey v. Smith (Mass.) 9 L. R. A. 259, and *note*.

Where a boy seven years of age in crossing a bridge went upon the roadway instead of the footway, and fell through an opening which no one could get into in the ordinary course of travel, and was killed, where his father had given him permission to cross the bridge, and was fully acquainted with its condition, he could not recover. Oil City & P. Bridge Co. v. Jackson, 5 Cent. Rep. 324, 114 Pa. 321. Compare Pennsylvania & O. Canal Co. v. Graham, 63 Pa. 290.

Where plaintiff had knowledge of the condition of a vault near his line, on defendant's lot, for two or three weeks before the accident, and could have placed guards around it and prevented the injury to his child from falling therein, but neglected to do so, he cannot recover. Mayhew v. Burns, 1 West. Rep. 577, 103 Ind. 328.

A plaintiff who, in violation of the regulations of a railroad, of which she has notice, puts her child upon a freight train, cannot recover for injuries occasioned by the negligence of the railroad employés who took the child in known violation of such rules. Whitehead v. St. Louis, I. M. & S. R. Co. 5 West. Rep. 84, 22 Mo. App. 60.

The rule making a distinction as to contributory negligence between parents able to employ nurses or attendants for their children, and those who are

See also 17 L. R. A. 407.

for such killing, which shows that deceased was a boy nearly five years old; that his mother had been confined two days before the accident and was without help except such as she received from neighbors who stepped in from time to time; that on the day of the accident, after keeping him in bed with her until about 11 o'clock, she permitted him to get up, and for the purpose of keeping him in the house permitted him to be only partly dressed; that soon afterwards she fell into a sleep, during which he got out of the house into the street, where he was run over and killed; that the father was a laborer, who was compelled to go to work early and did not return home until after his day's work was done, and who could not afford to procure help for his wife during her sickness.

(January 12, 1891.)

EXCEPTIONS by plaintiff to a ruling of the Superior Court for Hampden County (Barker, *J.*) that as matter of law plaintiff's intestate, for the alleged negligent killing of whom this action was brought to recover damages, was not shown to have been in the exercise of due care, and directing a verdict for defendant. *Sustained.*

The facts sufficiently appear in the opinion.

Messrs. **Wells, McClench & Barnes,** for plaintiff:

The question of the due care of the plaintiff's intestate was a material question of fact for the jury to decide. It was not a question of law for the court.

Gibbons v. *Williams*, 135 Mass. 333; *McGeary* v. *Eastern R. Co.* 135 Mass. 363.

It is not negligent to permit a child old enough to attend the public schools to be alone upon the public street.

Lynch v. *Smith*, 104 Mass. 52.

The child cannot be held responsible for the

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not, may well be doubted, for there should not be one rule of law for the rich and a different one for the poor. Indianapolis, P. & C. R. Co. v. Pitzer (Ind.) 4 West. Rep. 258, citing Hagan's Petition, 5 Dill. 96; Delphi v. Lowery, 74 Ind. 520; Morgan v. Illinois & St. L. Bridge Co. 5 Dill. 96.

The presence of an infant seventeen months old, unattended, upon the track of a railroad, unexplained, is proof of carelessness and inattention on the part of the mother. Chrystal v. Troy & B. R. Co. 7 Cent. Rep. 245, 105 N. Y. 164.

Negligence of another not imputable to child.

Negligence cannot be imputed to one who has not sufficient capacity or discretion to understand danger and use proper means to guard against it. Ridenhour v. Kansas City Cable R. Co. (Mo.) June 2, 1890. But see Casey v. Smith (Mass.) 9 L. R. A. 259, and *note.*

The negligence of a larger sister cannot be imputed to a child who is injured while in her care. Gulf, C. & S. F. R. Co. v. McWhirter, 77 Tex. 356.

The negligent omission of duty by a parent is not to be imputed to a child, in a suit by the latter to recover for personal injuries occasioned by defendant's negligence. Chicago City R. Co. v. Wilcox (Ill.) 8 L. R. A. 494.

What not contributory negligence of parent.

It is not, as a matter of law, negligence for parents to permit a child four and a half years old, unattended, to play on a city sidewalk. Birkett v. Knickerbocker Ice Co. 110 N. Y. 506; Oldfield v. New York & H. R. Co. 14 N. Y. 310; Ihl v. Forty-Second St. & G. S. F. R. Co. 47 N. Y. 317; McGarry v. Loomis, 63 N. Y. 104.

It is not unreasonable or negligent to permit a child to go out to play upon the sidewalk in close proximity to the house, there being no place on the premises where the child could go for that purpose. McGarry v. Loomis, *supra;* Mangam v. Brooklyn City R. Co. 38 N. Y. 455; Ihl v. Forty-Second St. & G. S. F. R. Co. and Oldfield v. New York & H. R. Co. *supra;* Fallon v. Central Park, N. & E. R. Co. 64 N. Y. 13; Barry v. New York Cent. & H. R. R. Co. 92 N. Y. 289; Minick v. Troy, 83 N. Y. 514; Barker v. Savage, 45 N. Y. 191.

It is not negligence for parents to send a child twenty months old into the street for air and exercise. Bliss v. South Hadley, 5 New Eng. Rep. 124, 145 Mass. 91.

Proof that a child four or five years old walked into the back room while his mother was busy and was gone only a minute or two, when she ran to the door and found that he had been injured by a horse in the street, does not show negligence on her part as a matter of law. Marsland v. Murray, 148 Mass. 91.

Contributory negligence of child.

The question of care and diligence to be exercised by an infant, and of contributory negligence on his part, is for the jury. Saare v. Union R. Co. 2 West. Rep. 538, 20 Mo. App. 211, citing Duffy v. Missouri Pac. R. Co. 2 West. Rep. 198, 19 Mo. App. 380.

The law does not require from a child that degree of care and caution which it demands from an adult; the jury must in such cases decide as to the question of contributory negligence; and the question as to age and responsibility is to be tried by the jury. Duffy v. Missouri Pac. R. Co. *supra.*

Where evidence as to contributory negligence is conflicting, it is for the jury to say whether the plaintiff, a girl of six years and seven months, used such care as is reasonably expected of one of her years. Mattey v. Whittier Mach. Co. 1 New Eng. Rep. 482, 140 Mass. 337.

Where a girl six or seven years old, and her sister twelve or thirteen years old, were going to school across a track, by a path which had been long used, and a switchman, who had on various occasions warned and prevented persons from walking on the path while cars were passing, was absent from his place, it was held that an action could not be maintained. Wright v. Boston & A. R. Co. 2 New Eng. Rep. 725, 142 Mass. 296.

Where a boy about nine years old had voluntarily placed himself in danger by riding upon the runner of a sleigh drawn by a horse, and after leaving the runner was struck by the defendant, who was driving at a moderate rate, recovery could not be had. Messenger v. Dennie, 1 New Eng. Rep. 759, 141 Mass. 335.

A ten-year-old boy of average intelligence, having a general knowledge of the structure and operation of a railway turntable, habitually warned by his father not to play upon it as it was dangerous, was held guilty of contributory negligence. Twist v. Winona & St. P. R. Co. 39 Minn. 164.

A boy thirteen years old, who had been working in the mill for a month, while ascending in an elevator in which he was accustomed to ride, was injured by the back part of his head extending beyond the elevator platform by contact with a joist, was held guilty of contributory negligence. Ludwig v. Pillsbury, 35 Minn. 256.

Defendant was erecting a building, and had a permit from the city to use the sidewalk, erecting barriers and excluding the public travel. A boy eight years of age took hold of the rope attached to a wheel or gin used in connection with the ele-

conduct of the parents unless they failed to exercise that degree of care which might be expected from persons in their circumstances and situation at the time of the injury.

Isabel v. *Hannibal & St. J. R. Co.* 60 Mo. 483; *Walters* v. *Chicago, R. I. & P. R. Co.* 41 Iowa, 71; *Chicago & A. R. Co.* v. *Gregory*, 58 Ill. 226; *Gibbons* v. *Williams, supra; Philadelphia & R. R. Co.* v. *Long*, 75 Pa. 257.

The parents of plaintiff's intestate were bound to exercise only that degree of care which was reasonable, considering their circumstances.

Chicago & A. R. Co. v. *Gregory, supra; Hoppe* v. *Chicago, M. & St. P. R. Co.* 61 Wis. 357.

Messrs. **George M. Stearns** and **T. B. O'Donnell,** for defendant:

The plaintiff's intestate, a child between four and five years old, was injured while unattended in the street. This alone would be prima facie proof, both of negligence on the part of intestate's parents, and that the said negligence contributed to the injury.

Wright v. *Malden & M. R. Co.* 4 Allen, 283; *Gibbons* v. *Williams*, 135 Mass. 335; *McGeary* v. *Eastern R. Co.* 135 Mass. 363; *Marsland* v. *Murray*, 148 Mass. 93.

The plaintiff may overcome this presumption by proof that the parents were not negligent or by proof "that the child did not in fact do or omit to do any act in the occurrence which common prudence forbade or required."

Gibbons v. *Williams, supra.*

To slide into a public street of "considerable travel" purposely and for pleasure is an act so

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vator, and, the rope being started, his hand was drawn into the wheel and injured. It was held error to direct a verdict for defendant; that the boy had previously been ordered from the place would not take the case from the jury. Moynihan v. Whidden, 3 New Eng. Rep. 362, 143 Mass. 287.

If the act of a child between thirteen and fourteen years of age in going near the gangway of a tugboat upon which she was allowed was such as a similar person of ordinary prudence would not have done, she is guilty of such negligence as will preclude a recovery for injuries received in consequence. Cook v. Houston Direct Nav. Co. 76 Tex. 353. See *note* to Winter v. Kansas City Cable R. Co. (Mo.) 6 L. R. A. 538.

What not contributory negligence.

The fact that a "door boy" in a mine, without a signal, attempted to open the door to prevent any possible consequences to himself by a collision between it and a train of loaded coal cars which, accidentally set in motion, suddenly came down, does not constitute contributory negligence. South West Imp. Co. v. Smith, 85 Va. 306.

A boy six years old ordered to keep away from a ditch across which he with others is jumping, who had no knowledge, or is not warned, of any danger from gas, is not by remaining there guilty of such contributory negligence as will prevent his recovery for injuries received by an explosion of gas. Rummele v. Allegheny Heating Co. (Pa.) Nov. 5, 1888.

The same circumstances which would justify a recovery by one who had reached years of discretion, while free from fault, would justify a recovery by an infant of such years as to be incapable of fault, provided its parents or guardian were guilty of no neglect which could be imputed to the child; and so, conversely, persons who are lawfully using, or carrying on business on, their own premises are not liable for injuries to children, unless, under the same circumstances, they would have been liable to adults who were equally free from fault. Indianapolis v. Emmelman, 6 West. Rep. 566, 108 Ind. 5.

Children, when sui juris.

It cannot be asserted as a proposition of law that a child just past seven years of age is *sui juris*, so as to be chargeable with negligence. The law does not define when a child becomes *sui juris*. Stone v. Dry Dock E. B. & B. R. Co. 115 N. Y. 109; Kunz v. Troy, 6 Cent. Rep. 493; 104 N. Y. 344.

It should be left to the jury to determine whether she acted with that degree of prudence which might reasonably be expected, under the circumstances, of a child of her years. This measure of care is all that the law exacts. Stone v. Dry Dock E. B. & B. R. Co. *supra;* Thurber v. Harlem Bridge M. & F. R. Co. 60 N. Y. 335.

On the other hand, it was said in Cosgrove v. Ogden, 49 N. Y. 255, that a lad six years of age could not be assumed to be incapable of protecting himself from danger in streets or roads, and in another case that a boy eleven years of age was competent to be trusted in the streets of a city. Stone v. Dry Dock E. B. & B. R. Co. *supra;* McMahon v. New York, 33 N. Y. 642.

A child seven years of age may be *sui juris* so as to be chargeable with contributory negligence; and it is incumbent upon a plaintiff seeking to recover damages for its death to prove that it is not so. Stone v. Dry Dock, E. B. & B. R. Co. 46 Hun, 184.

If the child was negligent and *non sui juris*, and the parents free from blame, the defendant, who was a wrong-doer, would not be absolved from liability by such negligence; and the question whether the child was or was not *sui juris* was a question of fact. Mangam v. Brooklyn R. Co. 38 N. Y. 455; Ihl v. Forty-Second St. & G. S. F. R. Co. 47 N. Y. 317; McGuire v. Spence, 91 N. Y. 303; Mullaney v. Spence, 15 Abb. Pr. N. S. 319; Prendegast v. New York Cent. & H. R. R. Co. 58 N. Y. 652; Casey v. New York Cent. & H. R. R. Co. 6 Abb. N. C. 104; Washington & G. R. Co. v. Gladmon, 82 U. S. 15 Wall. 401, 21 L. ed. 114; Cosgrove v. Ogden, 49 N. Y. 255.

It is a question for the jury whether a boy fourteen years old, killed while uncoupling cars, from his age and experience had discretion sufficient to recognize his danger and guard against it. If he had, being a trespasser, the company was not bound to anticipate and provide against peril to him. Kentucky Cent. R. Co. v. Gastineau, 83 Ky. 119.

Whether a child has sufficient discretion to understand the danger of his situation is for the jury, under proper instructions as to the degree of care exacted of a child of tender years, under the circumstances. Kunz v. Troy, 6 Cent. Rep. 493, 104 N. Y. 344.

A child of such tender years as to be incapable of exercising any judgment or discretion is not chargeable with contributory negligence; but where he has attained such an age as to be capable of exercising judgment and discretion, he is held to such a degree of care as might be reasonably expected of one of his age and mental capacity. Twist v. Winona & St. P. R. Co. 39 Minn. 164, citing Wendell v. New York Cent. & H. R. R. Co. 91 N. Y. 420; Messenger v. Dennie, 1 New Eng. Rep. 759, 141 Mass. 335; Chicago, R. I. & P. R. Co. v. Eininger, 114 Ill. 79; Brown v. European & N. A. R. Co. 58 Me. 384; Achtenhagen v. Watertown, 18 Wis. 331; Masser v. Chicago, R. I. & P. R. Co. 68 Iowa, 602; Murray v. Richmond & D. R. Co. 93 N. C. 92; Ludwig v. Pillsbury, 35 Minn. 256; Washington & G. R. Co. v. Gladmon, 82 U. S. 15 Wall. 401, 21 L. ed. 114; Gillespie v. McGowan, 100 Pa. 144. See *notes* to Chicago City R. Co. v. Robinson (Ill.) 4 L. R. A. 126; Winter v. Kansas City Cable R. Co. (Mo.) 6 L. R. A. 536.

plainly dangerous that it debars the plaintiff from recovery.

Messenger v. *Dennie*, 137 Mass. 197, 1 New Eng. Rep. 759, 141 Mass. 335.

The law assumes that a child of the intestate's years will be under the present, immediate attention of its parents.

Holly v. *Boston Gas-Light Co.* 8 Gray, 123–132; *Callahan* v. *Bean*, 9 Allen, 401.

Devens, J. (The opinion in this case was prepared by **Devens, J.**, and was read and approved after his death):

The plaintiff's intestate was a child of tender years and the question presented is whether its parents or those having custody of it were in the exercise of due care. If there was a want of due care on their part it is to be imputed to the child and will prevent a recovery. There was evidence tending to show the following facts: The intestate was a boy between four and a half and five years old, named Robert Healy. Two days before the accident his mother, Mrs. Healy, had been confined and on the day of the accident she kept him in bed with her until about 11 o'clock in the forenoon. Then he was permitted to get up and was partially dressed by a neighbor who came in from time to time to look after the mother and him. In order to keep him from going out of doors, his shoes and stockings were not put on but were left under the sofa where he had put them the night before, and he was permitted to play about the room with nothing on but his trousers. While he was playing about the room his mother fell asleep having in the bed with her the infant and another child about three years old, and did not wake until after the accident. About twelve o'clock and while the mother was asleep the boy went into the house of a Mrs. Fell, a neighbor, whose door was near that of Mrs. Healy, without his shoes and stockings on, and a little girl, a child of Mrs. Fell, went in and got his shoes and stockings and he put them on. Mrs. Fell saw him playing about with her children but as she was busy getting dinner for her family she did not know when he went out, and from the time he was in Mrs. Fell's house till the time of the accident there was no evidence where he was. Then he slid with other boys down out of a lot on the opposite side of the street from Mrs. Fell's house into the street and was run over by the defendant's cart and killed. The father was a laboring man working in one of the mills in Holyoke and was accustomed to go to his work early in the morning taking his dinner with him and returning after the mill closed in the afternoon. He was a poor man and not able to employ any attendance for his wife, who had no assistance but that of neighbors, and Mrs. Fell was attending to her as well as she could running in and out.

The burden of proof was on the plaintiff to show that no negligence in the care of the child existed which was contributory to the accident. The care which should have been exercised on the child was what was reasonable having regard to all the circumstances of the case; whether such care had been exercised was a question of fact for the jury, and not of law for the court. Although the mother permitted the child to be partially dressed, the jury might find that she was justified in believing that he understood that he was not to go out, and could reasonably have relied on his not going out or taking his shoes for that purpose, and on the fact that if he was not placed directly under the care of Mrs. Fell, her presence from time to time as she went in and out with her own supervision would be sufficient protection. She fell asleep, indeed, but we cannot say as matter of law that a jury would not be authorized to find that she might not reasonably have expected, notwithstanding her exhausted condition, to remain awake or sufficiently so to have watched the child. *Marsland* v. *Murray*, 148 Mass. 91; *Philadelphia & R. R. Co.* v. *Long*, 75 Pa. 257, 265; *Hoppe* v. *Chicago, M. & St. P. R. Co.* 61 Wis. 357, 365, 366; *Walters* v. *Chicago, R. I. & P. R. Co.* 41 Iowa, 71, 78, 79; *Gibbons* v. *Williams*, 135 Mass. 333.

In regard to the absence of the father, also, the jury might find that it was justified by the necessities of his family and the reliance which he was entitled to place upon the management and attention of his wife, assisted by her neighbors.

For these reasons a majority of the court think the *exceptions must be sustained.*

Alexander ROBERTS

v.

Annie T. FRENCH.

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

A statement made by an auctioneer at a sale of real estate in the presence of the owner's agent, that he had measured the lines and found them of a certain length, and that the tract to be sold contained a certain amount of land, will, if false, entitle the purchaser, who made his bid in reliance on the statement, to recover back the money paid by him, although the sale was made on the land, with which the purchaser was familiar and the boundaries of which were visible and pointed out.

(January 10, 1891.)

REPORT from the Superior Court for Essex County for the opinion of the Supreme Judicial Court of an action brought to recover back money paid as part of the purchase price for certain real estate in which, under the rulings of the court, a verdict had been returned for defendant. *New trial granted.*

The facts sufficiently appear in the opinion.

Messrs. **Ira A. Abbott** and **Francis H. Pearl**, for plaintiff:

Public policy requires that parties selling property at auction shall be held to a strict accountability for their conduct of the sale.

Veeder v. *Fonda*, 3 Paige, 94, 3 N. Y. Ch. L. ed. 71; *Cordingley* v. *Cheesebrough*, 3 Giff. 496; *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603.

Plaintiff had the right to rely on the representations and the declarations of the auctioneer.

Stevens v. *Giddings*, 45 Conn. 507, 513; *Flight* v. *Booth*, 8 Bing. N. C. 370.

Wherever there is any material mistake, and no provision respecting it, the vendor cannot offer a *pro tanto* allowance and enforce the sale against the purchaser.

1 Parsons, Cont. 415.

In the sale of real property at auction care should be taken that the description of it be accurate, or the purchaser will not be held to a performance of the contract.

2 Kent, Com. 11th ed. 537.

Messrs. **Jones, Jones & Pingree,** for defendant:

To maintain the action the plaintiff introduced evidence that he was induced to enter into the agreement and pay said money by false representations of the defendant as to the area of the parcel, and the length of its boundary lines, although he was familiar with the premises, which were inclosed by fences, and understood that the defendant was selling and he was buying only the land so inclosed. Plaintiff cannot recover on these facts.

Gordon v. *Parmelee*, 2 Allen, 212; *Silver* v. *Frazier*, 3 Allen, 382; *Mooney* v. *Miller*, 102 Mass. 217; *Parker* v. *Moulton*, 114 Mass. 99; *Dickinson* v. *Lee*, 106 Mass. 557.

A grantee named in a deed which overstates the area, but truly sets forth the boundaries, cannot maintain an action for the deficiency.

Powell v. *Clark*, 5 Mass. 355; *Noble* v. *Googins*, 99 Mass. 231.

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

This is an action to recover $200 paid by the plaintiff as part payment of the price of a lot of land for which he made the highest bid at auction. The advertisements described the lot as containing about 11,000 square feet and as extending 130 feet on the east. The plaintiff's evidence tended to show that at the auction one of the firm of auctioneers read the advertisement and said that the defendant's husband and himself had measured the land (as they had done), and that its dimensions were as stated in the bill, except as to the easterly line, which was only 107 feet long. The other auctioneer then proceeded to sell the property and said that the easterly line was 107 feet long; that the lot contained about 11,000 square feet and that a warranty deed would be given. The auction took place on the premises; the plaintiff was familiar with them and he understood that he was buying only the land inclosed by the fences. But according to his evidence he believed the statements of the auctioneers as to the length of the lines and the area, and made his bid relying upon them, and, we may fairly say by inference, being more or less induced by them to purchase. The eastern line in fact was only ninety-five and a half feet long, the other lines varied somewhat from the length given at the sale, and the contents were 7,760 feet, being 565 feet less than what they would have been if the length of the lines stated at the sale had been correct. The defendant has not offered a deed describing the premises as they were described by the auctioneer, but only a deed describing them correctly. The court below ruled that the action could not be maintained, and the plaintiff excepted.

On the foregoing evidence plainly the jury might have found that the auctioneer made a misstatement of fact as to the length of the eastern line, and also represented that he made the statement on the faith of his own senses, because, as he said, he and the defendant's husband (who, by the way, was also her agent and was present and assenting to what the auctioneer said), had measured the line. In other words, the statement of the length was a statement as of the party's own knowledge, of the kind which our decisions pronounce fraudulent. *Chatham Furnace Co.* v. *Moffatt*, 147 Mass. 403.

Notwithstanding the plaintiff's knowledge how the land looked, the jury also might have found that the statement in fact deceived him and induced him to buy, and that it materially varied from the truth. It is true that the agreement was to buy a lot with known boundaries, and very likely, in the absence of fraud, the rule would apply that monuments govern distances in such agreements and in deeds with warranty. *Noble* v. *Googins*, 99 Mass. 231; *Powell* v. *Clark*, 5 Mass. 355; Rawle, Cov. for Title, 5th ed. § 297. But that is only a rule of construction; it does not mean that measurements are not material or that a man who knows the monuments cannot be deceived about them. See *Lewis* v. *Jewell*, 151 Mass. 345.

Of course it was not necessary that the plaintiff's belief as to the length should have furnished his only motive for buying, if it furnished one motive (*Safford* v. *Grout*, 120 Mass. 20, 25; *Windram* v. *French*, 151 Mass. 547, 8 L. R. A. 750), and if the defendant's agents knew that the representations would affect action on the part of bidders, or if under the known circumstances it manifestly was likely to do so.

The ruling of the court below probably assumed all that we have said, but was based on the cases which hold fraudulent representations as to the contents of a piece of land, the boundaries of which are pointed out to the buyer, not to be actionable. *Gordon* v. *Parmelee*, 2 Allen, 212; *Mooney* v. *Miller*, 102 Mass. 217.

We do not mean to question these decisions in the slightest degree, but it is obvious that there must be a limit beyond which fraudulent representations cannot be made with impunity, and upon the whole we are of opinion that if the plaintiff's evidence is believed the representations made to him under the circumstances in which they were made went beyond that limit. When a man "conveys the notion of actual admeasurement" (*Hill* v. *Buckley*, 17 Ves. Jr. 394, 401, cited in 99 Mass. 233), still more when he says that he has measured a line himself and has found it so long, his statement has a stronger tendency to induce the buyer to refrain from further inquiry (*Barker* v. *Moulton*, 114 Mass. 99, 100), than a statement of the contents of a lot without giving grounds for the estimate. If false it is a grosser falsehood. It purports on its face to exclude the suggestion that it is a mere estimate which the other leaves open. See *Cacot* v. *Christie*, 42 Vt. 121, 126; *Deming* v. *Darling*, 148 Mass. 504, 505, 2 L. R. A. 743. If it is made at an auction, where it is out of the question for a bidder to go and verify it before making his bid, it seems to us reasonable to say that the purchaser has a right to rely upon it, as was held in a very similar case in Connecticut, *Stevens* v. *Giddings*, 45 Conn. 507. See *Lewis* v. *Jewell*, 151 Mass. 345: *Lynch* v. *Mercantile Trust Co.* 18 Fed. Rep. 486, 489; *Porter* v. *Fletcher*, 25 Minn. 493.

New trial granted.

NEBRASKA SUPREME COURT.

Lucien COY *et al.*, *Plffs in Err.*,
v.
Richard D. JONES *et al.*

MARATHON COUNTY BANK, *Plff. in Err.*,
v.
Richard D. JONES *et al.*

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

***Section 136, chap. 16, Comp. Stat., which makes stockholders in a corporation liable for debts contracted** by the corporation while its officers are in default in publishing an annual notice stating "the amount of all of its existing debts," is quasi penal only, but is not a penalty, the evident purpose being to secure the rights of creditors; and an action to recover such debts is not barred by the Statute of Limitations in one year.

(November 25, 1890.)

WRITS of error to the District Court for Webster County to review judgments in favor of defendants in actions brought to recover from the stockholders of an insolvent corporation debts owed by the corporation. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. **Kaley Brothers,** for plaintiffs in error:

Stockholders may be subjected to "a liability created by statute, other than a forfeiture or penalty," which may serve as a pecuniary punishment and as a preventive against abuses, and at the same time operate as a security to individuals transacting business with their corporation.

Morawetz, Priv. Corp. 2d ed. § 909; *Goodridge* v. *Rogers*, 22 Pick. 495; *Adams* v. *Palmer*, 6 Gray, 338; *Neal* v. *Moultrie*, 12 Ga. 104.

A statute providing a penalty is one that is enacted for and operates purely as a punishment, a pecuniary fine or mulct, which is paid into the public treasury and belongs to the public and is levied for the protection of the public at large; whereas the one which the petition in this case is predicated upon is a statute which imposes no obligation upon stockholders except to pay the debts contracted for their own advantage to which they assent when they become stockholders, and is simply intended to operate as a security to the patrons and creditors of corporations in transacting business with them.

1 Potter, Priv. Corp. 1st ed. §§ 299, 302; 1 Boone, Priv. Corp. § 126, and cases cited; 2 Morawetz, Priv. Corp. 2d ed. § 909; *Brown* v. *Hitchcock*, 36 Ohio St. 678; *Corning* v. *McCullough*, 1 N. Y. 47; *Neal* v. *Moultrie*, *supra*.

Parties contract with the corporation and extend it credit upon the faith of this individual liability held out as their security, and thereby accept the offer extended them by the stockholders, which constitutes it a binding contract.

Morawetz, Priv. Corp. 2d ed. § 870, and numerous authorities cited; *Trippe* v. *Huncheon*, 82 Ind. 314; *Marshall* v. *Harris*, 55 Iowa, 182; *Young* v. *Rosenbaum*, 39 Cal. 654.

Messrs. **Case & McNeny** for defendants in error.

Per Curiam:

The plaintiffs in error brought their action in the court below, alleging that on February 4, 1884, the Nebraska Lumber Company, of Red Cloud, in said county, became a duly authorized corporation under the laws of this State, of which corporation the defendants were stockholders and members, and were responsible as such, under § 136, chap. 16, Comp. Stat.; that on April 10, 1888, the plaintiffs recovered judgment in the court below against the said corporation, upon certain promissory notes given for goods sold and delivered to it for $1,975.84, and costs, for the collection of which final process was issued and served, and returned *nulla bona;* and that said corporation was thenceforward and hitherto insolvent. The plaintiffs further allege that, for more than one year next prior to the time of contracting said indebtedness, the corporation had not given notice of the amount of its existing debts in a newspaper printed in said county or elsewhere, as required by the Statute, of its incorporation, by reason of which default the defendants, as stockholders, became personally liable for the debts, and for said judgment recovered against the Nebraska Lumber Company. To this complaint the defendants demurred as insufficient to constitute a cause of action, which defense the court below held to be sufficient, and gave judgment thereon.

From the record, it appears that this action was brought in the court below on September 28, 1888, to secure the rights of the plaintiffs, as creditors, against the defendants, as stockholders, of a defaulting and insolvent corporation. The defendant's counsel, in their brief, maintain that this is a penal action merely, and, under section 13 of the Civil Code, that an action for the penalty or forfeiture can only be commenced within one year after the cause of action shall have accrued, citing twenty precedents in support of their view, and in endeavoring to bring the case within their premises. It is only necessary to state that this question has heretofore been considered by the court; that it was fully considered on a re-argument to the court in the case of *Howell* v. *Roberts* (Neb.) (at the last term), in which it was held that § 136, chap. 16, Comp. Stat., under which this action was brought, and "which makes stock holders in a corporation liable for debts con tracted by the corporation while its officers are in default in publishing an annual notice stating the amount of all the existing debts of the corporation, is quasi penal, but is not a penalty, the evident purpose being to secure the rights of creditors; and an action to secure the rights of creditors, and to recover such debts, is not barred by the Statute of Limitations in one year." *White* v. *Blum*, 4 Neb. 563; *Smith* v *Steele*, 8 Neb. 115; *Garrison* v. *Howe*, 17 N. Y 458; *Doolittle* v. *Marsh*, 11 Neb. 243.

The judgment of the District Court is reversed and the cause remanded for further proceedings

*Head note by the COURT.

See also 24 L. R. A. 333.

The Marathon County Bank, as plaintiff in error, alleges that on April 13, 1888, it recovered a judgment against the same corporation in the District Court of Webster County, on a promissory note of Kriegsman & Co. for $1,542.66, with interest at 10 per cent per annum, payable to said corporation on January 8, 1886, dated November 9, 1885, and indorsed by the defendant R. D. Jones, as president of said corporation, whereby the corporation was liable to the same for the sum of $1,920.50, and costs, for the collection or which final process was issued and served and returned *nulla bona;* and that said corporation was thenceforward and hitherto insolvent. Under the same conditions and terms the court below gave judgment for the defendants and against the plaintiff in error; and, upon the same conditions and terms of the preceding case, *the judgment is reversed, and the cause remanded for further proceedings.*

MICHIGAN SUPREME COURT.

Helen EDWARDS, *Appt.*,
v.
Albert CLARK *et al.*

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

1. **An outstanding lease is a breach of a covenant** in a deed of the property, against "all incumbrances whatever," where no exception of such lease is stipulated for in the deed; it cannot be shown by parol that the lease was in fact regarded by the parties as no incumbrance.
2. **The rent which a purchaser of property might have collected** from a tenant in possession, under the terms of the lease, cannot be deducted from the amount he is entitled to recover from the vendor as damages for breach of the covenants contained in the deed by reason of the outstanding lease, where he has never recognized or acknowledged the tenancy nor collected any rent thereunder.

(November 14, 1890.)

ERROR to the Circuit Court for Ingham County to review a judgment in favor of defendant in an action brought to recover damages for an alleged breach of the covenants in a deed conveying certain real estate. *Reversed.*

The facts are fully stated in the opinion.

Mr. **Russell C. Ostrander,** for appellant:

An outstanding leasehold interest is a breach of the covenant against incumbrances.

Jarvis v. *Buttrick,* 1 Met. 480; *Mills* v. *Catlin,* 22 Vt. 98; *Grice* v. *Scarborough,* 2 Speer, L. 649; *Cross* v. *Noble,* 67 Pa. 74; *Porter* v. *Bradley,* 7 R. I. 538; *Christy* v. *Ogle,* 33 Ill. 295; *Batchelder* v. *Sturgis,* 3 Cush. 201; *Weld* v. *Traip,* 14 Gray, 330; *Pease* v. *Christ,* 31 N. Y. 141.

Mr. **H. B. Carpenter,** for appellees:

Plaintiff, by accepting a deed of the reversion, acquired all the rights as landlord that defendants had, and assumed all the responsibilities.

Vos v. *Dykema,* 26 Mich. 399; *Perrin* v. *Lepper,* 34 Mich. 292; *Hansen* v. *Prince,* 45 Mich. 519; *Haldane* v. *Sweet,* 55 Mich. 198; *Lindley* v. *Dakin,* 13 Ind. 388; *Page* v. *Lashley,* 15 Ind. 153; *Kellum* v. *Berkshire L. Ins. Co.* 101 Ind. 455.

Where land is conveyed in the possession of another, and the rent passes to the grantee as an incident of the reversion, it would seem impossible to call such a lease an incumbrance.

Rawle, Cov. p. 78; *Harlow* v. *Thomas,* 15 Pick. 66; *Willets* v. *Burgess,* 34 Ill. 494.

Plaintiff knew of Bellinger's possession of the land. The effect of this knowledge is to attach to the plaintiff the responsibility of having accepted this deed with all the legal consequences.

Grice v. *Scarborough,* 2 Speer, L. 649; *Porter* v. *Bradley,* 7 R. I. 538; *Cross* v. *Noble,* 67 Pa. 74; *Page* v. *Lashley,* 15 Ind. 152.

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

The plaintiff traded a house and lot, in the City of Lansing, heavily mortgaged, for a farm in Wheatland, also largely incumbered, and then in process of foreclosure. The deed of defendants conveying the farm was, in form, a usual warranty deed. The covenant against incumbrances is full and without limitation "against all incumbrances whatever;" but, in the covenant to warrant and defend against the lawful claims, the mortgage then being foreclosed was mentioned and excepted. At the time the trade was made, one Bellinger was in possession of the farm under a verbal agreement with defendants. The plaintiff claimed that when she received the warranty deed of the defendants, Albert Clark told her that Bellinger had no right to stay upon the premises any longer than until such time as defendants should make a sale of the farm; that the agreement between him and defendants was that his lease should terminate as soon as a sale of the premises was made. Defendants claimed that they informed plaintiff that Bellinger was obliged to leave under the terms of his lease, as soon as a sale was made, and his interest in the crops was purchased. If such interest was not purchased, then he would be entitled to remain and harvest them. Upon this conflict of claims, the jury found with the plaintiff. The exchange of the property took place May 9, 1889. Notice was given Bellinger May 10, 1889, and possession demanded, but he refused to leave the premises, and remained upon them until he harvested his crops in the fall. In proceedings taken by plaintiff to recover possession from Bellinger before a circuit court commissioner, the decision was against plaintiff, June 22, 1889. June 24, 1889, plaintiff served a notice upon defendants of the result of such proceedings, and in such notice informed them that she claimed immediate possession of the premises under her deed, and that, unless it was secured to her, she would bring action against them for breach of the covenants of such deed; and authorizing them to use her name in any

proceeding they might choose to regain possession. Defendants failing to take any steps to secure the possession to her, she, on the 7th day of January, 1890, commenced this suit for damages for breach of covenant against incumbrances. Upon the trial, plaintiff showed the rental value of the premises to be $180 per year. Under Bellinger's arrangement with the defendants, he delivered one third of the crops to them. Plaintiff made no effort to obtain this one third after she purchased the premises, but treated Bellinger as upon the land without any right. The circuit judge instructed the jury that, by the warranty deed, defendants transferred to plaintiff the right which they had to collect and receive one third of the crops grown upon the place by Bellinger, and that, in determining the damages, they must deduct from the rental value for the time that Bellinger kept plaintiff out the amount of the value of one third of the crops harvested by him during such time.

This instruction is assigned as error. The position of the defendants in support of the judgment is that the plaintiff, by accepting the deed with Bellinger upon the premises, acquired all the rights as landlord that defendants had, and assumed all the responsibility; that where land is conveyed, in the possession of another, and the rent passes to the grantee, as an incident of the reversion, it would seem impossible to call such a lease an incumbrance. Counsel cite, to sustain this position, Rawle, Cov. § 78; *Lindley* v. *Dakin*, 13 Ind. 388; *Page* v. *Lashley*, 15 Ind. 252; *Kellum* v. *Berkshire Ins. Co.* 101 Ind. 455; *Vos* v. *Dykema*, 26 Mich. 399; *Perrin* v. *Lepper*, 34 Mich. 292; *Hansen* v. *Prince*, 45 Mich. 519; *Haldane* v. *Sweet*, 55 Mich. 196.

The cases cited from our own court do not touch the point in issue here. They simply establish the doctrine that the deed passes to the purchaser the right to collect the rent from the tenant, and that such tenant cannot prevent such collection by refusing to attorn to him. In Indiana, parol proof is held admissible to establish that an existing incumbrance was considered by the parties not to be embraced within the covenants against incumbrances. But the extent to which the cases cited in that State go, is that, where a purchaser takes such covenant with the knowledge of the tenant's possession and title, the lease will not be considered a breach of the covenant; and where no special contract is made the occupant becomes tenant to the purchaser. *Lindley* v. *Dakin*, 13 Ind. 388; *Page* v. *Lashley*, 15 Ind. 152.

In this case, if parol proof was admissible to vary or rebut the covenant in the deed, still the circuit judge was wrong in his instructions to the jury, because the plaintiff, under his theory, was informed that Bellinger had no right to occupy the premises for a moment after notice of the sale, and she never recognized any right in Bellinger to remain on the premises, and never accepted him as her tenant. But in this State no parol proof is admissible in an action upon covenants to show that an existing incumbrance was to be regarded in fact as no incumbrance. "It is as usual, and certainly as competent, to covenant against known as unknown incumbrances, or defects of title;" and, with a covenant of this kind, the purchaser is not called upon for the exercise of any diligence. *Smith* v. *Lloyd*, 29 Mich. 382, 388. And it is said that the fact of the purchaser having notice of an incumbrance is the very reason for his taking a covenant within whose scope it is included. Rawle, Cov. 5th ed. pp. 112–115, and cases cited in *notes*.

Of course, if it could be shown by parol that, after the deed was delivered the purchaser accepted the tenancy and received the rent from the tenant, the amount of such rent would be a proper deduction from the damages found upon the breach of the covenant; but it is not admissible to hold such purchaser liable for rent that he did not collect under a tenancy, or holding that he never recognized or acknowledged.

The judgment is reversed, with costs, and a new trial granted.

Cahill, J., did not sit; the other Justices concurred.

Sarah McNUTT
v.
Roscoe D. DIX, *Appt.*

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

1. **An agent will not be permitted to act for himself and his principal** in the same transaction so as to buy of himself, as agent, the property of his principal.
2. **Where the administrator of an estate advises one of the heirs to sell his share** in an undivided tract of land belonging thereto to another of the heirs for a certain price, and offers to collect and remit the amount in case a deed is executed and returned to him, he cannot, upon receiving a deed with a blank space for the grantee's name, fill it with his own name so as to get a title against the grantor, although the expected purchaser refuses to take the deed, and the administrator pays the full amount of the price agreed upon in good faith. If he takes the title and at a subsequent sale realizes more than he paid for the land his grantor may recover the excess in an action for money had and received.

(November 21, 1890.)

ERROR to the Circuit Court for Berrien County, to review a judgment in favor of plaintiff in an action brought to recover money received by defendant from the sale of land alleged to belong to plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Spafford Tryon** and **George S. Clapp**, for appellant:

That Mr. Dix was an administrator does not make him a trustee. He did not hold property and was not dealing with those he had not a right to deal with.

People v. *Board of Public Works*, 41 Mich. 725.

If the sale was a fraud to her prejudice, Mrs. McNutt's utmost right was that she had an election whether to avoid it or confirm it. She elects to insist that the title to her interest passed by her deed and she must stand by her election.

Merrill v. *Wilson*, 66 Mich. 232; *Jewett* v. *Petit*, 4 Mich. 512; *Detroit* v. *Michigan Paving Co.* 38 Mich. 361.

A plaintiff cannot sue in assumpsit for a

See also 20 L. R. A. 207; 21 L. R. A. 54; 47 L. R. A. 792.

fraud, keep what he has received and sue for the remainder. There was an express contract; none can be implied.

Galloway v. *Holmes*, 1 Doug. (Mich.) 330; *Wilson* v. *Wagar*, 26 Mich. 452; *Hunt* v. *Sackett*, 31 Mich. 18; *Keystone L. & S. Mfg. Co.* v. *Dale*, 43 Mich. 370.

Mr. **Marshall L. Howell,** with *Mr.* **Theodore G. Beaver,** for appellee:

Dix had no right to take the title to the lands in his wife's name.

Ingerson v. *Starkweather*, Walk. Ch. 346; *Beaubien* v *Poupard*, Harr. Ch. (Mich.) 206; *Walton* v. *Torrey*, Id. 259; *Moore* v. *Mandlebaum*, 8 Mich. 433; *Clute* v. *Barron*, 2 Mich. 192; *Ames* v. *Port Huron L. D. & B. Co.* 11 Mich. 139; *People* v. *Overyssel Twp. Board*, 11 Mich. 222; *Flint & P. M. R. Co.* v. *Dewey*, 14 Mich. 477; *Pierce* v. *Holzer*, 65 Mich. 263; *Ward* v. *Tinkham*, 65 Mich. 696; *Loomis* v. *Armstrong*, 49 Mich. 521.

And the liability may be enforced in assumpsit for money had and received.

Catlin v. *Birchard*, 13 Mich. 110; *Spencer* v. *Towles*, 18 Mich. 9; *Freehling* v. *Ketchum*, 39 Mich. 299; *Barnard* v. *Colwell*, 39 Mich. 215; *Schmemann* v. *Rothfuss*, 46 Mich. 453.

His denial of liability excuses demand.

O'Brien v. *Ohio Ins. Co.* 52 Mich. 131.

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

The plaintiff, as the daughter and one of the heirs-at-law of Margaret Hastings, deceased, owned an undivided one-fifth interest in eighty-six acres of land in Berrien County, in this State. She resided at Fredericktown, Ohio. Her brothers and sisters resided in this State. One of her brothers, John Hastings, was proposing to buy the claims of the others interested in the estate, and, with that purpose in view, had bought one share, being one fifth, for $300, and had contracted for and subsequently concluded a purchase of another share at $450. He had also written to the plaintiff in regard to purchasing her share. The defendant was the administrator of Margaret Hastings' estate. There were no debts to be paid, and the only thing to be done in the settlement of the estate was the division of this land and some small amount of personal property between the heirs. On the 24th of February, 1888, the plaintiff and her husband wrote the defendant the following letter:

Fredericktown, O., Feb. 24, 1888.

Roscoe D. Dix,—

Dear Sir: As you are appointed administrator of estate of Margaret Hastings, deceased, and we being heirs-at-law, we would like to be informed regarding said estate. What are the prospects of selling the farm? We have understood that John Hastings has bought out one of the heirs, and wants a controlling interest in lieu of forcing the remaining heirs to a sale. Can it be done according to the laws of your State? And we have no recourse but submit to a sacrifice. Please oblige the undersigned. Benjamin McNutt and Sarah McNutt. . .

Since writing the above, I have thought of another item. If John Hastings has his own individual interest set off, can it be done clear of the mortgage now on the farm? Benjamin McNutt and Sarah McNutt.

To this letter defendant made reply as follows:

Law Office of Dix & Wilkinson. Abstracts of Title, Real Estate, Loans, Collections.

Berrien Springs, Mich., Feb. 27, '88.

Benj. McNutt, Fredericktown, O.,—

Dear Sir: Your favor 24th at hand. In reply to your several inquiries, will say, first, the place cannot be sold for six months. The mortgage on the place now amounts to about $1,400, and draws interest at 8 per cent. The expense of administration and sale of place will amount to about $260; funeral expenses, $40; interest on $1,400 for six months, 8 per cent., $56; total, $1,756; taxes 1887, $44,—making in all $1,800. The place will sell in the fall for about $4,000, not to exceed $4,200. Deduct $1,800 from $4,200, leaves $2,400. Divide by 5, makes each share $480. Take $1,800 from $4,000, leaves $2,200. Each one-fifth share is worth $440. John has bought one-fifth interest at $300. He will have another share to-morrow at $450,—Mrs. Shearer's,—and I have no doubt he will give your wife the same, and close it all out. I advised Mrs. Shearer to sell at $450. It closes it all up at once, and otherwise it will run until fall, and then perhaps no one to buy even at $4,000, and in case did not sell would be to the expense of advertising again, and the interest of the mortgage going on all the time, and increasing the claim thereof. I would also advise you to sell at $450. I send deed herewith, and in case you conclude to sell please have Mrs. McNutt sign same, acknowledge, and then send to me, and I will remit you money by draft at once. After signing deed and acknowledging before a justice of the peace or notary public, then send it to your county clerk, and get his certificate attached similar to one I inclose, and return same, or send to me. . . .

Roscoe D. Dix.

Upon the receipt of this letter, plaintiff executed the deed, and returned it to the defendant on March 3, 1888. In this deed the name of the grantee was left in blank. On receipt of it, defendant claims that he saw John Hastings at his (defendant's) office, told him that he had received the deed from Mrs. McNutt, and asked him if he would take it and pay the $450. He says this conversation with John Hastings was on the 7th, 8th or 9th of March, and he thinks that on each of those days he had conversations with him about the deed, and in which he advised him to accept the deed and pay the money, but that on each occasion John said he was unable to do so. On the 7th of March defendant remitted to plaintiff $450, which was the consideration named in the deed, and on the 9th of March he wrote his wife's name in the deed as grantee, and put the same on record. It is conceded that this was done without any knowledge on the part of defendant's wife, and that she was not in fact the purchaser of the land, but held it for defendant. The defendant had in the mean time purchased the interest of one of the other heirs, so that at this time he had one share. The plaintiff's share stood in the name of defendant's wife, and John Hastings had three shares. On the 2d of April following, John Hastings purchased of defendant the two shares held by himself and his wife, for

$600 each. This suit is brought to recover the $150 received by defendant from John Hastings over and above the $450 already remitted, upon the theory that defendant, in making such sale, was acting as the agent of the plaintiff, and could not therefore lawfully purchase the same himself in his own name, or in that of his wife; that, in the subsequent sale of the land to John Hastings for $500, he was still acting as the agent of the plaintiff; and that the money received on such sale belongs to the plaintiff. The defendant claimed that the letter of February 27 was written in good faith, and correctly stated all of the facts within his knowledge at that time concerning the situation of the estate, and the value of the property; that he fully expected that John Hastings would take the plaintiff's interest, and pay for the same as stated; that, when the deed was received by him, he gave John Hastings every opportunity to take the land if he desired it, but that, having refused to do so, he felt himself at liberty to take the land himself at the same price; and that, as the plaintiff received all the money she expected to receive for her interest, she had no right to complain.

There is some force in the position taken by defendant, under the particular circumstances of this case; but there are certain legal principles which stand in the way of his being permitted to keep the money received by him on the sale of this property, if he had undertaken to act for the plaintiff as her agent in making this sale. The law is very strict in scrutinizing the conduct of those who are acting in a fiduciary relation.

In *Moore* v. *Mandlebaum*, 8 Mich. 441, this court, in speaking of one who had assumed to act as the agent of another, said: "In that confidential relation he was bound to the utmost degree of good faith, and had no right, while professing to act in that capacity, to make himself the agent of other parties for the purchase of the land he was authorized by the plaintiff to sell, nor to take any advantage of the confidence his position inspired to obtain the title himself. Nor could he make a valid purchase from his principal while that confidential relation existed without fully and fairly disclosing to his principal all the propositions he had received, and all the facts and circumstances within his knowledge, if any, calculated to enable his principal to judge of the propriety of such a sale."

In *People* v. *Overyssel Twp. Board*, 11 Mich. 225, it was said: "So careful is the law in guarding against the abuse of fiduciary relations that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal, or the like."

Applying these principles to the case at bar, is it not clear that by his letter of February 27 the defendant undertook to act as the agent of the plaintiff in negotiating the sale of her interest in the property to her brother John? In receiving the deed sent to him with the name of the grantee left blank, the defendant would have no authority to insert the name of the grantee, except upon the theory that he was the plaintiff's agent, and had authority from her for that purpose. Under such circumstances, the law says that defendant had no right to insert his own name, or, what would be the same thing in this case, that of his wife, as purchaser of this land. Nor does it avail the defendant that in this particular case he was acting in good faith, and in the honest belief that he had a right to do what he did do. The wholesome rule of law is one that applies to all transactions of this character, and courts will not stop to inquire as to the motive or intent of parties in particular cases, where it appears that the rule has been violated. Under the circumstances of this case, the money received by defendant from John Hastings, less the amount already paid by him to plaintiff, must be held to have been received for the plaintiff's use, and was rightly recovered under the declaration for money had and received.

The circuit judge instructed the jury in accordance with this view, and *the judgment must be affirmed, with costs.*

The other Justices concurred.

NORTH CAROLINA SUPREME COURT.

Durant WOODWARD *et al.*
v.
David BLUE *et al.*, *Appts.*

(.....N. C.....)

1. The presumption of the legitimacy of a child born of a woman to whom her husband had opportunity of access is not conclusive where he and she were living separate at the time of the birth and for several years prior thereto.

2. Evidence of the manner in which a child is treated by a man who is not the mother's husband is admissible on the question of legitimacy, where husband and wife were living separate at the time, and for several years before the child was born.

(December 22, 1890.)

NOTE.—*Presumption of legitimacy of child born in wedlock.*

Where intercourse between the husband and wife at the time of conception was probable the presumption is in favor of legitimacy. Bowles v. Bingham, 3 Munf. 599.

The maxim, *pater est quem nuptiæ demonstrant* is founded upon very strong reasons of policy as well as of law. Routledge v. Carruthers, Nich. Adult. Bast. 161.

The legitimacy of a child born before the commencement of a divorce suit must be presumed, until the contrary is shown; and sexual intercourse will be presumed, where personal access is not disproved. Where sexual intercourse is either proved or presumed, the husband must be deemed the father of the child. Cross v. Cross, 3 Paige, 139, 3 N. Y. Ch. L. ed. 89.

For a full discussion of this subject, including all the current cases, see *note* to Goss v. Froman (Ky.) 8 L. R. A. 102.

See also 25 L. R. A. 477; 41 L. R. A. 760.

APPEAL by defendants from a judgment of the Superior Court for Burke County in favor of plaintiffs in an action brought to recover possession of certain real estate. *Reversed.*

The land in controversy had been the property of one Underzine Pelot, deceased. Both parties claimed under him as next of kin or heirs-at-law. Plaintiff Emily Woodward, the wife of Durant Woodward, claimed to be the daughter of said Pelot by one Mourning Criss, who testified that she was married to Pelot about ten years prior to the late civil war. The jury found in accordance with plaintiffs' contention and from the judgment entered on their verdict defendants appeal.

The further facts are stated in the opinion.

Messrs. **J. T. Perkins** and **John Devereux, Jr.,** for appellants.

Mr. **Samuel J. Ervin,** for appellees:

Error cannot be assigned in the ruling out of testimony, unless it be distinctly shown what the evidence was, in order that its relevancy may appear and that a prejudice has arisen by reason of its rejection.

Sumner v. *Candler*, 92 N. C. 634; *McGowan* v. *Wilmington & W. R. Co.* 95 N. C. 417; *Thornton* v. *Brady*, 100 N. C. 38; *Knight* v. *Killebrew*, 86 N. C. 400; *State* v. *Williford*, 91 N. C. 529; *Williams* v. *Whiting*, 92 N. C. 683; *State* v. *McNair*, 93 N. C. 628.

If kind treatment of the child would tend to prove Greenlee its father, then unkind treatment would tend to prove he was not its father. It was not shown whether the treatment was kind or unkind; it might therefore, if admitted, have prejudiced the defendants' case, and if so, the ruling of the court is not assignable as error.

State v. *Anderson*, 92 N. C. 732.

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

The maxim, *pater est quem nuptiæ demonstrant*, was formerly so strictly construed that, from the time of the Year Books down to the last century, a child born of a married woman was conclusively presumed legitimate, unless the husband was shown to be impotent, or not "*infra quatuor maria.*" The ancient rule, with the homely illustration given by *Judge* Rickhill in Flettsham and Julian (Y. B. 7 Hen. IV. 9, 13), is familiar to us by the great dramatist having placed it in the mouth of King John (Act I., scene 1). *Van Aernam* v. *Van Aernam*, 1 Barb. Ch. 375, 5 N. Y. Ch. L. ed. 422. But the rule was much modified in *Pendrell* v. *Pendrell*, 2 Strange, 925, and the *Banbury Peerage Case*, in the House of Lords, 1 Sim. & Stu. 153, and succeeding cases, until now it is best stated by *Chancellor* Kent (2 Com. 210) as follows: "The question of the

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Presumption of access.

Generally during the coverture access of the husband is presumed, unless the contrary is shown, which is such a negative as can be proved only by showing him to be elsewhere, for the general rule is *præsumitur pro legitimatione.* 1 Bl. Com. 457; Goodright v. Saul, 4 T. R. 356.

But even where a husband and wife have had opportunities for sexual intercourse at a time when the husband might have become the father of the child, a court or jury may infer from the circumstances of the case that no sexual intercourse took place. See State v. Pettaway, 3 Hawks, 623; Tate v. Penne, 7 Mart. (La.) N. S. 548; Com. v. Wentz, 1 Ashm. 269; Johnson v. Johnson, 1 Desaus. Eq. 595; Vaughan v. Rhodes, 2 McCord, L. 227; 1 Phill. Ev. 630; 1 Beck, Med. Jur. chap. 9.

Presumption of legitimacy may be rebutted.

The presumption of the legitimacy of a child born in wedlock is not indisputable, but may be rebutted by testimony which places the negative beyond all reasonable doubt. Stegall v. Stegall, 2 Brock. 270.

This presumption can be overcome only by clear proof of non-intercourse. Egbert v. Greenwalt, 44 Mich. 250; Patterson v. Gaines, 47 U. S. 6 How. 550, 12 L. ed. 553; Sullivan v. Kelly, 3 Allen, 148; Phillips v. Allen, 2 Allen, 453; Hemmenway v. Towner, 1 Allen, 209.

Evidence admissible on the question of legitimacy.

Hearsay evidence upon the question of the legitimacy of offspring is admissible, but only from necessity. Mima Queen v. Hepburn, 11 U. S. 7 Cranch, 290, 3 L. ed. 348, 2 Cranch, C. C. 3.

The weight of hearsay evidence must depend upon the circumstances of the case, as, the remoteness of the time when the fact transpired, and the difficulty of procuring any positive testimony respecting it. Stegall v. Stegall, 2 Brock. 263.

Illegitimacy may be established by inference from facts and circumstances.

It may be established by inference arising out of the conduct of the parties, as where the birth was concealed, and the child took another name, and the father disposed of his property inconsistently with his idea that he had children. Banbury Peerage Case, 1 Sim. & Stu. 153.

The fact that all the members of the family were mentioned in the will, and no notice was taken of the claimant, was considered strong evidence against him. Tracy Peerage Case, 10 Clark & F. 190; Robson v. Atty-Gen. Id. 498; 1 Phill. Ev. 267.

Evidence of declarations, connected with conduct, is to be considered in order to determine upon the subject. Gardner Peerage Case, Harg. Co. Litt. 123b.

Where a father brought up a son as legitimate, it would amount to a daily assertion that the son is legitimate. Berkeley Peerage Case, 4 Campb. 409; Stein v. Bowman, 38 U. S. 13 Pet. 220, 10 L. ed. 129; Ellicott v. Pearl, 35 U. S. 10 Pet. 437, 9 L. ed. 475; United States v. Morris, 1 Curt. 46; *Re* Hall's Deposition, 1 Wall. Jr. 95.

Testimony admissible.

Upon the question of legitimacy the statement or acknowledgment of the father as to the relation which he sustained to the mother is competent. Sale v. Crutchfield, 8 Bush, 636.

The woman would be a competent witness from the necessity of the case upon common-law principles, but only so far as the necessity extends, everything else being capable of proof by other persons. Com. v. Shepherd, 6 Binn. 286; Rex v. Reading, Cas. t. Hardw. 79; Rex v. Bedel, Id. 379.

But non-access must be proved by other testimony than that of the wife, and this rule holds though the husband be dead. Selw. N. P. Legitimacy, title *Ejectment.*

It is incompetent to establish any specific fact which is in its nature susceptible of proof by witnesses who speak from their own knowledge. Gaines v. Relf, 53 U. S. 12 How. 472, 13 L. ed. 1071; Davis v. Wood, 14 U. S. 1 Wheat. 6, 4 L. ed. 22.

legitimacy or illegitimacy of the child of a married woman is one of fact, resting on decided proof as to the non-access of the husband, and the facts must generally be left to the jury for determination." Schouler, Dom. Rel. § 225; *Hargrave* v. *Hargrave*, 9 Beav. 552, opinion by *Lord* Langdale.

In *Cope* v. *Cope*, 5 Car. & P. 604, it is said: "If a husband have access, and others at the same time are carrying on a criminal intimacy with his wife, a child born under such circumstances is legitimate in the eye of the law. But if the husband and wife are living separate, and the wife is notoriously living in open adultery, although the husband may have an opportunity of access, it would be monstrous to suppose that, under these circumstances, he would avail himself of such opportunity. The legitimacy of a child born under such circumstances could not therefore be established."

The evidence of the mother in the present case was that, "while in Tennessee, she and Underzine lived in one of the cabins on Greenlee's place;" that they were in Tennessee six years, and the plaintiff Emily was born four years after they moved to Tennessee. It may be noted that she does not testify that Emily was the child of Underzine. As the defendants claim under Underzine, it may be a question under Code, § 590, if the mother, who is a party plaintiff, was a competent witness to show the alleged marriage or the living together of herself and Underzine, but the point is not raised by any exception, and we pass it by. The testimony offered by defendants was that for two or three years continuously before Emily was born, the mother lived at the residence of Greenlee, the master, and Underzine and she did not live together for three years prior to Emily's birth, during which time there was no friendly intercourse between them, and Underzine was not allowed at the house where the mother and Greenlee stayed; that the child favored Greenlee, and by its color was the child of a white man; that the mother told Underzine the child was not his, and he would not have it to support; that Greenlee was an unmarried man, without family. There was evidence on the part of the plaintiffs that Underzine had declared Emily to be his child, and much evidence on the part of defendants that he had repeatedly declared that she was not his child. The defendants then offered to show by a witness, a former slave of Greenlee, who lived on the farm in Tennessee at the time of Emily's birth, how Greenlee treated Emily, with a view of showing that he was her father. The court excluded the question, and the defendants excepted. Had Greenlee been a defendant in a bastardy proceeding, or in an indictment for fornication and adultery, this evidence would, in view of the other matter in evidence, have been competent. We can see no reason why it should not also have been valuable aid to the jury in arriving at a just conclusion in a proceeding to test the legitimacy of the child. There being evidence tending to show non-access of the husband, the jury should not have been cut off from a knowledge of how Greenlee treated the child. It may be that it could have been shown that he betrayed fondness and affection for it, showed anxiety in its illness, lavished money on it or educated it, and surely these things would be strongly corroborative of the evidence of the defendants, for it would be hardly expected that a white man should so act towards the child of Underzine, his negro slave. Was not the violent grief of David, the king, upon the death of the child, corroboration that he, and not Uriah, was its father? In the nature of the case, the paternity of a child can hardly be said to be subject to direct proof. Therefore, when it is born in wedlock, the law presumes its legitimacy from that circumstance. This presumption can only be rebutted by circumstances, and what more potent could there be than the conduct of the wife in living separate from the husband with a paramour, and the latter's treatment of the offspring? For, though there was opportunity of access by the husband, it is not conclusive of legitimacy. *Cope* v. *Cope*, *supra*. It should appear what the party offering excluded testimony expected to prove by it (*State* v. *Williford*, 91 N. C. 529); but here the question is sufficiently explicit in that it was asked to show the treatment of Emily by Greenlee, and the bearing of the evidence is sufficiently indicated by the question, and the statement that it was offered as testimony to show that Greenlee was the father.

In *Morris* v. *Davis*, 5 Clark & F. 163, the House of Lords, on an issue like this, gave weight to the conduct of the paramour towards the child. This also was done in *Cannon* v. *Cannon*, 7 Humph. 410; 1 Bishop, Mar. and Div. § 448. When this case was here before (103 N. C. 109), the court (Smith, *Ch. J.*, delivering the opinion) pointed out that the so-called "marriage" of Underzine and the mother, the former being a slave and the latter a free person (the child of a white mother and slave father), was utterly invalid till the Act of 1879 (Code, § 1281, Rule 13), and that "to repel the inference of paternity, drawn from the mere fact of cohabitation (by that Act), the same stringent rules do not prevail as in cases of established legal "marriage," for the application of that Statute is made to depend upon "cohabitation subsisting at the birth of the child, and the paternity of the party from whom the property claimed is derived. The cohabiting alone does not confer legitimacy, though it furnishes presumptive evidence," which is open to disproof.

A fortiori there was error in rejecting the testimony offered.

Error.

MINNESOTA SUPREME COURT.

John DEVLIN *et al.*, *Respts.*,
v.
C. E. QUIGG, *Appt.*

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

*1. **The mortgagor can maintain an action** to enjoin the foreclosure of a mortgage on the ground that it was without consideration, notwithstanding that it was executed for the purpose of hindering and delaying his creditors.

2. **Evidence,** *held* sufficient to justify the findings.

(November 26, 1890.)

APPEAL by defendant Quigg from a judgment of the District Court for Cottonwood County in favor of plaintiffs in an action brought to enjoin the foreclosure of a mortgage. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. **George B. Edgerton** and **Geo. W. Wilson,** for appellant:

Plaintiff voluntarily entered into this mortgage for the wrongful purpose of defeating her creditor's claim. Having executed a mortgage which became a matter of record upon which a *scire facias* could be brought, she estopped herself from showing the consideration upon which it was based.

See *Williams* v. *Williams*, 34 Pa. 312; *Hendrickson* v. *Evans*, 25 Pa. 444; *Drum* v. *Painter*, 27 Pa. 148; *Evans* v. *Draco*, 24 Pa. 62; 66; *Reichart* v. *Castator*, 5 Binn. 113; *Smith* v. *Hubbs*, 10 Me. 71; *Miller* v. *Marckle*, 21 Ill. 152; *Bolt* v. *Rogers*, 3 Paige, 154, 3 N. Y. Ch. L. ed. 95; *Dunaway* v. *Robertson*, 95 Ill. 427; *McMillan* v. *Ames*, 33 Minn. 260; *Weed* v. *Little Falls & D. R. Co.* 31 Minn. 161.

Messrs. **J. G. Redding** and **Lorin Cray,** for respondents:

If the mortgage was given with the intent to defraud creditors, then, if the mortgagee or his assigns attempt to overreach the mortgagor, the parties are not *in pari delicto* and the mortgagor may have relief.

Bump, Fraud. Conv. p. 441.

And he may have affirmative relief even as against an assignee of the mortgage where no debt is secured.

Briggs v. *Langford*, 10 Cent. Rep. 270, 107 N. Y. 680.

The rule of equity, which leaves joint wrongdoers where the court finds them, and refuses relief to either, is not intended to tie the hands of the one and allow the other to pluck him. The rule applies to executed contracts only, which the courts refuse to set aside; and in case of executory contracts, if either party seeks to proceed to take advantage of the other through the contract, either by legal or equitable steps, the court will restrain him.

Wearse v. *Peirce*, 24 Pick. 141; *Hannan* v. *Hannan*, 123 Mass. 441; *Briggs* v. *Langford*, *supra*; *Kansas Mfg. Co.* v. *Gaudy*, 11 Neb. 448; *Sackner* v. *Sackner*, 39 Mich. 39; *McMillan* v. *Ames*, 33 Minn. 257–260.

The court has found that the mortgage was executed without value, did not evidence a debt and was never regarded by anyone as a valid debt, and that the plaintiff, Mary J. Devlin, executed the mortgage solely because requested so to do, and that she had no knowledge of the purpose for which it was executed. This entitles her to the relief granted by the trial court.

Kansas Mfg. Co. v. *Gaudy*, *supra*.

The fact that the mortgage was under seal does not deprive the plaintiffs of their remedy.

1 Pom. Eq. Jur. § 370, *note 1*, and cases, § 383, and cases cited in *note 1*; *State* v. *Young*, 23 Minn. 551–557.

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

This was an action to enjoin the foreclosure of a mortgage under a power, on the ground that it was without consideration, and was not executed to secure the payment of any indebtedness. The court found as facts that "the mortgage was not executed to evidence, provide for or secure the payment of any indebtedness to the mortgagee, or any other person on part of the plaintiffs, or either of them, or anyone else; that it was executed without consideration, and for the sole purpose of creating an apparent indebtedness and cloud upon the premises to hinder and delay creditors." To rebut the solemn admissions of the plaintiffs contained in the mortgage, the evidence should be strong and convincing, especially as the mortgagee was dead. It is not as clear and satisfactory as might be desired, and, so far as we can judge from a cold record, we might have hesitated to arrive at the same conclusion which the learned trial judge reached. But if he believed the testimony of the plaintiffs and their witnesses, and their creditability was for him to determine, it was sufficient to justify the findings, and we cannot disturb them. Defendant, however, invokes the familiar maxims "that he who comes into equity must do so with clean hands," and that "a party cannot be heard to set up his own fraud as a ground for relief." But these maxims are not applicable here. A conveyance or transfer in fraud of creditors is not regarded as *turpis causa*, which renders all contracts void. It is merely voidable only in favor of the defrauded creditors, leaving it in all other respects, and as between the parties, valid, the fraud, if there be one, being strictly a private fraud, which is available only to those injured by it. *Livingston* v. *Ives*, 35 Minn. 55.

Hence, if this mortgage had been given to secure an actual indebtedness, the fact that it was also given and taken for the purpose of defrauding the creditors of the mortgagor would constitute no defense to an action to foreclose, or any ground for enjoining a foreclosure under a power. The plaintiffs doubtless could not set up their own fraud as a substantive cause of action to recover back property actually conveyed for the purpose of defrauding their creditors. But here the defendant is the actor. He is proceeding to enforce the mortgage which the plaintiffs are seeking to prevent, not on the ground that it was executed to defraud creditors, but that it was without

*Head notes by MITCHELL, *J.*

consideration, and does not in fact secure any indebtedness. If the defendant had proceeded to foreclose by action, there can be no doubt that this would have been available as a defense, and could not have been rebutted or overcome by showing that the mortgage was executed to defraud creditors. *Wearse* v. *Peirce*, 24 Pick. 141; *Hannan* v. *Hannan*, 123 Mass. 441; *Briggs* v. *Langford*, 107 N. Y. 680, 10 Cent. Rep. 270; *Sackner* v. *Sackner*, 39 Mich. 39.

But it can make no difference that the defendant is proceeding under the power of sale, and therefore the plaintiffs put to a suit to enjoin. The maxim, *in pari delicto*, etc., is not applicable. The plaintiffs are not seeking to recover back property which they have already conveyed, but to prevent defendant from enforcing the mortgage; and this they do, not on the ground that it was executed to defraud creditors, but that it was executed without consideration, and that "there was no debt to secure." This is a good defense to the mortgage independently of the fraudulent purpose for which it may have been executed, and one that may be shown, notwithstanding that the mortgage is under seal.

Judgment affirmed.

Petition for rehearing denied Dec. 9, 1890.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Nellie L. COBB, *per Prochein Ami*,
v.
COVENANT MUTUAL BENEFIT ASSO.

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

1. Where an insured person has made the truth of the statements contained in his application the basis of his contract of insurance, the question whether or not a false statement is actually material to the risk is unimportant, as is also the question whether or not the falsehood was intentional. To avoid liability on the policy it is sufficient for defendant to show that a statement was actually untrue.

2. The existence of a distinct disease permanently affecting the health of an applicant for life insurance is not necessary to render untrue his statement that he has not personally consulted a physician or been prescribed for or professionally treated within a certain time. The statement will be untrue if within the time named he, supposing himself in need of a physician, went to one for the purpose of consulting him as to his ailment, answered inquires and received the aid, advice or assistance which the physician deemed necessary.

3. An instruction in an action upon a life insurance policy is not open to the objection that it is a charge upon the facts,

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NOTE.—*Life insurance, application for; representations in.*

Mere representations made pending negotiations are not actionable *ex contractu*, even if untrue; they must be shown to be material and intended as a warranty. Bogardus v. New York L. Ins. Co. 2 Cent. Rep. 150, 101 N. Y. 328; Vivar v. Supreme Lodge K. of P. (N. J.) June 9, 1890.

Their known falsity will not vitiate the insurance. *Ibid.*

A question in an insurance application not answered raises no inference for or against the person signing the application. It is the same in effect as if no question had been asked. Breisenmeister v. Supreme Lodge K. of P. of W. 81 Mich. 525.

Statements contained in an application for life insurance are of themselves mere representations, and in order that they may have the force of warranties, they must not only be made part of the contract, but must also appear, on an examination of the entire contract, to have been deemed conditions upon the literal truth or fulfillment of which the validity of the insurance was intended to rest. Vivar v. Supreme Lodge K. of P. *supra*.

An answer untrue in fact, and known by applicant to be so, avoids the policy, irrespective of the question of materiality of the answer given, to the risk. Connecticut Mut. L. Ins. Co. v. Pyle, 2 West. Rep. 381, 44 Ohio St. 19.

Where answers in an application are qualified by the words at its foot, "The above is as near correct as I remember,"—to defeat recovery on the policy, the insured must have been consciously incorrect in some one of the answers. Ætna L. Ins. Co. v. France, 94 U. S. 561, 24 L. ed. 287.

If an insurance policy, in plain and unambiguous language, makes the observance of an apparently immaterial requirement the condition of a valid contract, it cannot be disregarded, nor can a new contract be constructed, by implication or otherwise, in the place of that made by the parties; and such contract is open to construction only when it appears, upon the face of the instrument, that its meaning is doubtful or its language is ambiguous or uncertain. Dwight v. Germania L. Ins. Co. 4 Cent. Rep. 529. 103 N. Y. 341.

Where the acknowledgment to an application warranted its statements to be true to the best of insurer's knowledge and belief, and that any untrue statement should forfeit his right to benefit under the contract, a fraudulent answer avoids the policy only when untrue to his knowledge and belief. Clapp v. Massachusetts Ben. Asso. 6 New Eng. Rep. 103, 146 Mass. 529.

Statements as to condition of health.

Only an ordinary and reasonable degree of health is required, and this question is generally to be determined by the jury. Maine Ben. Asso. v. Parks, 81 Me. 79.

"Sound health" means, in an application for life insurance, a state of health free from any disease or ailment that affects the general soundness of the system seriously; not a mere temporary indisposition which does not tend to weaken or undermine the constitution. Brown v. Metropolitan L. Ins. Co. 8 West. Rep. 775, 65 Mich. 306.

The word "serious" is not generally used to signify a dangerous condition, but rather to define a grave, important or weighty trouble. *Ibid.*

Where, in an application for life insurance, the applicant, in answer to inquiries as to whether he had certain diseases, made the answer, "Never sick," it must be taken to mean only that he never had had any of the enumerated diseases so as to constitute an attack of sickness. Knickerbocker L. Ins. Co. v. Trefz, 104 U. S. 197, 26 L. ed. 708.

See also 27 L. R. A. 398.

which, in response to an inquiry from the jury as to the meaning of the word "prescription," states that "if insured went to a physician for the purpose of getting his aid, advice or assistance as a physician in a difficulty under which he was then suffering, or supposed himself to be suffering, and the physician hearing what the insured had to say as a physician and for the purpose of relief or cure or aid or assistance gave to the insured medicine, then it may be said that such physician prescribed for him."

4. **The definition of a word by the court** in response to a request for such definition from the jury, if correct, is not reversible error, although the word is one in common use.

5. **An instruction by the court,** after stating to the jury that the existence of certain facts will in law amount to a certain thing, that "it will be your duty as jurors to so find," is not an instruction on the facts, since the court has the right to direct jurors to be governed in their finding by the facts as they exist without regard to the result that may follow therefrom.

(January 17, 1891.)

REPORT from the Superior Court for Bristol County (Hammond, *J.*) for the opinion of the Supreme Judicial Court of an action brought to recover the amount alleged to be due on a benefit certificate which had been issued by defendant to Pliny M. Cobb, deceased, in which a verdict had been returned in favor of defendant. *Bill dismissed.*

The facts are stated in the opinion.

Messrs. **H. M. Knowlton, G. E. Williams** and **E. M. Reed** for plaintiff.

Messrs. **Albert E. Avery** and **W. C. Calkins** for defendant.

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

By the terms of his application, which is referred to and made a part of the benefit certificate issued to the insured, he warranted the answers to the questions propounded, "to be full, complete and true," and agreed that the answers and application should form the exclusive and only basis of the contract between himself and the defendant, and further agreed that if "any misrepresentations or fraudulent or untrue answers" had been made, the contract should be null and void. The acknowledgment which was subscribed by the insured controls and governs the answers to which it refers, nor does it seem important to determine whether they are to be treated as warranties which are to be literally complied with or as representations only, as, if they were the latter, they were material to the risk and were so made and treated by the parties. Where one asserts that certain statements are true and that if not true this fact shall avoid the policy, the question whether they were actually material is not important, as parties have the right to make their truth the basis of the contract. *Miles* v. *Connecticut Mut. L. Ins. Co.* 3 Gray, 580; *Ætna L. Ins. Co.* v. *France,* 91 U. S. 510, 23 L. ed. 401; *Powers* v. *North Eastern Mut. L. Asso.* 50 Vt. 630; *McCoy* v. *Metropolitan L. Ins. Co.* 133 Mass. 82.

The case at bar differs obviously from those in which an applicant has averred that the answers made by him are true according to his best knowledge and belief, or has limited his statement by other similar words. Such an-

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To the question in an application for insurance upon life, whether the applicant had ever had the disease of "affection of the liver," the answer was "No." It was held that the answer was a fair and true one within the meaning of the contract, if the insured had never had an affection of that organ which amounted to disease. Connecticut Mut. L. Ins. Co. v. Union Trust Co. 112 U. S. 250, 28 L. ed. 708.

Where in an application for life insurance, the statement of the insured was "no hereditary taint on either side of the house to my knowledge," in order to show falsity of the statement, in an action on the policy, it is necessary for the insurance company to prove that a hereditary taint alleged was known to the applicant when he made the statement. Northwestern Mut. L. Ins. Co. v. Gridley, 100 U. S. 614, 25 L. ed. 746.

Where sunstroke was not included in the list of enumerated diseases, but it did include diseases of the brain, it was proper for the court to submit to the jury the questions whether an attack which the insured had had, called sunstroke, was it in reality, and whether such attack, whether sunstroke or not, was a disease of the brain. Knickerbocker L. Ins. Co. v. Trefz, *supra.*

Where a woman about twenty-four years old was confined by the birth of a child in November; was sick and had typhoid fever in January following, but she got up some time in March, and March 1 made an application for a life insurance, in which she stated that she was in good health; while May 12 her physician was called, who found her weak with a cough and sick with consumption, from which disease she died in July,—the policy will be canceled. Maine Ben. Asso. v. Parks, 81 Me. 79.

An ailment of some of the organs inquired about in the application, and represented sound, which materially deranged the functions of such organs, whether known to the insured or not, avoids the policy. Continental L. Ins. Co. v. Yung, 12 West. Rep. 715, 113 Ind. 159.

Any change in the health of the insured between the application for life insurance and the issuing of the policy should be communicated to the insurer. Ormond v. Fidelity L. Asso. 96 N. C. 158.

As to attendance of physician.

Where an application asks "Have you had any medical attendance within the last year prior to this date? If so, for what disease? Give name and address of doctor in full,"—the answer must state the fact, if applicant has had medical attendance within the time specified, for any cause. United Brethren Mut. Aid Soc. v. O'Hara, 12 Cent. Rep. 682, 120 Pa. 256.

Where, in an answer to a question, insured named the physician who had last attended her, and when he last called, the jury should have been instructed that the attendance of the physician must have been an attendance upon the insured for some disease or ailment of importance, and not for an indisposition of a day or so, trivial in its nature. Brown v. Metropolitan L. Ins. Co. 8 West. Rep. 775, 65 Mich. 306.

Condition in policy that statements made were true.

Where the policy contained the clause that if the proposal, answers and declarations should be in any respect false or fraudulent, the policy should be void, such statements must, by agreement of the parties, be absolutely true; and if untrue in any respect, however immaterial, the policy is void. Ætna L. Ins. Co. v. France, 91 U. S. 510, 23 L. ed. 401; Glutting v. Metropolitan L. Ins. Co. 11 Cent. Rep. 348, 50 N. J. L. 287.

The only way in which to give the provision of the policy relating to fraud, concealment and

swers if accepted by the insurer would render it necessary for them to prove that, as thus limited, they were untrue. *Clapp* v. *Massachusetts Ben. Asso.* 146 Mass. 529, 6 New Eng. Rep. 103.

The sixth question in form A of the application was: "Have you personally consulted a physician, been prescribed for or professionally treated within the past ten years?" To this question the insured answered "No," and it has been found by the jury, upon an issue submitted to them, that this answer was false. The plaintiff contended that such an issue should only be found against her in case the answer was intentionally false. In our view the insured having made the truth of his statements the basis of his contract it was sufficient for the defendant to show that this statement was actually untrue. The plaintiff further claimed that the question referred to in the application should be construed as referring to a specific disease, and that if the insured had consulted or been prescribed for by a physician for a pain that did not amount to a disease, his answer to this question would not prevent the plaintiff from recovering. The presiding judge declined to instruct in accordance with this contention, and instructed the jury that, if Cobb, the insured, being, as he supposed, in need of a physician, went to one for the purpose of consulting him as to what the matter was with him, had an interview, answering such inquiries as the physician deemed pertinent, receiving aid, advice or assistance from him, Cobb consulted a physician within the meaning of the interrogatory; and further, that if they found that he went to a physician for the purpose of procuring aid and assistance from the physician as such, and the physician prescribed a remedy or treated him professionally either by giving him a prescription or by administering hypodermic injections of morphine (of which there was some evidence), then he was professionally treated within the meaning of the interrogatory or professionally prescribed for. This ruling appears to us correct. While the question whether Cobb had a fixed disease, and what the disease was, might be an inquiry involved in considerable embarrassment, the question whether he had consulted a physician, or had been professionally treated by one, was simple and one about which there could be no misunderstanding. Had it been replied to in the affirmative, the answer would have led to other inquiries. Indeed the question which follows is, "If so, give dates, and for what disease." It is upon the existence of this latter question that the plaintiff founds an argument that it was necessary to show that Cobb had some distinct disease permanently affecting his general health before it could be said that he answered this question untruthfully. But the scope of the question cannot be thus narrowed. Even if Cobb had only visited a physician from time to time for temporary disturbances, proceeding from accidental causes, the defendant had a right to know this in order that it might make such further investigation as it deemed necessary. By answering the question in the negative the applicant induced the defendant to refrain from doing this.

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misrepresentation any effect, is by treating the answers in the policy as mere representations, not warranties, when any defense founded on the misrepresentation and concealment would have to be alleged and proved. Continental L. Ins. Co. v. Rogers, 8 West. Rep. 88, 119 Ill. 474.

In contracts of life insurance, courts do not favor warranties by construction. Vivar v. Supreme Lodge K. of P. (N. J.) June 9, 1890.

Whether a statement is to be construed as a warranty, or as a representation merely, depends rather on the form of the expression, the apparent purpose of its insertion, and its connection with other parts of the application and policy, construed together as one entire contract. Alabama Gold L. Ins. Co. v. Johnston, 80 Ala. 467.

When a policy of insurance contains contradictory provisions, or has been so framed as to leave it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. Modlor v. American L. Ins. Co. 111 U. S. 335, 28 L. ed. 447.

Where the applicant, after answering numerous questions, used these words: "I certify that the answers made by me," etc., "are true, in which there are no misrepresentations or suppressions of known facts," agreeing that such statements should be a warranty, the language, being ambiguous, is to be taken most strongly against the insurer, and warrants the statements to be true only to the best of the insured's knowledge. Anders v. Supreme Lodge, K. of H. 51 N. J. L. 175.

Warranty of truth of representations.

Where the application for life insurance is expressly declared to be a part of the policy, and the statements therein contained are warranted to be true, such statements will be deemed material, whether they are so or not; and if shown to be false, there can be no recovery on the policy. Continental L. Ins. Co. v. Rogers, 8 West. Rep. 91, 119 Ill. 474; Ripley v. Ætna F. Ins. Co. 30 N. Y. 136; O'Neil v. Buffalo F. Ins. Co. 3 N. Y. 122; Barteau v. Phœnix Mut. L. Ins. Co. 67 N. Y. 595.

The validity of a contract depends upon the truth of the warranties. The engagement of the policy holder is absolute that the facts shall be as they are stated. Home Mut. L. Asso. v. Gillespie, 1 Cent. Rep. 135, 110 Pa. 84.

A warranty is generally a stipulation made and described in the policy itself, and must be complied with whether material or not. Connecticut Mut. L. Ins. Co. v. Pyle, 2 West. Rep. 380, 44 Ohio St. 19.

It is part and parcel of the contract itself, is in the nature of a condition precedent, and, whether material to the risk or not, must be strictly complied with or literally fulfilled, before the assured can recover on the policy. Alabama G. L. Ins. Co. v. Johnston, 80 Ala. 467.

When a policy is issued and accepted on an expressed condition that answers and statements of applicant are warranted true, and that, if obtained by untruth, fraud, misrepresentation or concealment, it shall be void, and some answers are untrue in fact, although made under an innocent misapprehension, it is void *ab initio*. Connecticut Mut. L. Ins. Co. v. Pyle, *supra*.

A warranty by an applicant for insurance that his answers to the medical examiner are true, does not make him responsible for their truth if incorrectly written down by such examiner. Equitable L. Assur. Co. v. Hazlewood, 7 L. R. A. 217, 75 Tex. 338.

In *Metropolitan L. Ins. Co.* v. *McTague*, 49 N. J. L. 587, 8 Cent. Rep. 611, it was held that where the applicant stated that he had not consulted a physician or been prescribed for by one, and such statement was shown to have been false by proof of a prescription received, there could be no recovery, although it appeared to have been given for a cold. The court says: "The representation did not aver a condition of health or that it was requisite or proper to consult a physician. It averred that he had not consulted a physician or been prescribed for by a physician. The fact found contradicted this averment, whether the consultation and prescription related to a real disease or an apprehended disease."

After retiring, the jury returned into court with a request that the court would define the word "prescription." There was evidence in the case from three physicians tending to show that on more than one occasion they had consulted with him, administered hypodermic injections for the pain which he was suffering and also given him medicine. The presiding judge instructed the jury fully as to the meaning of a "prescription," and added that if the insured went to one of those physicians and received from him a medicine as a physician, for the purpose of assistance and relief in a difficulty under which he was then suffering, then it is a prescription within the meaning of the law. The judge added, "And it is your duty as jurors so to find, whether the consequences may be as you would wish them or otherwise." The plaintiff excepting to the last paragraph, as a charge upon the facts, the presiding judge modified this and said: "I will endeavor in this way to define a prescription, and let this definition stand for the definition objected to. If the insured went to a physician for the purpose of getting his aid, advice or assistance as a physician in a difficulty under which he was then suffering or supposed himself to be suffering, and the physician, hearing what the insured had to say, as a physician, and for the purpose of relief or cure or aid or assistance, gave to the insured medicine, then it may be said that such a physician prescribed for him." To this the plaintiff also objected as a charge upon the facts and claimed that the jury should have been instructed that the word "prescription" was a word in common use, which they could define as well as the court. This latter instruction leaves clearly to the jury the inquiry whether the insured had gone to the physician and received from him aid, assistance, medicine, etc., in answer to his application. We cannot see that it has any element of a charge upon the facts. The definition of a prescription was entirely correct, nor, even if a word in common use was explained, was there reason why the judge should not define it in answer to the request, if he gave them an accurate definition.

The plaintiff also insists that the last clause of the definition, as first given, was a charge upon the facts. It is perhaps sufficient to say that it was clearly withdrawn and the later definition given in place of it. We do not, however, consider the last clause of the first definition as a charge upon the facts within the meaning of Pub. Stat., 153, chap. 5. The judge

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Settled rules of construction.

Among the settled rules for the construction of policies of insurance are these: 1. That all the conditions and obligations of the contract will be construed liberally in favor of the assured, and strictly against the insurer. 2. That the clearest and most unequivocal language is necessary to create a warranty, and all statements of doubtful meaning will be construed as representations merely. 3. That even though a warranty in name or form be declared by the terms of the contract, its effect may be modified by other parts of the policy, or of the application, including the questions and answers, so that answers to questions not material to the risk will be construed as warranting only their honesty and good faith. Alabama Gold L. Ins. Co. v. Johnston, 80 Ala. 467.

However innocently made, and notwithstanding their falsity may have no agency in producing the death of the assured, yet there are cases in which the statements in the application have been held to be representations merely, notwithstanding they were expressly declared to be warranties. Continental L. Ins. Co. v. Rogers, 8 West. Rep. 91, 119 Ill. 474.

A representation by the insured, made on the first of October, in regard to the state of his health, is not a continuing representation until the 14th of October; and the development of disease between those days is no defense to the policy. Mutual Ben. L. Ins. Co. v. Higginbotham, 95 U. S. 380, 24 L. ed. 499.

Evidence in action on the policy.

Evidence of the health of the insured prior to the insurance, where there is no issue in regard to it, is inadmissible. American L. Ins. Co. v. Mahone, 88 U. S. 21 Wall. 152, 22 L. ed. 593.

Evidence to show that, prior to the application, a physican had given an opinion that the applicant was unfit for insurance, is not admissible. *Ibid.*

Conversations had by a physician with the mother of insured, respecting her daughter's health, in the absence of any examination of the child herself, are incompetent as independent evidence of the state of her health. Brown v. Metropolitan L. Ins Co. 8 West. Rep. 775, 65 Mich. 306.

Where the issue is whether statements made in an application for the insurance were true or false, testimony as to what would have been the effect if some different statement from that therein contained had been made is improper. Northwestern Ben. & Mut. A. Asso. v. Hall, 6 West. Rep. 76, 118 Ill. 169.

The burden of proving that any of the statements or warranties made by the assured in his application are untrue is upon defendant. National Ben. Asso. v. Grauman, 5 West. Rep. 848, 107 Ind. 288; North Western Mut. L. Ins. Co. v. Hazlett, 2 West. Rep. 690, 105 Ind. 212.

The burden of proving the truth of the answers, in an application for insurance, does not rest on the insured or his representative, in an action on the policy. Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610.

Instructions of court.

Where payment of a policy of life insurance is contested because of the falsity of answers the charge to the jury must be confined to such questions and answers as were put in issue by the pleadings and evidence. Equitable L. Assur. Co. v. Hazlewood, 7 L. R. A. 217, 75 Tex. 338.

An instruction that if the answers in the application concerning the health of the applicant were "essentially untrue" there can be no recovery, is proper, since "essentially" is synonymous with "strictly," the term used in the policy. Hoffman v. Supreme Council Am. L. of H. 35 Fed. Rep. 252; Lamberton v. Connecticut F. Ins. Co. 39 Minn. 129.

had defined the word as to the meaning of which they had inquired, and submitted to them in a condensed way the evidence bearing upon the issue which they were to determine. Certain facts, if they find them to exist, he informs the jury, will make a prescription by a physician within the meaning of the law. He then adds: "And it will be your duty as jurors so to find, and it is your duty so to find whether the consequences may be as you would wish them to be or otherwise."

Although the last clause is a caution to the jury to disregard the consequences which may follow their decision, there is no reason why a judge, when he deems it proper to do so in the trial, may not caution the jury not to be swayed by sympathy, prejudice or passion, and direct them to be governed in their finding by the facts as they exist without regard to the results that may follow therefrom.

On the back of the certificate there is (among many conditions) the twelfth, which recites that the contract shall be subject to and construed only according to the laws of Illinois.

The plaintiff relies on the case of *Continental L. Ins. Co.* v. *Rogers*, 119 Ill. 474, 8 West. Rep. 88, as being the law of Illinois. In this case it is said that as a general rule, where the application for insurance on a person's life is expressly declared to be a part of the policy, and such statements are warranted to be true, they will be deemed material whether actually so or not. But as a qualification, where a statement in a policy of insurance that the answers, statements, etc., in the application are warranted by the assured, "to be true in all respects" is followed by the further statement "that if this policy has been obtained by or through any fraud, misrepresentation or concealment said policy shall be absolutely null and void," which fraud relates to the answers to the questions in the application, erroneous answers not material to the risk, honestly made in the belief that they are true, will not be so far binding on the assured as to present any obstacle to his recovery. The case is not decided on this point, but on the ground that whether answers are warranties or representations, the burden of proving their falsity was upon the defendant, a proposition not controverted by the defendant in the case at bar. It is only on this last ground that the case can be held an authority for the law of Illinois.

In the case at bar, the policy is declared to be avoided not only by misrepresentations and fraudulent answers but by those which are untrue, and the question which is found to have been untruly answered must be deemed to have been made, by the parties, one material to the risk.

Bill dismissed.

OREGON SUPREME COURT.

James STEEL, Admr., etc., of Ben Holladay, Deceased, *Appt.*,
v.
Joseph HOLLADAY, *Respt.*

(....Or.....)

***1. In an action by an administrator with the will annexed against his predecessor** in the trust for a *devastavit*, in failing to redeem certain stock in a private corporation belonging to said estate, and which had been sold under a decree of the United States circuit court, and by the terms of sale subject to redemption within six months, the complaint must allege that there were assets in the executor's hands available and applicable to the purpose of redemption, and that the proper county court ordered the redemption to be made.

2. Section 895, Hill's Code, confers upon the county court exclusive jurisdiction, in the first instance, to direct and control the conduct and to settle accounts of executors, administrators and guardians, and this includes the power to inquire into a case of *devastavit*, and to charge the delinquent with the amount thereof.

3. Devastavit is a violation of duty by the executor or administrator, such as renders him personally responsible for mischievous consequences; a wasting of the assets; a mismanagement of the estate and effects of the deceased in squandering and misapplying the assets, contrary to the duty imposed on the executor or administrator.

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

(November 17, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County, sustaining a demurrer to the complaint in an action brought to recover the amount lost to the estate of Ben Holladay, deceased, by reason of the alleged *devastavit* of defendant while acting administrator of such estate. *Affirmed.*

Statement by **Strahan,** *Ch. J.*:

The defendant demurred to plaintiff's amended complaint, which being sustained a final judgment was entered in favor of the defendant, from which this appeal is taken. The plaintiff sues as administrator with the will annexed of Ben Holladay, deceased. The amended complaint, after setting forth at length the plaintiff's appointment and qualification, the previous appointment of Joseph Holladay as executor, the provisions of the will and the condition of said 10,000 shares of the capital stock of the Oregon Real Estate Company, that they had been sold under the decree of the Circuit Court of the United States for the District of Oregon for $334,000, and that the executor had been given by said court the right to redeem said stock within six months from the date of the decree, to wit, July 30, 1888, by paying the said amount for which the stock had been sold, and that there were no other liens or incumbrances thereon, and that the same were owned by said Ben Holladay, deceased,—alleges as follows: "That the said real estate so standing in the name of said Oregon Real Estate Company

was, at the date of said sale, and during the time said right of redemption existed, and is now, of the value of not less than $1,200,000, and that said shares of stock were, during all of said time, of the value of not less than $1,000,000, and that the redemption of said stock would have been vastly to the interest of said estate of Ben Holladay, deceased, and not in any way prejudicial to any of the creditors of said deceased, or other persons interested in said estate. That it became and was the duty of said Joseph Holladay, as executor of the will of said Ben Holladay, deceased, by virtue of his trust to pay off the amount of said claims against said deceased, for which said stock had been sold, as aforesaid, and redeem the same for the benefit of said estate, and to prevent said property, worth over $1,000,000, from being sold and taken away from said estate for said sum of $335,000, all of which, with due and reasonable diligence on his part, he could have done. That during the period allowed for such redemption, as aforesaid, there was real estate belonging to said estate of Ben Holladay, deceased, of the probable value of $200,000, which, under the provisions of said will, he had as such executor the power to sell and convert into cash, and that, in addition thereto, he had under his control as such executor personal property belonging to said deceased to the amount and value of over $500,000, out of the proceeds of which he could have easily procured funds sufficient to make such redemption of said stock, or that he could have pledged the same as security for the money with which to have made such redemption, without in any way impairing or affecting the claims or interest of any person in or against said estate, and thereby secured possession of said stock for the purposes of administration, all of which he failed, neglected and refused to do. That it became and was the duty of said Joseph Holladay, as executor of the will of said Ben Holladay, deceased, within one month from the date of his appointment, or such further time as the court or the judge of the County Court of Multnomah County, State of Oregon, might allow, to make an inventory, verified by his own oath, of all the real and personal property of the deceased which should come to his possession or knowledge, and, before filing the same with the clerk of said county court, cause the property therein specified to be appraised at its true cash value by three disinterested and competent persons appointed by said court or judge, and that said county court did appoint three competent and disinterested persons appraisers of said property. That it would have then been the duty of said Joseph Holladay, as such executor, upon the filing of said inventory, or at the next term of the court, to wit, the first Monday in November, 1888, to have made an application to sell the said personal property of the estate, or so much thereof as was necessary, to pay the funeral charges, expenses of administration and the claims against said estate, including said claims mentioned in said decree, and it would then have been the duty of the county court to have ordered such sale, and of the said Joseph Holladay, as such executor, to have sold the same and applied the proceeds thereof, or so much thereof as was necessary, to the payment of said claims for which said stock was sold, as aforesaid, and redeem the same as provided in said decree of confirmation. That it became and was the duty of said Joseph Holladay, as such executor, by virtue of the Statute in such case made and provided, to apply to the County Court of Multnomah County, State of Oregon, for an order directing him, as such executor, to redeem said stock out of the proceeds of the other personal property belonging to said estate; and if, upon such application to the county court, such redemption had been deemed not proper or expedient, said county court would have been bound to have ordered said property sold in the manner provided by law, subject to the lien of said decree, and that he was offered and could have sold said stock during the said period allowed for redemption thereof for the sum of $500,000 or $165,000 subject to the lien of said decree, and for an amount largely in excess of said $335,000. But said Joseph Holladay, in violation of his duty under the law as such executor, willfully, purposely and maliciously failed, neglected and refused to make and file an inventory and appraisement of the property belonging to said estate, or any part thereof, or of said shares of stock; purposely, willfully and maliciously failed, neglected and refused to apply for an order of sale of said property, or any part thereof, or to sell the same or any part thereof, or to apply for an order to redeem said shares of stock out of the other personal property of said estate, or for an order to sell said stock subject to the lien of said decree; purposely, willfully and maliciously failed, neglected and refused to redeem said stock, or to borrow the money with which to redeem the same, when offered to him at reasonable figures, or to sell or pledge or mortgage the property of said estate to raise the money with which to pay said indebtedness for which said shares of stock had been sold, and redeem the same, or otherwise to comply with his duty as such executor in the premises, but wrongfully, maliciously, purposely and through his gross negligence and carelessness suffered and allowed the time given for making such redemption of said stock to expire without redeeming the same or selling the same as aforesaid, whereby the same was wholly lost to said estate. That by reason of the premises said estate suffered loss and injury, and has been damaged in the sum of $500,000. That, upon petition of said Esther Holladay and said Linda and Ben Campbell Holladay, the County Court of Multnomah County, State of Oregon, in the Matter of the Estate of said Ben Holladay, Deceased, on the 31st day of May, 1889, duly made and entered an order and decree in said matter finding and adjudging that said Joseph Holladay had been unfaithful to, and neglected his trust to the probable loss of, the petitioners therein, as alleged and set forth in said petition, and removing him from said office of executor, and revoking his letters as such executor, and that this plaintiff is his successor in office. And that it is necessary for the complete administration of said estate, and to enable the plaintiff to secure funds with which to pay the claims, debts and charges against said estate, that said defendant

should make good to this plaintiff the said loss, and that, unless he does so, plaintiff will be unable out of the remaining assets to pay the debts, claims and charges against said estate in full, or to pay the legacy provided for in said will. Wherefore plaintiff, as administrator with the will annexed of the estate of Ben Holladay, deceased, prays judgment against said defendant in the sum of $500,000, and for costs and disbursements of this action." Defendant demurred to the amended complaint upon the grounds (1) that the said amended complaint did not state facts sufficient to constitute a cause of action; and (2) that the court had no jurisdiction of the subject matter of the suit alleged in said complaint.

Messrs. **Mitchell & Tanner,** for appellant:

Under the Constitution and Statutes the matter of an administrator's accounting in the county court is confined to property coming into his possession. If he does not reduce the property to his possession or file an inventory, and is removed for unfaithfulness to the trust, there is nothing upon which the county court can hold him to account for. In such cases the circuit court is the only court having jurisdiction.

Fourinquet v. *Perkins*, 48 U. S. 7 How. 160, 12 L. ed. 650.

Section 1099 of the Statute providing that the new administrator may institute any necessary and proper action, suit or proceeding, indicates that an action or suit may be brought by him; but actions or suits are not brought in the county court, but in the circuit court; hence the Statute by its very terms authorizes the bringing of this action.

Woerner, Administration, §§ 321, 324.

The facts stated constitute a cause of action.

An executor is personally liable for any and all losses suffered by the estate on account of his negligence and mismanagement.

Schouler, Executors, §§ 315, 382-384; *Fisher* v. *Skillman*, 18 N. J. Eq. 239; *Harrington* v. *Keteltas*, 92 N. Y. 40, 45.

Personal property of the deceased, subject to lien, constitutes assets, and it is the duty of the executor or administrator to reduce it to possession and pay off the lien out of the other property when beneficial to the estate.

Hill, Code, §§ 1161-1163; Schouler, Executors, §§ 203, 206, 317, 318; 2 Woerner, Administration, § 310.

If he neglects his duty in this respect he is liable for the loss.

Schouler, Executors, § 209, *note C; Feagan* v. *Kendall*, 43 Ala. 628; Hill, Code, § 1142.

It is the duty of an executor or administrator to sell off the personal property within a reasonable time after his appointment, and for any loss resulting by reason of his failure in this respect, he is personally liable.

Re Gorman's Estate, 50 Mo. 179; Schouler, Executors, §§ 355, 316; Perry, Trusts, §§ 845, 847; Woerner, Administration, § 330.

A right of redemption in personal property is assets and may be sold, as other property.

Jackson v. *Hull*, 10 Johns. 481; Freeman, Executions, §§ 117, 384, 917; Woerner, Administration, §§ 313, 471.

It was undoubtedly his duty to redeem or sell the right of redemption; his gross negligence and willful misconduct in failing to do either are sufficient to make him personally liable for the loss.

Perry, Trusts, § 845; *Fisher* v. *Spillman*, 18 N. J. Eq. 229; *Re Gorman's Estate*, 50 Mo. 179; *Sanford* v. *Thorp*, 45 Conn. 241; Schouler, Executors, §§ 316, 355; Woerner, Administration, § 330.

Messrs. **R. & E. B. Williams & Carey,** for respondent:

The authority for instituting this suit is doubtless derived, if at all, from section 1099, Hill's Code, which provides that on the removal of an executor the new administrator is entitled to the exclusive administration of the estate and may maintain any necessary or proper action, suit or proceeding on account thereof, against the executor ceasing to act. Under this Statute no "action, suit or proceeding" can be deemed "necessary" or "proper" until the accounts of the removed executor have been passed upon by the county court.

Adams v. *Petrain*, 11 Or. 304; *Hamlin* v. *Kinney*, 2 Or. 91.

In the absence of statute, an administrator *de bonus non* cannot sue his predecessor, either directly or on his administration bond for delinquencies or *devastavit*.

7 Am. & Eng. Encyclop. Law 228, *note; Beall* v. *New Mexico*, 83 U. S. 16 Wall. 540, 21 L. ed. 294; *Carter* v. *Trueman*, 7 Pa. 315; *Kendall* v. *Lee*, 2 Penr. & W. 482; *Johnson* v. *Hogan*, 37 Tex. 77; *American Board of Comrs. App.* 27 Conn. 344; *Searles* v. *Scott*, 14 Smedes & M. 94; *Rives* v. *Patty*, 43 Miss. 338; Schouler, Executors, §§ 408, 412; 3 Redf. Wills, 102.

The administrator *de bonis non* is only entitled to the assets unadministered, which remain *in specie*.

4 Bac. Abr. title *Executors*, 24; *Brownlee* v. *Lockwood*, 20 N. J. Eq. 256; *Potts* v. *Smith*, 3 Rawle, 361.

And it would appear that even where the executor is charged in a proper proceeding with delinquency or *devastavit*, a creditor or heir, and not the new administrator, is the proper person to call him to account.

Short v. *Johnson*, 25 Ill. 495; *Rowan* v. *Kirkpatrick*, 14 Ill. 7; *Beall* v. *New Mexico*, 83 U. S. 16 Wall. 535, 21 L. ed. 292.

An administrator cannot pay money out of the estate, to remove an incumbrance from the property of the estate; much less, then, to remove an incumbrance from property that does not constitute a part of the estate, and which never came into his hands as assets.

Re Knight, 12 Cal. 200.

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

The only question presented on this appeal is the sufficiency of the complaint. It appears that Joseph Holladay had been the executor of Ben Holladay's will, and for cause was removed from his trust. While he was acting as such executor, the property described in the complaint was sold under a decree of the Circuit Court of the United States for the District of Oregon, and a time specified in the decree of the federal court within which a redemption might be had. The amount for which the

property sold was more than $330,000. Independently of the provision of the Code conferring exclusive jurisdiction on the county courts to settle the accounts of executors and administrators, presently to be noticed, does the complaint state a cause of action? We do not think it does, for two reasons: *First.* It is not alleged in the complaint that the County Court of Multnomah County made any order authorizing or directing the defendant to make such redemption. Manifestly, the executor had no power or authority without the direction of the county court, or at least he was under no legal duty, to act and apply so large an amount of the estate under his control to the redemption of the stock in question. The value of such stock fluctuates, and at boom prices it might appear to be worth a very large sum, and yet, if subjected to the true test of its actual market value in cash, it might not appear to be so desirable as an investment. At least there is room for differences of opinion, and, in the absence of a positive direction by the county court on the subject, the executor might lawfully forbear making the redemption without subjecting himself to the charge of the *devastavit*. *Second.* It does not appear from this complaint that there were any assets in the hands of the executor available and applicable to the purposes of such redemption. The fact that he had property is not enough. Whether the county court would have ordered it converted into money, and applied to the exclusive purpose of this redemption, without regard to all other claimants, cannot be known; and to assume that it would have been so ordered, and that the money necessary could have been realized by a sale of the property in time to have made the redemption, would be going further to sustain this action than the facts would justify.

But there is another objection equally fatal to this complaint. The Constitution, § 12, art. 7, provides: "The county court shall have the jurisdiction pertaining to probate courts . . . as may be prescribed by law," and Hill's Code, § 895, provides: "The county court has the exclusive jurisdiction, in the first instance, pertaining to a court of probate; that is, . . . (3) to direct and control the conduct and settle the account of executors, administrators and guardians."

The complaint attempts to charge the defendant with what would have constituted *devastavit* at common law. It is defined to be a violation of duty by the executor or administrator such as renders him personally responsible for mischievous consequences, and which the law styles a *devastavit*,—that is, a wasting of the assets; or, to take the definition of the courts, a mismanagement of the estate and effects of the deceased in squandering and misapplying the assets contrary to the duty imposed on him. For a *devastavit* the executor or administrator, it is said, must answer out of his own means, so far as he had or might have had assets of the deceased. Schouler, Executors, § 383.

To the same effect is 7 Am. & Eng. Encyclop. Law, 346, where the authorities are very fully collated. For a *devastavit* an executor or administrator is liable to be called to an account in the county court. 2 Woerner, Administration, § 534; Schouler, Executors, § 383; *Re O'Connor*, 20 N.Y. S. R. 140; *Stiles* v. *Burch*, 5 Paige, 132, 3 N.Y. Ch. L. ed. 657; *Brown* v. *Brown*, 53 Barb. 217; *Irwin* v. *Backus*, 25 Cal. 214.

And the decision of this court in *Adams* v. *Petrain*, 11 Or. 304, very fully sustains the exclusive jurisdiction of the county courts in such matters, to the authority of which we fully accede. Counsel for appellant argued that it was the defendant's duty to have gone into the county court and endeavored to obtain an order for the redemption of this stock, and that his failure to do so constituted a *devastavit*. But the defendant may have honestly believed that method of procedure to have been impracticable, or that the money could not have been thus raised, or even that the interest of the estate would not have been promoted by the redemption; in either of which cases, if he honestly exercised his best judgment, he would not be personally responsible for a mistake. Besides this, if other persons interested in the estate differed with him on this subject, it was their right to apply to the county court and obtain its direction in relation to the redemption which, when given, the defendant would have been bound to obey.

It follows that the *judgment appealed from must be affirmed.*

C. P. HOGUE, *Respt.*,
v.
CITY OF ALBINA *et al.*, *Appts.*

(....Or.....)

*1. **In order to constitute a dedication by parol,** there must be some acts proved evincing a clear intention to dedicate the land to the public use.

2. **Where it is sought to establish a dedication by the sale of lots** with reference to a map or plat, the extent of such dedication is to be determined from the consideration of the whole map, the object being to ascertain the intention of the donor, the cardinal rule of construction being to give effect to the intention of the party as manifested by his acts.

3. **A dedication of land to the public use is not presumed,** but must appear by acts and declarations of the owner of such a public and deliberate character as clearly show an intention on his part to surrender his land for the use of the public, and the burden of proof is on the party asserting such dedication.

4. **In order to constitute a common-law dedication,** the owner's acts and declarations must be deliberate, unequivocal and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the public use.

5. **When the owner of land lays out a town, and records a plat thereof,** on which streets are dedicated to the public, and it is sought to establish another and different dedica-

*Head notes by BEAN, J.

NOTE.—Dedication a matter of intention. See *note* to Jacob v. Woolfolk (Ky.) 9 L. R. A. 551.

Presumption from user. See *note* to Church v. Portland (Or.) 6 L. R. A. 259.

tion by the acts and conduct of the owner, in exhibiting to intending purchasers another map prepared on the same day, and selling lots by reference to the second plat, such second plat, to have this effect, must be essentially different from the recorded one, showing on its face an intention on the part of the owner to make an additional dedication.

(December 16, 1890.)

APPEAL by defendants from a decree of the Circuit Court for Multnomah County in favor of plaintiff in a suit brought to enjoin defendants from entering upon, for the purpose of improving for highway purposes, land alleged to belong to plaintiff. *Affirmed.*

Statement by **Bean, J.:**

The plaintiff being the owner of a tract of land in size 1,141 feet north and south, and 408 feet east and west, within the corporate limits of the City of Albina, on April 3, 1889, caused an addition to the City to be laid off, of which under the name of "Albina Addition" a map or plan was made, signed, acknowledged and recorded by him, representing said addition, with its streets, lots and blocks, the size and width thereof being stated thereon. On this plan or map a strip of land about eighteen feet wide along the south side of block 1 was dedicated to the public as a part of Morris Street, which, together with a strip of land adjoining on the south before dedicated by the owner thereof, made Morris Street in front of this addition about forty-six feet wide. That prior to the platting of Albina Addition, Riverview Addition, which lies west of and adjoining said Albina Addition, the Railroad-Shops Addition, which lies south of and adjoining said Albina Addition, and Proebstel's Addition, which lies south of and adjoining Riverview Addition, had each been laid out, platted and the streets therein dedicated to the public, and the plats thereof duly recorded. That Morris Street, extending east and west between Albina Addition and Riverview Addition on the north, and Railroad-Shops Addition and Proebstel's Addition on the south, between Proebstel's Addition and Riverview Addition, is sixty feet wide, and between Railroad-Shops Addition and Albina Addition is forty-six feet wide, according to the said recorded plats, the south line of said street being a continuous straight line. On April 3, 1889, after making and filing the plat of Albina Addition by plaintiff, he caused to be published and exhibited to intending purchasers a map of said addition upon which are represented lots, blocks and streets, named and numbered, the same as on the recorded plat, and also represented, or attempted to represent thereon, the streets and public ways connecting with the streets in his said addition, but neither the size of lots or blocks nor width of streets are marked upon said last-named plat. On this plat, the north line of Morris Street is represented to be a continuous, straight line, but its width is not marked on the map, nor does the map indicate that block 1 abutting on this street is of any less width than the other blocks in the addition. That prior to the commencement of this action, plaintiff sold and conveyed lots in Albina Addition by reference to said map, but no sales were made of lots fronting on Morris Street. That on May 23, 1889, the City of Albina duly passed an ordinance providing for the time and manner of improving said Morris Street along and in front of Albina Addition, the full width thereof, and on July 13, 1889, the City duly entered into a contract with defendant Richardson for the improvement of said Morris Street, according to said ordinance, to the full width of sixty feet. That Richardson commenced the improvement of said street to the width of sixty feet, and, in doing so, entered upon a part of said street,—a strip of land fourteen feet wide,—from the south side of block 1, Albina Addition, as appeared on the recorded plat. Whereupon plaintiff began this suit for an injunction to restrain the defendants from entering upon said strip of land. A trial in the court below resulted in a decree in favor of the plaintiff, from which this appeal is taken.

Messrs. **P. L. Willis** and **Charles H. Carey,** for appellants:

A sale of lots with reference to a plat amounts to an immediate and irrevocable dedication of the streets exhibited on such plat.

2 Dillon, Mun. Corp. p. 638, § 640 (503); Ang. & D. Highways, § 149; *Pope* v. *Union,* 18 N. J. Eq. 282; *Bissell* v. *New York Cent. R. Co.* 23 N. Y. 66; *Rowan* v. *Portland,* 8 B. Mon. 232; *Lamar Co.* v. *Clements,* 49 Tex. 354; *Evansville* v. *Evans,* 37 Ind. 233; *Denver* v. *Clements* 3 Colo. 472; *Hanson* v. *Eastman,* 21 Minn. 509.

The principle is true not only as to streets upon which the lots sold face, but to all streets in the plat.

Derby v. *Alling,* 40 Conn. 411; *Denver* v. *Clements* and *Rowan* v. *Portland, supra.*

The exhibition or publication of a map of a town with spaces marked as streets thereon is evidence of the dedication of such spaces, of the most certain and definite character.

Lowndale v. *Portland,* 1 Or. 404, 405; *Meier* v. *Portland Cable R. Co.* 1 L. R. A. 856, 16 Or. 500, 505; *Hicklin* v. *McClear,* 18 Or. 126; *Dummer* v. *Jersey City Selectmen,* 20 N. J. L. 86.

Whatever may have been the secret or private intention of the owner, the intention as learned from his public acts must control.

Lamar Co. v. *Clements* and *Denver* v. *Clements, supra; Elizabethtown, L. etc. R. Co.* v. *Combs,* 10 Bush, 382; *Morgan* v. *Chicago & A. R. Co.* 96 U. S. 716, 24 L. ed. 743; *Clark* v. *Elizabeth,* 37 N. J. L. 120, 40 N. J. L. 172.

The failure to record the new map does not affect the dedication of the streets indicated thereon.

M. E. Church v. *Hoboken,* 33 N. J. L. 13, 97 Am. Dec. 698; *Cass County Suprs.* v. *Banks,* 44 Mich. 467.

Messrs. **H. W. Hogue** and **C. M. Idleman,** for respondent:

The map used in making sales does not act as a dedication in contradiction to the dedication executed and recorded. To show a dedication *in pais,* where there has been no judicial proceeding and no solemn form of conveyance, the proof ought to be so cogent, persuasive and full as to leave no reasonable doubt of the owner's intent.

David v. *New Orleans,* 16 La. Ann. 404, 79

Am. Dec. 586; *Lee* v. *Lake*, 14 Mich. 12, 90 Am. Dec. 220; Ang. & D. Highways, §§ 142, 147, 149; Herman, Estoppel, pp. 1278–1286, and cases cited; *Irwin* v. *Dixion*, 50 U. S. 9 How. 10, 31, 13 L. ed. 25, 34; Dillon, Mun. Corp. §§ 632, 636, and *note*, 639; *Niagara Falls S. B. Co.* v. *Bachman*, 66 N. Y. 261; *People* v. *Jones*, 6 Mich. 176; *Cincinnati* v. *White*, 31 U. S. 6 Pet. 439, 8 L. ed. 456; *United States* v. *Chicago*, 48 U. S. 7 How. 196, 12 L. ed. 665.

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

The contention of the defendants is that plaintiff, by making and exhibiting to intending purchasers the second map or plat of Albina Addition showing the north line of Morris Street to be a continuous straight line, and by selling lots with reference to this plat, thereby dedicated to the public the south fourteen feet of block 1 of this addition as shown on the recorded plat. It is not claimed that plaintiff ever expressly dedicated this strip of land to the public, or ever had any express intention so to do, but it is sought to conclude him upon the ground that he has suffered the public and individuals, relying upon his acts and conduct in exhibiting the second map to intending purchasers, and making sale of lots by reference to such plat, to acquire rights upon the faith that he has devoted this strip of land to the use of the public as a part of Morris Street. The law is well settled that where the owner of land lays out and establishes a town thereon, and makes and exhibits a map or plan of the town, with lots, blocks, streets and alleys, and sells lots with reference to such plan, he thereby dedicates to the public the streets and public ways marked thereon; that the sale and conveyance of lots, according to such plan or map, implies a grant or covenant that the streets or other public places represented by the map shall never be appropriated by the owner to a use inconsistent with that represented by the map on the faith of which the lots are sold, and in this State such dedication becomes irrevocable, and no formal acceptance by the public or corporate authorities is necessary. *Carter* v. *Portland*, 4 Or. 339; *Meier* v. *Portland Cable R. Co.* 16 Or. 500, 1 L. R. A. 856.

It is, however, conceded in this case, by the plaintiff, that he did dedicate to the public a portion of his land as a part of Morris Street, but the controversy here is whether the strip of land so dedicated is eighteen feet wide, as claimed by plaintiff, or thirty-two feet, as contended for by the defendants, and this question must be determined from plaintiff's intention as evinced by his acts and conduct. In order to constitute a dedication by parol, there must be some acts proved evincing a clear intention to devote the premises to the public use. *Carter* v. *Portland*, 4 Or. 339.

It is essential that the donor should intend to set apart the land for the use of the public, for it is held without contrariety of opinion that there can be no dedication unless there is a present intent to appropriate the land to the public. Elliott, Roads and Streets, 92; 2 Dillon, Mun. Corp. § 636, and *note*.

This intention is not a secret one, but that which is expressed in the visible and open conduct of the owner. His acts and declarations may, and often do, evince an intention to dedicate land to the public as a highway, when he had no real intention of so doing. His intention is to be inferred from his acts and declarations, but such acts and declarations must clearly indicate an intention on the part of the donor to dedicate the land to the public, or no dedication can exist. When it is sought to establish a dedication by the sale of lots with reference to a map or plat, the extent of such dedication is to be determined from the consideration of the whole map, the chief object being to ascertain the intention of the donor, for the cardinal rule of construction is to give effect to the intention of the party as manifested by his acts. A dedication is not presumed, but must be shown by the acts and declarations of the owner of such a public and deliberate character as clearly shows an intention on his part to surrender his land for the use of the public, and the burden of proof is on the party asserting such dedication.

In *Tinges* v. *Baltimore*, 51 Md. 609, it is said: "It is well settled by the decisions of this court that an intent on the part of the owner to dedicate his land to the particular use alleged is absolutely essential, and, unless such intention is clearly proved by the facts and circumstances of the particular case, no dedication exists. *McCormick* v. *Baltimore*, 45 Md. 524."

So in *Shellhouse* v. *State*, 110 Ind. 513, 9 West. Rep. 63: "To constitute a valid dedication, there must have been an actual intention on the part of the owner, clearly indicated by unequivocal acts or conduct, to dedicate the land to the public for use as an alley. *Tucker* v. *Conrad*, 103 Ind. 349, 1 West. Rep. 281, and cases cited.

"As was in effect said in the case above cited, unless there appears an actual intent to dedicate on the part of the owner, the court cannot do otherwise than to find that there was no dedication."

So in *Holdane* v. *Cold Spring*, 21 N. Y. 477: "The owner's acts and declarations should be deliberate, unequivocal and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use. If they be equivocal, or do not clearly and plainly indicate the intention to permanently abandon the property to the use of the public, they are insufficient to establish a case of dedication."

In *Lowndale* v. *Portland*, 1 Or. 405, Deady, *J.*, in discussing this question, says: "The burden of proof rests on the defendant to show a dedication. It must be clear and satisfactory. . . . The security and certainty of the title to real estate are among the most important objects of the laws of any civilized community. Around it the law has thrown certain solemnities and formalities so that the fact may be known and read by all men. What a man once had he is not to be presumed to have parted with, but the fact must be shown beyond conjecture; and although in the case of streets and public grounds in towns, from the nature of the case a dedication may be shown by acts resting in parol, they must be of such a public and deliberate character as makes them generally known, and not of doubtful intention." To the same effect are *Lee* v. *Lake*, 14 Mich. 18; *People* v. *Jones*, 6 Mich. 176; *Niagara*

Falls S. B. Co. v. *Bachman*, 66 N. Y. 261; *Rowan* v. *Portland*, 8 B. Mon. 232; Ang. & D. Highways, § 142; 5 Am. & Eng. Encyclop. Law, 400, and *note*.

From these and other authorities that might be cited it may be stated that the question of intent to dedicate is the paramount one in all cases of disputed dedication, and is to be determined as a question of mixed law and fact, from the evidence in each particular case.

The controversy here is not between a purchaser of lots fronting on Morris Street and the plaintiff, but between him and the City of Albina acting on behalf of the public. The claim of the City is based wholly upon the fact that the north line of Morris Street as shown upon the second map is a continuous straight line, and for that reason it is insisted that plaintiff is estopped from denying the dedication of the land in controversy to the public as a part of that street. This second map was made and published on the same day the original plat of Albina Addition was recorded, and was evidently designed to be used by the plaintiff or his agents in the sale of lots, and to this end it undertakes to represent the public ways connecting with the streets in this addition, the distance from school-houses, churches and public lines of transportation, and has published therein a statement of the many advantages claimed for this particular property. As far as Albina Addition is concerned, it appears to be an exact copy of the recorded map, except that the size of lots and width of streets are not marked thereon. In fact the map in evidence, and by stipulation of the parties conceded to be a copy of the recorded map, appears to be one of the second maps published by plaintiff, with the portion representing the adjoining property removed, and with the size of lots and width of streets marked thereon in pencil; so that, as far as plaintiff's property is concerned, there is no difference whatever in the two plats, but one is an exact copy of the other, and there is nothing on the second plat to indicate that Morris Street is more than forty-six feet wide, unless it be that the north line of this street is represented to be a continuous straight line from the southeast corner of this addition, extending west. Block 1 of this addition, which fronts on this street, appears to be the same size and contains the same number of lots as the other blocks in the addition, which could not be the case if a strip fourteen feet wide from the south side of this block is a part of Morris Street. From an inspection of the map, we think it much more probable that plaintiff only intended to represent the width of Morris Street as actually located in front of his property, than its width in front of the adjoining property, which he did not own, or in any way control.

As we have already seen, in order to constitute a common-law dedication, "the owner's acts must be deliberate, unequivocal and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the public use," and particularly is this true when there has been a statutory dedication by recording an acknowledged plat, and it is sought to establish another and different dedication by the acts and conduct of the owner in exhibiting to intending purchasers a map prepared on the same day as the recorded plat, and selling lots by reference to the second map. The second plat, to have this effect, should be essentially different from the recorded one, showing on its face an intention on the part of its owner to make an additional dedication. In this case the second map, as far as plaintiff's property is concerned, is precisely the same as the prior recorded one. The dimensions of streets, lots and blocks are not exhibits upon it, nor does it contain any evidence of an intention to make any dedication different from that already made. It is simply a plat, and made by the plaintiff for his own convenience in selling the property. Where the owner of property has complied with the statutory requirements in making and filing a plat of his proposed town or addition, we know of no rule of law that requires him to be bound by another or additional dedication simply because he makes a copy of his recorded plat for his own convenience in disposing of his property, upon which the lines do not appear with as complete accuracy as on the recorded plat, and especially when it does not clearly appear to be radically different from the recorded one.

It follows, therefore, that *the judgment of the court below must be affirmed.*

NEW YORK COURT OF APPEALS.

CANAJOHARIE NATIONAL BANK,
Respt.,
v.
John F. DIEFENDORF, *Appt.*

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

1. Negotiable notes bought by a bank cashier cannot, as matter of law, be said to have been purchased in good faith in the usual course of business so as to cut off the defense of fraudulent inception on the part of the maker, a farmer known to the cashier, who had never engaged in any business requiring the discounting of paper to the extent represented by the notes, which were executed two hundred miles from home, if they were purchased at a usurious rate of interest from the payee, a stran-

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NOTE.—*Protection of bona fide holder of commercial paper.*

One who holds negotiable paper, acquired in the usual course of business, for value and in good faith, has a perfect title notwithstanding circumstances of suspicion in the mode of its transfer, which might put a prudent man on inquiry. Good faith, and not care or negligence in any degree, is the question for the jury. Steinhart v. Boker, 34 Barb. 436.

It was at one time held in England that a person who had taken a bill under circumstances which should have excited the suspicions of a prudent and careful man could not retain it as against the rightful owner or recover against the parties to it. Gill v. Cubitt, 3 Barn. & C. 466; Snow v. Peacock, 2 Car.

10 L. R. A.

See also 29 L. R. A. 827; 34 L. R. A. 723.

ger, without any inquiry on the part of the cashier as to their origin or the existence of equities in favor of the maker; the question of good faith is for the jury.

2. **The cashier of a bank, who is also an owner of its capital stock,** is not a disinterested witness when testifying as to the good faith of his purchase of negotiable paper, so that his testimony must be regarded as controlling, if not contradicted; the question of his credibility is for the jury.

3. **The payment of value for negotiable paper is never conclusive upon the question of the bona fides** of its purchase, excepting in the absence of evidence tending to show bad faith or notice on the part of the purchaser of equities in favor of the maker.

4. **Evidence of gross carelessness in the purchase of negotiable paper** may be considered as tending to prove bad faith on the part of the purchaser, which will prevent his claiming to hold the paper free from equities on the part of the maker.

5. **The burden of showing that the holder of negotiable paper had notice** of facts impeaching its validity does not fall upon the maker until the holder has proved that he purchased in good faith, for value and in the usual course of business.

6. **Where the maker of negotiable paper has shown that it was fraudulently or illegally obtained** from him and put in circulation, the holder, in order to recover thereon, must show not only that he bought before maturity and paid value, but also that he acted in good faith.

(October 7, 1890.)

APPEAL by defendant from an order of the General Term of the Supreme Court, Third Department, reversing a judgment of the Montgomery Circuit in favor of defendant, and granting a new trial in an action brought to recover the amount alleged to be due on certain promissory notes. *Reversed.*

The facts are stated in the opinion.

Mr. **Z. S. Westbrook,** for appellant:

The notes in question are absolutely void under chapter 65, Laws of New York for 1877, in not having the words "given for a patent right" written or printed upon the face thereof, above the signature, as thereby required, in the hands of any purchaser who is not a bona fide holder.

Laws 1887, chap. 65; *Spring* v. *Quance*, 3 How. Pr. N. S. 65; *Palmer* v. *Minar*, 8 Hun, 342; *Herdic* v. *Roessler*, 12 Cent. Rep. 68, 109 N. Y. 127.

The general term erred in holding that as a matter of law the plaintiff was a bona fide holder of the notes, and entitled, therefore, to recover the amount paid for the same.

1 Randolph, Com. Paper, § 14, p. 12; Benjamin's Chalmers, Dig. art. 85; 1 Parsons, Bills and Notes, 254. See *Stalker* v. *McDonald*, 6 Hill, 93.

The question whether plaintiff was a bona fide holder was properly submitted to the jury.

The burden was cast upon the plaintiff to show that it was a bona fide holder of the notes in suit, and that it purchased without notice of the consideration or matters of defense alleged.

Vosburgh v. *Diefendorf*, 119 N. Y. 357; *First Nat. Bank of Cortland* v. *Green*, 43 N. Y. 298;

& P. 215, 3 Bing. 403; Down v. Halling, 4 Barn. & C. 330; Beckwith v. Corrall, 2 Car. & P. 261; Strange v. Wigney, 6 Bing. 677.

It was subsequently held that gross negligence alone would defeat the holder of a bill for value (Crook v. Jadis, 5 Barn. & Ad. 909; Backhouse v. Harrison, Id. 1098); and finally the question of negligence (Goodman v. Harvey, 4 Ad. & El. 870) was entirely thrust aside, except so far as it tended to show bad faith. Where there is no proof of bad faith, there is no objection to the title. Uther v. Rich, 10 Ad. & El. 784; Arbouin v. Anderson, 1 Ad. & El. N. S. 498; Stephens v. Foster, 1 Cromp. M. & R. 849.

So that in the absence of evidence of bad faith in the holder, if he is in other respects within the rule established for the benefit of commercial paper, his title will be upheld. Hall v. Wilson, 16 Barb. 551; Phelan v. Moss, 67 Pa. 59; Solomons v. Bank of England, 13 East, 135, *note*.

The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to diligence or negligence. He owes no duty of active inquiry. Magee v. Badger, 34 N. Y. 247; Belmont Branch Bank v. Hoge, 35 N. Y. 65.

The title of the person who takes negotiable paper before due, for a valuable consideration, can only be defeated by showing bad faith in him, which implies guilty knowledge or willful ignorance of the facts impairing the title; and the burden of proof lies on the assailant of the taker's title. Hotchkiss v. National S. & L. Bank, 88 U. S. 21 Wall. 354, 22 L. ed. 645; Murray v. Lardner, 69 U. S. 2 Wall. 110, 17 L. ed. 857.

Bona fide purchaser; protection of. See *notes* to Smythe v. Sprague (Mass.) 3 L. R. A. 822; McCleerey v. Wakefield (Iowa) 2 L. R. A. 529.

Circumstances indicating bad faith in holder.

If there is nothing upon the face of negotiable paper to cast suspicion upon its character, it can only be impeached in the hands of a holder for value by evidence that he took it under circumstances which rendered him guilty of bad faith. Goodrich v. McDonald, 77 Mich. 486.

A note drawn in a peculiar form prescribed by a bank, and payable to the cashier or bearer, when marked to show that it has been presented to the bank for discount and rejected, carries on its face circumstances of suspicion. Fowler v. Brantley, 39 U. S. 14 Pet. 318, 10 L. ed. 473.

A person who takes a bill under circumstances calculated to excite suspicion, and, having the means of knowledge, willfully abstains from making any inquiries, must be considered a holder with notice of the fraud, if any exists. Jones v. Gordon, 37 L. T. N. S. 477, L. R. 2 App. Cas. 616.

A person who takes paper with erasures and insertions plainly apparent on the face of it, and changing the nature of the instrument, is chargeable with all the facts which by proper inquiry he might have ascertained. Angle v. Northwestern L. Ins. Co. 92 U. S. 330, 23 L. ed. 556.

Presumption and burden of proof in favor of holder.

The holder of commercial paper is presumed to have taken it underdue for a valuable consideration, and without notice of any objection to which it was liable, and this presumption stands until overcome by sufficient proof. Swift v. Tyson, 41 U. S. 16 Pet. 1, 10 L. ed. 865; Lexington v. Butler, 81 U. S. 14 Wall. 282, 20 L. ed. 809; Carpenter v. Longan, 83 U. S. 16 Wall. 271, 21 L. ed. 313; Chambers County v. Clews, 88 U. S. 21 Wall. 317, 22 L. ed. 517; New Orleans Canal & Bkg. Co. v. Montgomery, 95 U. S. 16, 24 L. ed. 346; San Antonio v. Mehaffy, 96 U. S. 312, 24

See also 34 L. R. A. 69.

Farmers & C. Nat. Bank v. *Noxon*, 45 N. Y. 762; *Grocers Bank* v. *Penfeld*, 69 N. Y. 502; *Comstock* v. *Hier*, 73 N. Y. 273; *Davis S. M. Co.* v. *Best*, 7 Cent. Rep. 63, 105 N. Y. 59; *Seymour* v. *McKinstry*, 8 Cent. Rep. 73, 106 N. Y. 240; *Vosburgh* v. *Diefendorf*, 48 Hun, 619.

The consideration paid for a note is important as bearing on the question of notice.

Dan. Neg. Inst. § 777.

There is a presumption of bad faith where the price is small.

Dan. Neg. Inst. § 777*a*; *Auten* v. *Gruner*, 90 Ill. 300.

The test is good faith, and the holder of a fraudulent note must prove his bona fides, and that may be impeached by facts and circumstances.

1 Dan. Neg. Inst. §§ 746, 749, 751, 795, 796, 799, 801.

A purchaser knowing facts sufficient to put him on inquiry is presumed to have ascertained the extent of prior rights, or he is guilty of negligence fatal to his claim as bona fide purchaser.

Williamson v. *Brown*, 15 N. Y. 354; *Baker* v. *Bliss*, 39 N. Y. 70; *Nutter* v. *Storer*, 48 Me. 163; *Hamilton* v. *Marks*, 52 Mo. 78; *Merritt* v. *Duncan*, 7 Heisk. 156; *Steinhart* v. *Baker*, 34 Barb. 436; *Gould* v. *Stevens*, 43 Vt. 125.

If the circumstances are such as to invite inquiry and imply bad faith on the purchaser's part in neglecting to inquire, they will defeat his character as a bona fide holder.

1 Dan. Neg. Inst. 746; Chitty, Bills and Notes, 295; 1 Edw. Bills and Notes, § 517; 1 Parsons, Bills and Notes, 260; Story, Prom. Notes, § 197; 2 Randolph, Com. Paper, 693; *Smith* v. *Harlow*, 64 Me. 510; *Oakeley* v. *Oakdeen*, 2 Fost. & F. 655; *Craft's App.* 42 Conn. 146.

The amount of the share on the purchase of a note, and the inadequacy or unreasonableness of price paid for the note, are evidence of bad faith to be submitted to the jury.

2 Randolph, Com. Paper, §§ 991, 992. See *Lay* v. *Wissman*, 36 Iowa, 305; *De Witt* v. *Perkins*, 22 Wis. 474; *Baily* v. *Smith*, 14 Ohio St. 396; *Hereth* v. *Merchants Nat. Bank*, 34 Ind. 380; *Gould* v. *Stevens*, 43 Vt. 125; *Goldsmid* v. *Lewis County Bank*, 12 Barb. 410; *Gould* v. *Segee*, 5 Duer, 270.

Messrs. **William H. Van Steenbergh** and **Matthew Hale**, with *Messrs.* **Cook & Barnes**, for respondent:

The plaintiff paid substantially full value for the notes.

1 Dan. Neg. Inst. § 779; *Phelan* v. *Moss*, 67 Pa. 59; *Baily* v. *Smith*, 14 Ohio St. 402.

No case can be found where the fact that the payee does not reside near the maker, or near the bank where the note is payable, has been held to be evidence of bad faith.

See *Murray* v. *Lardner*, 69 U. S. 2 Wall. 110, 17 L. ed. 857; *Welch* v. *Sage*, 47 N. Y. 143; *National Bank of Republic* v. *Young*, 5 Cent. Rep. 113, 41 N. J. Eq. 531.

When defendant has proved that the instrument was originally without consideration, or was obtained by illegal means as by fraud, felony or force, then the holder must take up the burden of showing that he gave value for the instrument. This proof of value being

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L. ed. 816; Pana v. Bowler, 107 U. S. 529, 27 L. ed. 424; Montclair v. Ramsdell, 107 U. S. 147, 27 L. ed. 431.

The right to recover against the maker in such cases is not affected by the circumstance that such assignee is in possession of facts sufficient to arouse suspicion, and is negligent in not pursuing such information to discover the fraud or illegality to which the facts may seem to point. Merchants Bank v. McClelland, 9 Colo. 608; Wilson v. Metropolitan E. R. Co. 120 N. Y. 145.

It only devolves on him the burden of proving that which would have protected him had he diligently inquired before making the investment, Wilson v. Metropolitan E. R. Co. *supra*.

Note fraudulently obtained.

There can be no recovery on a promissory note obtained by fraud, unless the plaintiff shows that he is in possession of it as a bona fide holder without notice of the fraud. Giberson v. Jolley, 120 Ind. 301; Baldwin v. Fagan, 83 Ind. 447; Mitchell v. Tomlinson, 91 Ind. 167; Eichelberger v. Old Nat. Bank, 1 West. Rep. 481, 103 Ind. 401.

Where the maker shows that a note was obtained from him by fraud, it devolves upon the holder to show that he paid value and took before maturity without notice. Eichelberger v. Old Nat. Bank, *supra;* Harrison v. State Bank, 28 Ind. 133; Zook v. Simonson, 72 Ind. 183; Baldwin v. Fagan and Mitchell v. Tomlinson, *supra;* Hinkley v. St. Louis Fourth Nat. Bank, 77 Ind. 475.

This is regarded as the settled rule in New York State. First Nat Bank of Cortland v. Green, 43 N. Y. 298; Farmers & C. Nat. Bank v. Noxon, 45 N. Y. 762; Ocean Nat. Bank v. Carll, 55 N. Y. 440; Wilson v. Rocke, 58 N. Y. 643; Grocers Bank v. Penfield, 69 N. Y. 502; Nickerson v. Ruger, 76 N. Y. 279; Seymour v. McKinstry, 9 Cent. Rep. 823, 106 N. Y. 240; Stewart v. Lansing, 104 U. S. 505, 26 L. ed. 866; Smith v. Livingston, 111 Mass. 342; Sullivan v. Langley, 120 Mass. 437.

A promissory note is not delivered so that it can become valid, even in the hands of a bona fide purchaser, where the maker signs his name to it through fear of violence, and it is snatched up as soon as signed and carried away against his will. Palmer v. Poor, 6 L. R. A. 469, and *note*, 121 Ind. 135.

Where a party is induced to sign a negotiable instrument by fraud, artifice or deception, and he signs it innocently, there can be no recovery upon the bill or note, although the holder may be an innocent purchaser for value before maturity, unless the maker was guilty of laches or carelessness in omitting to read the same, or by some other means ascertaining the true nature and import of the instrument. The burden of proving this, and his freedom from laches, rests upon the maker. National Exchange Bank v. Veneman, 43 Hun, 241; Chapman v. Rose, 56 N. Y. 137; Foster v. MacKinnon, 38 L. J. C. P. 310; Citizens Nat. Bank v. Smith, 55 N. H. 593; Pennsylvania R. Co. v. Shay, 82 Pa. 202; Bigelow, Bills and Notes, 583; 1 Dan. Neg. Inst. § 850; Douglass v. Matting, 29 Iowa, 498.

When the consideration of a note is the sale and assignment of a patent right, and the payee obtains the possession by fraud, without making the assignment, the fraud is available as a defense to the maker, if the note is not negotiable but not if negotiable; and it is transferred before maturity, for value, in the usual course of business. Wildsmith v. Tracy, 80 Ala. 258.

But where accommodation indorsement is procured by the fraud of the maker, in concealing a condition annexed to a prior indorsement, the payee not having knowledge or notice of such fraud when he accepts the note as payment, such fraud is no defense to the accommodation indorser. Marks v. First Nat. Bank, 79 Ala. 550.

established, if the promisor would defend, he must now show that the transfer to the plaintiff was fraudulent.

2 Parsons, Bills and Notes, 280; 1 Dan. Neg. Inst. 2d ed. 668, § 819; Byles, Bills, 6th Am. ed. p. 194, *121; Chitty, Bills and Notes, 648, 12th Am. ed. p. 725, *notes g, s.*

The English cases require of the plaintiff, in case of proof of fraud or illegality between the original parties to the paper, that he should prove merely that he paid value for it, before maturity.

Duncan v. *Scott*, 1 Campb. 100; *Rees* v. *Marquis of Meadfort*, 2 Campb. 574; *Paterson* v. *Hardacre*, 4 Taunt. 114; *Thomas* v. *Newton*, 2 Car. & P. 606; *Smith* v. *Braine*, 15 Jur. 287; *Bailey* v. *Bidwell*, 13 Mees. & W. 73; *Harvey* v. *Towers*, 6 Exch. 656. See also *Vallett* v. *Parker*, 6 Wend. 615; *Catlin* v. *Hansen*, 1 Duer. 309; *Hart* v. *Potter*, 4 Duer, 458; *Ross* v. *Bedell*, 5 Duer, 462; *Dalrymple* v. *Hillenbrand*, 62 N.Y. 5; *Cowing* v. *Altman*, 71 N. Y. 435.

Circumstances that might excite suspicion in a cautious man are not equivalent to notice to the purchaser of negotiable paper.

Chapman v. *Rose*, 56 N. Y. 137; *Welch* v. *Sage*, 47 N. Y. 143; *Seybel* v. *National Currency Bank*, 54 N. Y. 288; *Murray* v. *Lardner*, 69 U. S. 2 Wall. 110, 17 L. ed. 857; *Texas* v. *White*, 74 U. S. 7 Wall. 700, 19 L. ed. 227; *Hotchkiss* v. *National Shoe & Leather Bank*, 88 U. S. 21 Wall. 354, 22 L. ed. 645; *Collins* v. *Gilbert*, 94 U. S. 753, 24 L. ed. 170; *Shaw* v. *Mechanics Nat. Bank*, 101 U. S. 557, 25 L. ed. 892.

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

The evidence tended to prove that Henderson and Van Valkenburgh procured from the defendant at Rochester on December 7, 1886, eight promissory notes of $1,000 each, payable to Henderson or bearer at various times, from two to twelve months from date, by fraud and misrepresentation, and under an agreement that they should be retained in the possession of the payee to be paid from the receipts of a business to be carried on as partners by the said parties, and under such circumstances as would not have authorized their payee to enforce them against the maker. Two of these notes were purchased by the plaintiff of Henderson at its banking office in the Village of Canajoharie, nearly 200 miles from the place where the notes were executed, on the 9th and 10th days of December, 1886, respectively, and these notes are the subject of this action. The purchase of the notes by the plaintiff was conducted by its cashier, and the circumstances attending their transfer were not materially different, in respect to the two notes, except in the fact that the transfer of the second note indicated a larger indebtedness of their maker at the time of the last transaction than was inferable from the first sale. The circumstances of the transfer were testified to by the cashier alone, and constituted a part of the plaintiff's affirmative case. It may be assumed in the further consideration of the case that such evidence established the fact that the notes were purchased before maturity, and that the plaintiff paid

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Burden of proof in cases of fraud or illegality.

If there is any proof of fraud or illegality which can be left to the jury, such proof will cast on the plaintiff the *onus* of showing that he gave value for negotiable papers sued on. Smith v. Sac County, 78 U. S. 11 Wall. 139, 20 L. ed. 102; Combs v. Hodge, 62 U. S. 21 How. 397, 16 L. ed. 115; Collins v. Gilbert, 94 U. S. 753, 24 L. ed. 170; Stewart v. Lansing, 104 U. S. 505, 26 L. ed. 866.

The rule that when the maker shows that the note has been obtained by fraud or duress, a subsequent transferee must, to recover, show that he is a bona fide purchaser, is not satisfied by showing that the transferee paid value for the note, but it is necessary to show that he had no knowledge of the fraud. Vosburgh v. Diefendorf, 119 N. Y. 357.

Proof of fraud in procurement of note casts upon the holder the burden of proof as to consideration paid before maturity, without notice. Crampton v. Perkins, 3 Cent. Rep. 691, 65 Md. 22. See Totten v. Bucy, 57 Md. 452, 453.

Where a note for a patent right does not contain the words "given for a patent right" as required by Act of April 12, 1872, the holder has the burden of showing that he acquired the note before maturity and for value, without notice; and the question is for the jury. Horstman v. Zimmerman (Pa.) 3 Cent. Rep. 249; New v. Walker, 6 West. Rep. 869, 108 Ind. 365.

Note obtained through false representations.

A person signing a note on false representations as to the nature of the instrument, without exercising due care to ascertain its contents, although he could not read or write the English language, is liable thereon to the indorsee of the note in due course. Bedell v. Hering, 77 Cal. 572; Haight v. Joyce, 2 Cal. 65; Rich v. Davis, 4 Cal. 22, 6 Cal. 141; Hellman v. Potter, 6 Cal. 14; Fuller v. Hutchings, 10 Cal. 523; Mitchell v. Hackett, 14 Cal. 666; Poorman v. Mills, 39 Cal. 345; Smith v. Silsby, 55 Cal. 470; Meyer v. Brown, 65 Cal. 590.

The fact that acceptance was induced by fraudulent misrepresentations, or without consideration, is not a defense in an action against the acceptor, where the bill was acquired before acceptance, for value and without notice. Heurtematte v. Morris, 1 Cent. Rep. 792, 101 N. Y. 63; Arpin v. Owens, 1 New Eng. Rep. 204, 140 Mass. 144; 1 Parsons, Bills and Notes, 323, 544.

False representations as to consideration a defense.

A purchaser of land may set up a false representation made as an inducement to the purchase in defense of an action on the note given by him for the purchase price, and this defense is available either against the payee or a purchaser with notice. Applegarth v. Robertson, 3 Cent. Rep. 886, 65 Md. 493.

In such action the burden is on the defendant to prove that fact and that the note was given without consideration; which, when established, makes it incumbent on the holder to prove that he received it bona fide, before maturity, and for value; having done so, it devolves upon the maker to prove that the holder had actual notice of the specific facts which would render the note originally invalid; and failing to produce such countervailing proof, plaintiff must recover. Carson v. Porter, 4 West. Rep. 883, 22 Mo. App. 179; Johnson v. McMurray, 72 Mo. 278; Kenney v. Hannibal & St. J. R. Co. 80 Mo. 573; Cannon v. Moore, 17 Mo. App. 102; Boone v. Wabash, St. L. & P. R. Co. 2 West. Rep. 525, 20 Mo. App. 232.

Knowledge of facts and circumstances.

To impeach commercial paper by proof of facts and circumstances outside of the instrument itself, it must be first shown that he had knowledge of such facts and circumstances at the time the transfer was made. Goodman v. Simonds, 61 U. S. 20

nearly their face value therefor. The cashier also testified that he had no knowledge or notice of the consideration of the notes, and that he took them for the Bank in the usual course of its business. Other circumstances affecting the purchase appear from the uncontradicted evidence, and are substantially as follows: The defendant was a resident of the Town of Root, and had for many years lived about six miles from Canajoharie, where the plaintiff's banking institution was located. There is no evidence in the case showing his pecuniary condition; but it does appear that he was a farmer, upwards of sixty years of age, and had never been engaged in any business requiring the discount of negotiable paper to any noticeable extent. He was known to the cashier of the plaintiff, by whom the purchase was effected, but Henderson, from whom the notes were bought, was, as he says, a "perfect stranger" to him, and he did not know his place of residence, except that he had said he lived in Colorado. The transaction connected with the purchase of the notes took place in the outer office of the Bank, and occupied only about ten minutes. One Vosburg, a resident of Canajoharie, introduced Henderson to the cashier, stating that his name was Henderson, and that he wanted to get the money on the note. The cashier requested Vosburg to indorse it, which he declined to do. The cashier then stated what he would give for the notes, payment to be made in drafts, and Henderson assented, and the transaction was closed. Henderson indorsed the notes, but it does not appear that he gave any information to the plaintiff as to his residence,—the place where he might receive notice of protest,—or his pecuniary circumstances, and none was required of him. It did not appear that the cashier was acquainted with the handwriting of Diefendorf, or made inquiry of anyone who knew it. The amount of the purchase price was paid to Henderson in drafts on plaintiff's correspondents in other cities, for which a percentage was charged by it, and these drafts were cashed on the day after they were respectively received by the plaintiff, upon the statement by Henderson that he wanted the cash, and did not want drafts. There was no haggling about terms in the negotiation. The cashier dictated the price, and the funds in which the payment was to be made, and Henderson accepted the offer without demurrer or hesitation. The notes bore interest, and the plaintiff paid Henderson a sum amounting to their face value less a discount, which insured the Bank from 15 to 18 per cent profit upon the transaction. As might naturally have been expected, after the lapse of a short time Henderson disappeared, and has not since been heard from. The notes were, apparently, for unusual amounts for a farmer in ordinary circumstances to give, and would naturally have excited curiosity in those who knew him, as to the circumstances under which such an indebtedness was incurred. The plaintiff's

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How. 343, 15 L. ed. 934; Collins v. Gilbert, 94 U. S. 753, 24 L. ed. 170. See Gould v. Segee, 5 Duer, 260.

The question whether a party taking negotiable paper had such knowledge or not is a question of fact for the jury. Goodman v. Simonds, *supra*; Smith v. Brush, 11 Conn. 368; Wheeler v. Guild, 20 Pick. 545; May v. Chapman, 16 Mees. & W. 355.

Knowledge of the consideration, even when imparted by the note itself, will not prejudice the rights of a good-faith purchaser, unless the consideration is such as invalidates the note or is legally insufficient. New v. Walker, 6 West. Rep. 873, 108 Ind. 365; Hereth v. Merchants Nat. Bank, 34 Ind. 380; Doherty v. Perry, 38 Ind. 15; Bank of Commerce v. Barrett, 38 Ga. 126; Heard v. Dubuque County Bank, 8 Neb. 10; Stevenson v. O'Neal, 71 Ill. 314.

Mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud, is not a defense to a note. Clark's App. 57 Conn. 565; Worth v. Case, 42 N. Y. 362; Earl v. Peck, 64 N. Y. 596; Cowee v. Cornell, 75 N. Y. 91; Dean v. Carruth, 108 Mass. 242; Wolford v. Powers, 85 Ind. 294.

The right of a bona fide holder to recover can be defeated only by proof of such circumstances as show that he took the paper with knowledge of some infirmity in it, or with such suspicion with regard to its validity as that his conduct in taking it was fraudulent. National Bank of Republic v. Young, 5 Cent. Rep. 113, 41 N. J. Eq. 531; Goodman v. Harvey, 4 Ad. & El. 870; Goodman v. Simonds, 61 U. S. 20 How. 343, 15 L. ed. 934; Murray v. Lardner, 69 U. S. 2 Wall. 110, 17 L. ed. 857.

Mere notice of facts not sufficient.

Mere notice of facts such as would put a prudent person upon inquiry is not sufficient to impeach the title of the holder of negotiable paper taken for value before maturity. National Bank of Republic v. Young, 5 Cent. Rep. 113, 41 N. J. Eq. 531.

Yet express notice is not indispensable, so as to let in notice of defect or infirmity as a bar or defense against a holder for value; it is sufficient if the circumstances are such as necessarily cast a shade upon the transaction and put the holder on inquiry. Cone v. Baldwin, 12 Pick. 545; Hall v. Hale, 8 Conn. 336; Knapp v. Lee, 3 Pick. 452.

Notice of facts to impeach a bill means knowledge of those facts; and by facts is intended facts which of themselves would impeach the transaction, and not merely facts which tend to prove fraud or excite suspicion. Credit Co. v. Howe Mach. Co. 3 New Eng. Rep. 564, 54 Conn. 357; Brush v. Scribner, 11 Conn. 388.

But a person who takes a bill under circumstances calculated to excite suspicion and, having the means of knowledge, willfully abstains from making inquiries, must be considered a holder with notice of the fraud, if any exists. Jones v. Gordon, L. R. 2 App. Cas. 616, 37 L. T. N. S. 477, 26 Week. Rep. (H. L.) 172.

The burden is upon the holder to show that his indorser took it without notice as to the nature of the consideration. New v. Walker, 6 West. Rep. 873, 108 Ind. 365; 1 Dan. Neg. Inst. § 198; Paton v. Coit, 5 Mich. 505; Johnson v. Meeker, 1 Wis. 436; Doe v. Burnham, 31 N. H. 426; Story, Bills and Notes, § 196.

And if the payee of a note took it for value and without notice of the illegality and want of consideration, his assignee can recover upon it even though he had notice. Graham v. Larimer, 83 Cal. 173; Marion County v. Clark, 94 U. S. 278, 24 L. ed. 59; Cromwell v. Sac County, 96 U. S. 351, 24 L. ed. 195; Shell v. Telford, 4 N. Y. Leg. Obs. 307.

The pendency of a suit relating to the validity of negotiable paper is not constructive notice to subsequent holders thereof before maturity. Enfield v. Jordan, 119 U. S. 680, 30 L. ed. 523.

State laws or decisions cannot change this rule so as to affect nonresidents not within the State. *Ibid.*; Warren County v. Marcy, 97 U. S. 96, 24 L. ed. 977; Carroll County v. Smith, 111 U. S. 556, 28 L. ed. 517; Brooklyn v. Ætna Ins. Co. 99 U. S. 362, 25 L. ed. 416; Empire v. Darlington, 101 U. S. 87, 25 L. ed. 878; Pana v. Bowler, 107 U. S. 545, 27 L. ed. 430.

cashier, however, studiously refrained from acquiring any information in regard thereto, even such as might be, under many circumstances, desirable for the Bank to have. He made no inquiry as to the consideration of these large notes, the influences which had taken this farmer so far from home or the circumstances attending their execution. He asked no questions as to the responsibility, employment or associations of his vendor, but apparently bought the notes upon the security of a single name, evidenced by a signature unfamiliar to him, and indifferent to the manner in which they were obtained, or the responsibility of the person with whom he was contracting. For aught that he knew, his vendor was utterly irresponsible, and might have been a man of infamous character, capable of any crime, and able to place himself beyond the reach of criminal process, if circumstances rendered such a precaution necessary or prudent. Even Vosburg refused to approve the responsibility of the parties, although he went to the Bank professedly to enable Henderson to get the money on the notes. The notes might have been given for a gambling transaction, or for a usurious consideration, and have been uncollectible by their holder, or impaired in value; but the plaintiff took no heed of these circumstances, and embarked the funds of the Bank in the purchase of questionable obligations from a perfect stranger, in violation of the customary rules which prevail in financial institutions. The notes were transferred at a prohibited rate of interest, and would have been void for usury, within the doctrine of *Hall* v. *Wilson*, 16 Barb. 550, in the hands of any other transferee than a national bank. This fact limits the forfeiture to the interest, but does not make the taking of usury by such banks lawful. The history of the negotiation is best described by negatives, and is more significant from what was omitted than what was avowed. *Stewart* v. *Lansing*, 104 U. S. 510, 26 L. ed. 868. Greater caution in avoiding the most natural information could not have been exhibited by the plaintiff if the cashier had known the notes were obtained by fraud or crime, and desired to remain in ignorance of those facts. His conduct indicated something more than negligence. He exhibited a studious desire to avoid any information which might throw light upon the origin of the notes, or the existence of equities in favor of their maker. Henderson, a "perfect stranger" to the plaintiff, coming redhanded from the perpetration of his fraud, and desiring to realize its fruits, while his confederate kept Diefendorf employed at a distance from his residence, could not have discovered a less scrupulous or more accommodating instrument than this National Bank, if he had sought the customary agencies for the negotiation of feloniously acquired securities. Henderson displayed a cautious reticence in recommending the paper he had to dispose of; and the cashier, with a delicacy as novel as it was considerate, appreciated his situation, and refrained from putting any questions which might embarrass his vendor in negotiating a successful sale. Without being called upon to make the explanation usually required by banking institutions, in respect to the most ordinary transactions of every-day customers, this stranger, it is claimed, walked into a national bank and converted his feloniously acquired property into money without difficulty or delay. Common prudence, and a decent regard for the rights of those who might be injured by his conduct, required more than this from the least scrupulous of men, and much more, it would seem, from the managers of a chartered financial institution. Such institutions have no right to advertise the purchase by them of unlawfully acquired notes, bonds or negotiable paper without inquiry or question, neither have they the right to deal in such securities in defiance of the salutary rules regulating the acquisition of title to personal property. It cannot be seriously contended that a business carried on in such a manner is conducted according to the usual and ordinary course of such institutions, within the meaning of those words as used in relation to transfers of personal property. Promissory notes purchased at a usurious and illegal rate of interest before inception, and being void in the hands of their transferrer, under circumstances so strange and unusual as accompanied this transaction, cannot be said, as matter of law, to have been acquired in good faith, in the usual course of business.

No material question arises in this case as to which party had the burden of proof, as the plaintiff voluntarily assumed that burden in the outset of the trial, and no contradictory proof as to the circumstances attending the transfer of the notes was given by the defendant. The burden of proof to establish this fact, as we shall hereafter see, rested upon the plaintiff; and, upon all the evidence, the question, we think, was for the jury to determine. The claim that the plaintiff's cashier was a disinterested witness, whose testimony must be regarded as controlling, if not contradicted, cannot be sustained. Aside from the alleged improbability of his statements, he was the financial agent of the plaintiff, and the owner of one fifth of its capital stock, and, aside from his direct interest, responsible to his principal for the care, fidelity and prudence with which he discharged his official duties. His interest in the transaction was co-extensive with that of the plaintiff, and brings him directly within the cases which hold that the credibility of such a witness is a question for the jury to determine. *Elwood* v. *W. U. Teleg. Co.* 45 N. Y. 549; *Honegger* v. *Wettstein*, 94 N. Y. 252. Such evidence is also for the jury, where the evidence of the witness shows his conduct to have been unusual, imprudent and inconsistent with the character which he seeks to maintain as a bona fide holder. *Stilwell* v. *Carpenter*, 2 Abb. N. C. 239; *Moody* v. *Pell*, Id. 275; *Kavanagh* v. *Wilson*, 70 N. Y. 177.

At the close of the evidence the plaintiff requested the court to direct a verdict for it upon the ground "that upon the undisputed evidence in the case plaintiff purchased the notes before maturity, paid value therefor, and without notice of any facts constituting a defense to the notes." This request was denied, and the plaintiff excepted. The trial court submitted the case to the jury under instruction that if they found the notes were procured from Diefendorf by fraud, and under such circumstances as would not entitle the payee thereof

to recover against him, they should consider the further question, whether the plaintiff purchased said notes for value and in good faith, and if it did not that the defendant was entitled to a verdict. The jury found for the defendant. Upon appeal, the judgment entered on this verdict was reversed, upon questions of law, and a new trial ordered. The ground upon which this result was reached was said to be that there was no evidence of bad faith in the purchase of the notes on the part of the plaintiff, and that the trial court erred in not directing a verdict for the plaintiff. The plaintiff claims that the proof showing it purchased the notes before maturity, paying value therefor, conclusively establishes its character as a bona fide holder, and entitles it to recover, in the absence of proof showing that it had notice or knowledge of facts constituting a defense to the action. The plaintiff's contention eliminates the element of good faith from the transaction, and assumes that the language, "a holder for value," as used in the authorities, is satisfied by proof that the notes were purchased before maturity, and value paid therefor. We think this contention is contrary to the weight of authority in this State, even if it is not wholly unsupported by it. The payment of value for negotiable paper is a circumstance to be taken into account, with other facts, in determining the question of the bona fides of the transaction, and, when full value is paid, is entitled to great weight; but that fact is never conclusive, except in the absence of evidence tending to show notice of bad faith. Those who seek to secure the advantages which the commercial law confers upon the holders of bank-bills and negotiable paper must bring themselves within the conditions which that law prescribes to establish the character of a bona fide holder. They are entitled to the benefits of that rule only when they have purchased such paper in good faith, in the usual course of business, before maturity, for full value and without notice of any facts affecting the validity of the paper. This has been the law in this State since the case of *Bay* v. *Coddington*, 5 Johns. Ch. 54, 1 N. Y. Ch. L. ed. 1006, 20 Johns. 637. The fact that they took the paper before maturity, and paid the full value thereof, in the absence of other facts, undoubtedly affords a presumption of the good faith of the transaction; but where it further appears that such property has been fraudulently or illegally obtained from its owner or maker, and under such circumstances that the person putting it in circulation could not maintain an action thereon, it is incumbent upon the holder, in order to succeed, to go further and show the circumstances under which it came into his possession, and that he has acted in good faith in the transaction. What constitutes good faith in such transactions has been the subject of frequent discussion in the books; and, while differences of opinion may exist on some points, there is perfect uniformity among them upon the point that a want of good faith in the transaction is fatal to the title of the holder, and that gross carelessness, although not of itself sufficient, as a question of law, to defeat title, constitutes evidence of bad faith. The requirement of good faith is expressed in the very term by which a holder is protected, and is fundamental in the maintenance of the character claimed to be protected. 1 Parsons, Notes and Bills, 238.

It was held in *Seybel* v. *National Currency Bank*, 54 N. Y. 288, that gross negligence, though not conclusive, was evidence of bad faith; and, impliedly, that a verdict of a jury based upon such evidence would be upheld. This doctrine is conceded even by the case of *Goodman* v. *Harvey*, 4 Ad. & El. 870, the leading case in England in upholding the rights of the holders of commercial paper. *Justice* Swayne, in the case of *Murray* v. *Lardner*, 69 U. S. 2 Wall. 121, 17 L. ed. 859, says: "The rule may be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith." *Chief Judge* Church said, in the case of *Dutchess County Mut. Ins. Co.* v. *Hachfield*, 73 N. Y. 228, that "bad faith is predicated upon a variety of circumstances,—some of them slight in character, and others of more significance. . . . A perfectly upright, honest man might sell a bond which had been stolen, and the explanation might prevent even the taint of wrong on his part; while the explanation, although falling far short of proof of actual guilt, might leave upon the mind an apprehension that he either directly or impliedly connived at the wrong, or at least that he was willing to deal in securities, and keep his eyes and ears closed so that he should not ascertain the real truth."

In the American and English Encyclopædia of Law (vol. 2, p. 390) it is said that "to constitute a bona fide holder of a note or bill it must be obtained for value before the real or apparent maturity of the paper, and in the due course of business, and in good faith." Numerous authorities are there cited to maintain the doctrine of the text. The late *Judge* Allen, in the case of *Hall* v. *Wilson*, 16 Barb. 548, defined the conditions necessary to render a person a bona fide holder, within the meaning of the mercantile law, in the following language: "To entitle the holder of negotiable securities which have been fraudulently, feloniously or without consideration obtained and put in circulation, to the benefit of this rule, he must have become such holder, in good faith, for a full and fair consideration, in the usual course of business, and without notice of the defect or infirmity in the title." The opinion in respect to each of the conditions mentioned by the judge was supported by numerous authorities, and the case has been repeatedly cited and approved in the subsequent reports of this State. The case seems to be in point. The action there was brought upon a note for $120 made by the defendant, and stolen by one Bundy from the maker's desk. Bundy sold the note to one Bigelow for $115, before maturity. Bundy was introduced to Bigelow by another man, who told Bigelow that Bundy had been at work for the defendant. It was held that the note, never having been delivered to Bundy, had no inception until Bigelow bought it, and he, having purchased it at a usurious rate of interest, had not acquired it in good faith and in the usual course of business. The defense of usury was not set up, and the fact that usury was taken was regarded only as evidence upon the question of good faith in the purchase.

The rule is also laid down in Daniel on Negotiable Instruments, 2d ed. § 819, as taken from plaintiff's brief, that after proof by the defendant that the paper was fraudulently or feloniously procured from him, and "when the holder responds by showing that he did acquire the instrument bona fide for value, in the usual course of business, while it is current, and under circumstances which do not operate as constructive notice of the facts which impeach the original validity, the defendant must then prove that he had actual notice of such facts." Clearly by this rule the burden of showing that the holder had notice of the facts impeaching the validity of the paper did not fall upon him until the holder had proved that he purchased in good faith, for value, and in the usual course of business. So also the rule laid down in Chitty on Bills and Notes, 12th Am. ed. § 643, quoted by the plaintiff, is to the same effect. The author says: "In an action by the indorsee of a bill of exchange, if it appears on the part of the defendant that the defendant or a prior party made it under duress, or was defrauded of it, or had only part of its value, the plaintiff must be prepared to prove under what circumstances and for what value he became the holder." Can it be claimed under this rule, if the circumstances showed the holder acquired the paper in bad faith, or by an unusual course of business, that he could recover upon it? Most certainly not; and yet it seems to us that that is just what the plaintiff claims here.

The case of *Vallett* v. *Parker*, 6 Wend. 615, also cited by plaintiff, is authority for the defendant's position. *Chief Judge* Savage there says: "If there are any suspicious circumstances as to the bona fides of his [the holder's] possession, and the defendant has a good defense against the payee, then he must show that he paid value for it. For instance, if the note has been lost or stolen, or fraudulently put into circulation, etc., then the plaintiff must show that he came lawfully and fairly by it, and paid value for it,"—citing *Cumberland* v. *Codrington*, 3 Johns. Ch. 260, 1 N. Y. Ch. L. ed. 612.

In *First Nat. Bank of Cortland* v. *Green*, 43 N. Y. 300, *Judge* Rapallo said: "The ground taken at general term, that the burden of proof was on the defendant, not only to show the defense of duress, but also to impeach the title of the plaintiff as a bona fide holder for value, cannot be sustained. If the defendant had been permitted to prove and had proved the defense of duress, the burden would have been thereby thrown upon the plaintiff to prove that it gave value for the note, and the circumstances under which it was received." This case is also cited by the learned counsel for the plaintiff to sustain his contention. Upon what theory this is done it is difficult to understand; for if the burden is cast upon the plaintiff by proof of the illegality of the paper, to show the circumstances under which it received it, this can be for no other reason than to compel it to show whether it received the paper in good faith or not. We find no authorities holding that this obligation is discharged by simply proving that value was paid for the property. It was said by *Judge* Church, in *Ocean Nat. Bank* v. *Carll*, 55 N. Y. 441, that "the only point presented for the consideration of this court is that the plaintiff failed to prove that it was a bona fide holder for value of the note upon which the action was brought. The possession of the note was sufficient, prima facie, to establish this; but when it was proved that the note was given without consideration, and fraudulently put in circulation, it was incumbent upon the plaintiff to prove the fact."

In *Nickerson* v. *Ruger*, 76 N. Y. 282, the court said: "At the close of the plaintiffs' case, they had, by the admission in the answer, proof of Taylor's indorsement, and production of the note, established a prima facie case, and, for the time being, their own right to recover and the defendants' liability. But if the facts offered in evidence by the defendants had been proved, the latter would have established, not merely that the note was without consideration, and made for the accommodation of Taylor, but that it was fraudulently put in circulation, and diverted from the use intended. It would then have been necessary for the plaintiffs to prove, if they could, that they were bona fide holders of the note for value, or fail in the action."

A sufficient number of authorities have been cited to show the uniformity with which the cases in the highest courts of the State hold that upon proof by the defendant that his obligations have been fraudulently or illegally obtained, and put in circulation, the person seeking to recover upon them must show, not only that he bought before maturity and paid value, but also the circumstances under which he acquired the paper, with the view of enabling the jury to determine whether he acted in good faith or not. It makes no difference in the question presented whether the plaintiff pursues the orderly course of first presenting and proving his note, relying upon the presumptions of bona fides which accompany the possession of the paper, and delays making proof of the circumstances of his purchase until after the defendant gives evidence of his defense, or, as in this case, he makes the proof of such circumstances as part of his affirmative case. The burden of making out good faith is always upon the party asserting his title as a bona fide holder in a case where the proof shows that the paper has been fraudulently, feloniously or illegally obtained from its maker or owner. Such a party makes out his title by presumptions, until it is impeached by evidence showing the paper had a fraudulent inception; and when this is done the plaintiff can no longer rest upon the presumptions, but must show affirmatively his good faith. The question of law involved in this case was considered in the case of *Vosburgh* v. *Diefendorf*, 119 N. Y. 360, and there received the unanimous approval of the court. That case involved questions relating to a note procured in a manner similar to those now under discussion, and we might well have rested our decision upon that case if there had not been some slight difference in the facts and the manner of their presentation, which have been urged upon us in this appeal.

The order of the General Term should be reversed, and the judgment entered upon the verdict affirmed, with costs.

All concur.

Petition for rehearing denied December 9, 1890.

John S. RIGGS, *Respt.*,
v.
COMMERCIAL MUTUAL INSURANCE CO., *Appt.*

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

1. **Where separate actions are brought against an insurance company** upon two policies covering the same property, in both of which there is a question as to loss, while in one there is the further question as to insurable interest, and the company is defeated in the action having the single question and appeals, and is successful in the other action, in which plaintiff proceeds to perfect an appeal, whereupon a stipulation is entered into by which plaintiff waives his right to appeal upon defendant's consenting that in case the judgment in the former case is affirmed there shall be a reargument in the latter case upon the question of insurable interest, the decision upon which shall be final as to the plaintiff, but without prejudice as to defendant's right to appeal therefrom, if the judgment in the first case is affirmed and a reargument in the second case results in a judgment for plaintiff from which defendant appeals, it will be held bound by the stipulation, and the only question open will be that of insurable interest.

2. **A stockholder in a corporation has an insurable interest in specific corporate property,** although that interest does not amount to an estate, either legal or equitable, in the property insured.

(December 2, 1890.)

APPEAL by defendant from a judgment of the General Term of the Superior Court for the City of New York affirming a judgment of the Trial Term in favor of plaintiff in an action upon a policy of marine insurance. *Affirmed.*

The policy was issued upon the steamer Falcon which belonged to the Merchants' Steam-Ship Company, insuring J. L. Tobias, a stockholder in such corporation, on account of whom it may concern, loss payable to Andrew Simonds. The policy was subsequently assigned to plaintiff.

The further facts appear in the opinion.

Mr. **David Willcox,** with *Mr.* **Oliver Drake Smith,** for appellant:

The subject of the insurance was property of the Merchants' Steam-Ship Company. Tobias, as a stockholder in that company, had no title to, lien upon or property rights or interests in the Falcon.

Plimpton v. *Bigelow*, 93 N. Y. 592; *Van Allen* v. *Assessors*, 70 U. S. 3 Wall. 573, 18 L. ed. 229; *Button* v. *Hoffman*, 61 Wis. 20; *Reg.* v. *Arnaud*, 9 Q. B. 806; *Wilson* v. *Jones*, L. R. 2 Exch. 139.

The stockholder's right is merely to his share of the dividends, if any, while the corporation exists, and upon its dissolution to have his proper proportion of what may remain after payment of its debts.

Utica v. *Churchill*, 33 N. Y. 237; *Burrall* v. *Bushwick R. Co.* 75 N. Y. 211.

A stockholder in a corporation, merely by virtue of that relation, has no right to procure for his own benefit insurance generally upon the property of the corporation.

Wilson v. *Jones, supra; Philips* v. *Knox County Mut. Ins. Co.* 20 Ohio, 174; Wood, Ins. 684; *Seaman* v. *Enterprise F. & M. Ins. Co.* 18 Fed. Rep. 250.

Messrs. **J. E. Burrill** and **George Zabriskie,** for respondent:

Anyone has an insurable interest in a ship on whom an injury to it will inflict pecuniary loss.

White v. *Hudson River Ins. Co.* 7 How. Pr. 341; *Cone* v. *Niagara F. Ins. Co.* 60 N. Y. 619; *Herkimer* v. *Rice*, 27 N. Y. 163; *Harvey* v. *Cherry*, 76 N. Y. 436; *Rohrbach* v. *Germania F. Ins. Co.* 62 N. Y. 47; *Hooper* v. *Robinson*, 98 U. S. 528, 25 L. ed. 219; *National Filtering Oil Co.* v. *Citizens Ins. Co.* 9 Cent. Rep. 177, 106 N. Y. 535; *DeForest* v. *Fulton F. Ins. Co.* 1 Hall, 84; *Springfield F. & M. Ins. Co.* v. *Allen*, 43 N. Y. 389; *Seaman* v. *Enterprise F. & M. Ins. Co.* 18 Fed. Rep. 250.

The interest of a shareholder in the corporate property is such that he will be liable to pecuniary loss through its destruction.

Warren v. *Davenport F. Ins. Co.* 31 Iowa, 464; *Seaman* v. *Enterprise F. & M. Ins. Co. supra;* May, Ins. § 95; Greenhood, Pub. Pol. 255.

The relation of the stockholder to the corporation and the property is that of *cestui que trust* towards the trustee and the trust estate.

Anderton v. *Wolf*, 41 Hun, 571; 1 Morawetz, Priv. Corp. 2d ed. § 237; *White* v. *Hudson River Ins. Co.* 7 How. Pr. 341; *Hume* v. *Providence Washington Ins. Co.* 23 S. C. 190.

The *cestui que trust* has an insurable interest in the trust property, and it follows that the stockholder has an insurable interest in the corporate property.

White v. *Hudson River Ins. Co.* and *Hume* v. *Providence Washington Ins. Co. supra.*

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

This defendant is, we think, precluded by the stipulation of January 10, 1889, from raising any question on this appeal except as to whether Tobias, the assignor of the plaintiff, by reason of his being a stockholder in the Merchants' Steam-Ship Company, had an insurable interest in the Falcon when the policy was issued, and perhaps the further question whether that interest, if it existed, was covered by the policy. The situation when the stipulation was made was this: The judgment which the plaintiff recovered at the trial term had been reversed at the general term, and a new trial had been ordered, and the plaintiff was about to appeal from the order of reversal to this court. The Merchants' Steam-Ship Company had recovered judgment against the defendant in the same court on its policy on the same vessel similar to the policy issued to the plaintiff, and this judgment had been affirmed by the general term, and the defendant had brought an appeal to this court, which was then pending. There was one question common to both cases, viz., whether there had been an absolute total loss of the vessel insured, without which it was conceded there could be no recovery. In the *Case of the Merchants' Steam-Ship Company* this was the sole question. In this case there was the additional point whether the plaintiff had an insurable interest. The parties to the stipulation assumed

See also 27 L. R. A. 614.

that the question of total loss would be conclusively determined as to both cases by the result of the appeal in the *Case of the Merchants' Steam-Ship Company*, but if the judgment in that case was affirmed it would still leave open in this case the question of insurable interest. Under these circumstances, the parties entered into the stipulation by which the plaintiff waived his right to appeal to this court from the order of reversal upon the defendant's consenting that if the judgment in the *Steam-Ship Company Case* should be affirmed there should then be a reargument in this case before the general term of the question of the plaintiff's insurable interest, which consent was given; and the stipulation further provided "that the decision of the general term on such reargument should be final so far as the plaintiff was concerned, but without prejudice to any right in defendant to appeal therefrom." This court affirmed the judgment in the *Steam-Ship Company Case*, and the reargument on the question of the plaintiff's insurable interest was then had before the general term; whereupon the general term reversed its former decision upon the point and affirmed the judgment of the trial term. The present appeal is from this judgment of affirmance.

It was the plain purpose of the stipulation that the defense common to both actions should abide the decision in the *Steam-Ship Company Case*, leaving open in this action the distinct and separate question of insurable interest only. The stipulation was valid, and governs this appeal. *Townsend* v. *Masterson S. & S. S. D. Co.* 15 N. Y. 587. The question whether a stockholder in a corporation, as such, has an insurable interest in the corporate property, which he may protect by an insurance of specific, tangible property of the corporation, is the question now presented. The policy does not disclose the nature of the interest of Tobias in the vessel insured; but this was not necessary, unless required by some condition in the policy. *Lawrence* v. *Van Horne*, 1 Cai. 276; *Tyler* v. *Ætna F. Ins. Co.* 12 Wend. 507. The policy, if otherwise valid, attached to whatever insurable interest he had, whether as owner or otherwise.

What constitutes an insurable interest has been the subject of much discussion in the cases, and is often a question of great difficulty. It is quite apparent that the tendency of decisions in recent times is in the direction of a more liberal doctrine upon this subject than formerly prevailed. May, Ins. § 76.

Contracts of insurance where the insured had no interest were permitted at common law (*Craufurd* v. *Hunter*, 8 T. R. 13); but the manifest evils attending such contracts, and the temptation which they afforded for fraud and crime, led to the enactment in England of the Statute 19 Geo., II. chap. 37, prohibiting wager policies, and this was followed by the enactment in this State of a similar statute (1 Rev. Stat. 662) prohibiting wagers. But to prevent application of the Statute to cases of insurance by way of security and indemnity it was provided that it should "not be extended so as to prohibit or in any way affect any insurances made in good faith for the security or indemnity of the party insured, and which are not otherwise prohibited by law." Section 10. It would seem, therefore, that whenever there is a real interest to protect, and a person is so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of that interest, an insurance on such interest would not be a wager within the Statute, whether the interest was an ownership in or a right to the possession of the property, or simply an advantage of a pecuniary character, having a legal basis, but dependent upon the continued existence of the subject. It is well settled that a mere hope or expectation, which may be frustrated by the happening of some event, is not an insurable interest.

The stockholder in a corporation has no legal title to the corporate assets, or property, nor any equitable title which he can convert into a legal title. The corporation itself is the legal owner, and can deal with corporate property as owner, subject only to the restrictions of the charter. *Plimpton* v. *Bigelow*, 93 N. Y. 593; *Van Allen* v. *Assessors*, 70 U. S. 3 Wall. 573, 18 L. ed. 229.

But stockholders in a corporation have equitable rights of a pecuniary nature, growing out of their situation as stockholders, which may be prejudiced by the destruction of the corporate property. The object of business corporations is to make profits through the exercise of the corporate franchises, and gains so made are distributable among the stockholders according to their respective interests, although the time of the division is ordinarily in the discretion of the managing body. It is this right to share in the profits which constitutes the inducement to become stockholders. So, also, on the winding up of the corporation, the assets, after payment of debts, are divisible among the stockholders. It is very plain that both these rights of stockholders—viz., the right to dividends and the right to share in the final distribution of the corporate property—may be prejudiced by its destruction. In this case the ships were the means by which profits were to be earned, and their loss would naturally, in the ordinary course of things, diminish the capacity of the corporation to pay dividends, and consequently impair the value of the stock. The same would be true in other cases which might be mentioned, as, for example, where buildings producing rent, owned by a corporation, should be burned. It is not necessary, to constitute an insurable interest, that the interest is such that the event insured against would necessarily subject the insured to loss. It is sufficient that it might do so, and that pecuniary injury would be the natural consequence. *Cone* v. *Niagara F. Ins. Co.* 60 N. Y. 619.

The question now before us was considered by the Supreme Court of Iowa in the case of *Warren* v. *Davenport F. Ins. Co.*, 31 Iowa, 464. The court, in a careful opinion, reached the conclusion that a stockholder in a corporation had an insurable interest in the corporate property.

In *Philips* v. *Knox County Mut. Ins. Co.*, 20 Ohio, 174, there is an adverse dictum, but the decision went on another ground.

In *Wilson* v. *Jones*, L. R. 2 Exch. 139, the action was upon a policy in favor of the plaintiff, a shareholder in the Atlantic Telegraph

Company, a company organized to lay the Atlantic cable. The court construed the contract as an insurance of the plaintiff in respect to the adventure undertaken by the company to lay the cable, and it was held that his interest as shareholder was an insurable interest, and likened it to an insurance on profits. See also, *Paterson* v. *Harris*, 1 Best & S. 336. It is difficult to perceive any good reason why, if a stockholder could be insured on his shares in a corporation against a loss happening in the prosecution of a corporate enterprise, he could not insure specifically the corporate property itself embraced in the adventure, and prove his interest by showing that he was a shareholder. The question here is, Did the plaintiff have an insurable interest covered by the policy? The amount of damages is not in question. Except that the parties have taken that question out of the controversy, the extent of the loss would be a question of fact to be ascertained by proof, and the recovery up to the amount insured would be measured by the actual loss. We are of opinion that the view that a stockholder in a corporation may insure specific corporate property by reason of his situation as stockholder, stands upon the better reason, and also that it is in consonance with the current of authority defining insurable interests in our courts. The cases of *Herkimer* v. *Rice*, 27 N. Y. 163; *Rohrbach* v. *Germania F. Ins. Co.*, 62 N. Y. 47, and *National Filtering Oil Co.* v. *Citizens Ins. Co.*, 106 N. Y. 535, 9 Cent. Rep. 177, sustained policies upon interests quite as remote as the interest now in question. It would be useless reiteration to restate the particular facts and grounds of the decisions in these cases. It is sufficient to refer to them, and to say in conclusion that it seems to us, both upon authority and reason, that the insurance now in question is not a wager policy, but is a fair and reasonable contract of indemnity, founded upon a real interest, though not amounting to an estate, legal or equitable, in the property insured.

The judgment should therefore be affirmed.

All concur

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF MICHIGAN.

Austin KELLEY
v.
YPSILANTI DRESS-STAY MANUFACTURING CO.

(44 Fed. Rep. 19.)

*1. **A defendant in a patent suit, who was the manufacturer of certain articles** claimed to be an infringement of plaintiff's patent, sought to obtain an order enjoining the prosecution of three suits begun in other districts against its customers, as well as the commencement of new suits, and the sending of letters and circulars to others engaged in the trade, threatening prosecution for selling articles made by the defendant. *Held*—

(a) **That the prosecution of suits in other districts should not be enjoined** because such suits were begun before this suit, and because comity demanded that application should be made to the court in which such suits were pending.

(b) **That as the plaintiff might recover substantial damages** against the defendant's vendees in addition to those which he would be entitled to recover against the defendant as manufacturer, the commencement of new suits should not be enjoined unless irreparable injury was threatened to defendant's business, or there was evidence of malice or bad faith on the part of the plaintiff in commencing such suits.

(c) **That plaintiff had a right to notify persons using his device of his claim,** and to call attention to the fact that, by selling or using it, they were making themselves liable to prosecution, and that an injunction would not be ordered unless the language of his letters or circulars was false, malicious, offensive or opprobrious, or they were used for the willful purpose of inflicting an injury.

(November 17, 1890.)

SUIT in equity to recover damages for an alleged infringement of a patent. On defendant's motion to restrain the commencement and prosecution of suits against its customers and the sending of circulars, etc., to the trade. *Denied.*

From the petition it appeared that the suit was brought because of the alleged infringement of a patent corset stay; that petitioner owns property subject to execution in this district, of the value of $50,000, and is engaged in the manufacture of dress-stays at Ypsilanti, under a patent to Enoch C. Bowling and another to Elsie M. Smith; that plaintiff has brought three suits for alleged infringement of his patent against customers of petitioner for selling, in the ordinary course of trade, dress-stays made by petitioner, the defense of which suits petitioner is forced to assume, viz.: one in the Circuit Court for the Southern District of New York, against the firm of Calhoun, Robbins & Co., one in the Circuit Court of Massachusetts against Coleman, Mead & Co. and one in the Circuit Court for Illinois against the Storm & Hill Company; that the defendants in these suits are merchants, and have no real interest in the suits, petitioner being the real defendant; that, in addition to bringing said suits, plaintiff has sought further to intimidate the trade and maliciously to injure and interfere with defendant's business by means of circulars and letters from himself and his counsel, addressed to petitioner's customers, threatening suit against them, and also in advertising that he will bring suit against any person who sells a dress-stay made in the same manner as petitioner's; that petitioner has filed its answer and is ready to proceed with the trial, and is abundantly responsible for all damages or profits which may be recovered against it. The prayer is for injunction against the prosecution of suits already begun, against the bringing of other suits against petitioner's customers and against molesting in any way by letters, circulars, oral threats or otherwise.

*Head notes by BROWN, J.

persons who may buy or sell or deal in petitioner's dress stays, etc., during the pendency of this suit.

Mr. **George H. Lothrop** for petitioner.
Messrs. **Charles H. Fisk** and **Broadnax & Bull** for plaintiff, *contra*.

Brown, *J.*, delivered the following opinion:

Defendant seeks in this petition to obtain an injunction for three distinct purposes, viz.: to prevent (1) the prosecution of three suits already begun; (2) the commencement of new suits against his customers; and (3) the molesting of others engaged in the trade by letters, circulars or oral threats. As the legal principles applicable to these three kinds of relief are not precisely the same, we are compelled to give them an independent consideration.

1. Conceding that there are intimations in some of the cases that the court has power to enjoin the prosecution of suits already begun in other districts (although our attention has not been called to any reported case where an injunction was actually ordered), we think that this power, if it exists at all, of which we have grave doubt, should not be exercised in this case for the following reasons: *First*. Because the suits sought to be enjoined were all begun before this suit. While this case may not be exactly within the line of authorities which hold that where jurisdiction has once attached it cannot be taken away by proceedings in another court—a question which frequently arises where property in possession of one court is interfered with by another, or an issue pending in one court is raised in another—still we apprehend that there must be some peculiar reason giving to the court enjoining some superior authority to the other, such, for instance, as the pendency of proceedings under the Bankruptcy or Limited Liability Act, to authorize it to reach out its arm and arrest a pending suit of like character in another court. *Second*. Because we think that comity demands that the application should be made to the court in which the proceedings are pending. Such court is perfectly competent to give the relief, and would undoubtedly do so upon a proper showing. For this court to assume such power, is virtually an attempt to dictate to another court of co-ordinate jurisdiction what it ought to do in a particular case, and would naturally be considered as an offensive intermeddling with its proceedings. *Third*. As the plaintiff is a nonresident of this district, an injunction, if granted, could only be enforced by staying proceedings in this court, or dismissing his bill. He might still elect to proceed in the other courts, which would be under no obligation to take notice of our injunction.

2. With regard to the commencement of new suits, there are undoubtedly authorities which support the contention of the defendant; but most of them seem to be founded upon an impression with regard to the rights of a patentee against infringers which the supreme court has held to be erroneous. Thus in *Birdsall* v. *Hagerstown Agr. & Imp. Mfg. Co.*, 1 Hughes, 64, where a similar application was made by a defendant who had been sued for manufacturing and selling a patented machine for hulling and threshing clover, it was held that an injunction should be granted, the court giving as a reason: "That the defendants were thoroughly responsible, and that upon the original suit being carried on to completion, if recovery was made, the complainant would recover in that suit all the profits that defendants had obtained from the wrongful manufacture and the damages that he had suffered by reason of the wrongful manufacture, and that complainant would therefore be put in the same position as if he had originally sold all the machines; that, this being the case, he ought not to be allowed to interfere with the vendees of defendants while the suit against them was pending."

Yet, in a subsequent case upon the same patent (*Birdsell* v. *Shaliol*, 112 U. S. 485, 28 L. ed. 768), it was held that a decree in favor of a patentee, upon a bill in equity against one person for making and selling a patented machine, was no bar to a subsequent suit by the patentee against another person for afterwards using the same machine within the term of the patent; that while a license to make, use and sell machines gives the licensee the right to do so throughout the term of his patent, and has the effect of wholly releasing them from the monopoly, and discharging all claims of the patentee for their use by anybody, an infringer does not, by paying damages for making and using a machine in infringement of a patent, acquire any right himself to a future use of the machine. "On the contrary, he may, in addition to the payment of damages for past infringement, be restrained by injunction from further use, and, when the whole machine is an infringement of the patent, be ordered to deliver it up to be destroyed." The court in this case cites with approval the case of *Penn* v. *Bibby*, L. R. 3 Eq. 308, in which the chancellor said that "the patent is a continuing patent, and I do not see why the article should not be followed in every man's hands until the infringement is got rid of. So long as the article is used, there is a continuing damage." We do not see why the same principle does not apply to one who purchases of the manufacturer for the purpose of reselling to consumers. Indeed, it is difficult to see how this case can be reconciled with the language of the courts in *Spaulding* v. *Page*, 4 Fish. Pat. Cas. 641; *Gilbert & Barker Mfg. Co.* v. *Bussing*, 12 Blatchf. 426; *Perrigo* v. *Spaulding*, 13 Blatchf. 391, and *Booth* v. *Seevers*, 19 Pat. Off. Gaz. 1140. So, in *Allis* v. *Stowell*, 16 Fed. Rep. 783, in which the injunction was denied, it was intimated that, "where a patentee recovers from an infringing manufacturer full damages and profits on account of the infringement, the purchaser from such manufacturer, who is a user of the machine, will be protected in such use against a suit for infringement, as he would be if he were a licensee from the patentee." In this view of the law it was held that, to prevent a multiplicity of suits, the court might, in a proper case, and on proper showing, require the prosecution of suits between a patentee and a mere user of a patented machine to be suspended, to await the result of the suit between the patentee and the principal infringer from whom the user purchased this machine,—a doctrine in which we fully concur, although we think the

application should be made to the courts in which these suits are pending. The cases of *Ide* v. *Ball Engine Co.*, 31 Fed. Rep. 901, and *National Cash Register Co.* v. *Boston Cash Indicator & R. Co.*, 41 Fed. Rep. 51, seem to have been decided upon the authority of the prior cases, and without the attention of the court being called to the case of *Birdsell* v. *Shaliol*, above cited. Upon the other hand, in *Rumford Chemical Works* v. *Hecker*, 11 Blatchf. 552, it was held, by *Mr. Justice* Blatchford, that the court had no jurisdiction of a bill filed by a patentee to assume to regulate the conduct of the plaintiffs by injunction, except as regards the proceedings in the particular suit. "To grant the injunction asked for would be to turn the defendant into the plaintiff, and the plaintiff into the defendant, and to administer independent affirmative relief in favor of a party, without his coming into court as an actor, by bill or other pleading containing allegations capable of being put in issue by formal pleading, or of being contested on proofs, and to do so on matters arising *post litem motam.*" See also *Asbestos Felting Co.* v. *United States & F. S. Felting Co.* 13 Blatchf. 453.

The view we have taken of the case of *Birdsell* v. *Shaliol* seems to be supported by the opinion of *Judge* Coxe, in *Tuttle* v. *Matthews*, 28 Fed. Rep. 98, in which a similar application for an injunction was denied upon the authority of that case.

There is undoubtedly great force in the argument that a defendant manufacturer, who has agreed to defend suits brought against his customers, and indemnify them against damages obtained by their selling his machines or device, ought not to be vexed by a multiplicity of suits in different parts of the country. But, in view of the case of *Birdsell* v. *Shaliol*, it is not easy to see how the recovery of damages from the defendant for manufacturing and selling would prevent the recovery of other substantial damages from the defendant's vendees for their profits upon reselling the patented articles. If the recovery of damages from the manufacturer does not operate as a license to use the patented article, or, in the language of the supreme court in *Bloomer* v. *McQuewan*, 55 U. S. 14 How. 549, 14 L. ed. 539, to pass it out of the limitation of the monopoly, there would seem to be no reason for enjoining him from prosecuting anyone trespassing upon his domain. The risk of being mulcted in costs will ordinarily be sufficient to prevent the patentee from bringing any great number of suits until his patent has been judicially established.

In addition to these considerations, the plaintiff, by an injunction of this kind, might be debarred from the commencement of actions pending an appeal so long as to lose his rights against infringers, since it is well settled that the existence of an injunction does not operate to suspend the running of the Statute of Limitations. Wood, Lim. of Act. 484.

There would seem to be, however, no objection to the court in which such actions are brought staying proceedings in them until the validity of plaintiff's patent and the infringement of the defendant have been judicially ascertained in one of the principal suits; and perhaps in an aggravated case of threatened irreparable injury to defendant's business, or, if there were any evidence of malice, oppression or bad faith on the part of the plaintiff, the court might enjoin temporarily the commencement of new suits.

3. With regard to the third branch of this application, viz., the molesting of others engaged in the trade by letters, circulars and oral threats, it is sufficient to say that, even it be conceded that a court of equity has power upon petition of a defendant to enjoin the plaintiff from publishing libelous statements concerning his business, there would seem to be no good reason why a patentee may not notify persons using his device of his claim, and call attention to the fact that, by selling or using it, they are making themselves liable to a prosecution. There is undoubtedly authority for holding that, if the language of such letters or circulars be false, malicious, offensive or opprobrious, or used for the willful purpose of inflicting an injury, the party is entitled to his remedy by injunction; and this is the extent to which the authorities go. *Hovey* v. *Rubber Tip Pencil Co.* 57 N. Y. 119; *Snow* v. *Judson*, 38 Barb. 210; *Emack* v. *Kane*, 34 Fed. Rep. 46; *Croft* v. *Richardson*, 59 How. Pr. 356; *Wren* v. *Weild*, L. R. 4 Q. B. 730. Upon the other hand, it would seem to be an act of prudence, if not of kindness, upon the part of a patentee, to notify the public of his invention, and to warn persons dealing in the article of the consequence of purchasing from others, and in such cases an injunction has been uniformly denied. *Chase* v. *Tuttle*, 27 Fed. Rep. 110; *Boston Diatite Co.* v. *Florence Mfg. Co.* 114 Mass. 69; *Kidd* v. *Horry*, 28 Fed. Rep. 773.

The language of the letters in the present case is perfectly respectful and courteous, and while the circular is a distinct and firm assertion of the patentee's rights, there is nothing in it to which the person receiving it can take a just exception. Nor is there anything to indicate that they were not written in good faith, and in the belief that the plaintiff had rights under his patents which he was entitled to protect by suit.

The motion for an injunction is therefore denied.

MARYLAND COURT OF APPEALS.

Thomas ROBERTS *et al.*, *Appts.*,
v.
Charles J. BONAPARTE.

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

1. **It is for the jury, and not for the court, to determine whether the contract** upon which an action is founded is wholly in writing or partly in parol, and, if the latter, to determine from all the evidence in the case, written as well as oral, what the contract actually is.
2. **The benefit of an objection to the admission of evidence** cannot be availed of on appeal if such evidence is admitted over the objection unless the objecting party applies to the court to exclude the evidence objected to and thus obtains a distinct ruling as to its admissibility.
3. **Evidence of a parol agreement that defendant's liability should be limited** to seeing to the proper application of money advanced to him under a written contract that the same should be furnished to enable a third person to pack corn and tomatoes is admissible in an action to recover such money, where the contract provided that the defendant should not be expected to invest capital in, and the surrounding facts negative any intention of a loan to enable him to carry on, the business.

(December 4, 1890.)

APPEAL by plaintiffs from a judgment of the Court of Common Pleas for Baltimore City in favor of defendant in an action brought to recover money alleged to have been loaned to defendant. *Affirmed.*

The facts are stated in the opinion.

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

Mr. **Charles Marshall** for appellants.

Messrs. **Bernard Carter, William A. Fisher and William Reynolds,** for appellee:

A contract may be partly in writing and partly in parol.

Fusting v. *Sullivan*, 41 Md. 162, 169; *Bladen* v. *Wells*, 30 Md. 582; *Creamer* v. *Stephenson*, 15 Md. 211; *McCreary* v. *McCreary*, 5 Gill & J. 157; *Dorsey* v. *Eagle*, 7 Gill & J. 331; *Basshor* v. *Forbes*, 36 Md. 154, 166; *Allen* v. *Sowerby*, 37 Md. 420; *Coates* v. *Sangston*, 5 Md. 130; *Atwell* v. *Miller*, 11 Md. 361; *Penniman* v. *Winner*, 54 Md. 132.

When there is evidence from which it is competent to find the contract to have been partly oral and partly in writing, and when the jury believe this evidence, then it is for the jury to determine from the whole evidence what the entire contract between the parties actually was.

Warnick v. *Grosholz*, 3 Grant, Cas. 235; *Osgood* v. *Lewis*, 2 Har. & G. 478, affirming *Horn* v. *Buck*, 48 Md. 370; *Cathell* v. *Goodwin*, 1 Har. & G. 468; *Atwell* v. *Miller*, 6 Md. 19; *Riswick* v. *Davis*, 19 Md. 94; *Bloomer* v. *State*, 48 Md. 540.

When it is necessary to resort to oral evidence to establish the terms of a contract, then the whole contract is regarded as a verbal one.

Tomlinson v. *Briles*, 101 Ind. 538; *Higham* v. *Harris*, 5 West. Rep. 643, 108 Ind. 246; *Louisville, N. A. & C. R. Co.* v. *Reynolds*, 118 Ind. 170.

The construction of a contract, partly oral and partly written, must be submitted to the jury for decision.

Bolckow v. *Seymour*, 17 C. B. N. S. 107, App.; *Goddard* v. *Foster*, 84 U. S. 17 Wall. 123, 142, 21 L. ed. 589; *Brown* v. *McGran*, 39 U. S. 14 Pet. 479, 498, 10 L. ed. 550; *Farwell* v. *Tillson*, 76 Me. 227, 239; *Homans* v. *Lambard*, 21 Me. 308, 313; *St. Louis Nat. Stock Yards* v. *Wiggin's Ferry Co.* 102 Ill. 514, 517; *Fagin* v. *Connoly*, 25 Mo. 94; *Cobb* v. *Wallace*, 5 Coldw. 539, 542; *Edwards* v. *Goldsmith*, 16 Pa. 43, 49; *Foster* v. *Berg*, 104 Pa. 324; *Reissner* v. *Oxley*, 80 Ind. 580, 584; *Miller* v. *Stevens*, 100 Mass. 518; *Keefer* v. *Mattingly*, 1 Gill, 182; *Warner* v. *Meltenberger*, 21 Md. 264; *Wooster* v. *Butler*, 13 Conn. 309.

The contract in suit could have its uncertainty removed by parol testimony, showing the relations of the parties and their intentions, even if there had not been an additional supplementary agreement by parol.

Allen v. *Sowerby, supra; Laflin & Rand Powder Co.* v. *Sinsheimer*, 48 Md. 411; *Bradley* v. *Washington, A. & G. Steam Packet Co.* 38 U. S. 13 Pet. 89, 10 L. ed. 72; *Reed* v. *Merchants Mut. Ins. Co.* 95 U. S. 23, 30, 31, 32, 24 L. ed. 348, 350; *Bladen* v. *Wells*, 30 Md. 577, 583; *Warfield* v. *Booth*, 33 Md. 63, 69; *Planters Mut. Ins. Co.* v. *Deford*, 38 Md. 382, 402; *Frederick County Mut. Ins. Co.* v. *Deford*, Id. 404.

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

The controversy in this case is over a contract relating to the packing and sale of canned corn and tomatoes. The parties are widely apart as to what the contract actually was, as to its construction and as to their respective rights and obligations under it. The appellants contend that the entire contract is embodied in the two written papers dated the 27th of February, 1888; that no parol or extrinsic evidence is admissible to modify or vary it, and that, by its true construction, the appellee is personally responsible to them for the moneys advanced to him under it, just as if it had been so much money loaned to him by them. On the other hand, the appellee insists that these papers do not contain the entire contract; that there was a verbal agreement between them, made at or before the date of these papers, to the effect that his responsibility was to be limited to seeing that the money advanced to him by the appellants should be applied by Clagett, the packer, to the purpose of canning corn and tomatoes at the cannery in question, and not wasted or devoted by Clagett to any other purpose; that this was the extent of his liability, and that this parol agreement is in no wise in conflict with anything contained in these papers, construed, as they must be, in the light of surrounding circumstances, and the relation of the parties to each other and to Clagett at the time they were signed. The testimony of the appellee as to the making of

this parol agreement, and as to conversations at various interviews he had with the appellants, and their testimony in contradiction of his version of such conversations, as well as other written documents, and a large number of letters which passed between them, and between the appellants and Clagett, and others in relation to the business in question, some dated before, and some after, the 27th of February, 1888, were offered in evidence. All this testimony was allowed to go to the jury by agreement of counsel, subject to exception. When the testimony was all in, the court was not requested by either party to exclude any portion of it from the consideration of the jury, except in so far as the appellants' first prayer may be regarded as an exception to the admissibility of so much of the appellee's testimony as relates to the parol agreement referred to. A number of prayers were offered on both sides, and the only exception taken to the rulings of the court below is to the rejection of the appellants' first and third prayers, and the granting of the appellee's seventh prayer.

By the exception, this ruling is the sole subject of review in this court, and we shall first consider whether there was any error in granting the appellee's seventh prayer, because we regard that as the most important question in the case. By granting this prayer, the court instructed the jury that it was their duty "to determine whether or not the whole of the contract between the plaintiffs and defendant was embraced in the two paper writings offered in evidence, signed by the plaintiffs and defendant, respectively, and dated the 27th of February, 1888; and if they shall find that the whole of the contract was not embraced in the said two paper writings, then it will be their duty further to find, from all the evidence in the cause, what the said contract was." Assuming the testimony to be admissible, this instruction asserts: *first*, that it is for the jury to find therefrom whether the contract was wholly in writing, or partly in writing and partly in parol; and, *second*, if they find it of the latter character, then they, and not the court, are to decide from all the evidence, written and oral, what the contract, as a whole, actually was. Now, in the first place, it is a proposition about which there can be no doubt that a contract may be partly in writing and partly in parol. This is recognized in all the numerous cases in which the courts have held that parol evidence is admissible to prove some independent collateral or suppletory verbal agreement about which the written contract is silent; and this court in *McCreary* v. *McCreary*, 5 Gill & J. 157, 158, has adopted the language of Starkie in his work on Evidence, where it is said: "It may be shown that a parol contract was made independently, wholly collateral to and distinct from, a written one made at the same time. In such cases, the parol evidence is used, not to vary the terms of the written instrument, but to show either that it is inoperative as an entire and independent agreement, or that it is collateral and irrelevant; and, in many instances, the terms reduced to writing may constitute but a small part of the real contract."

When cases of this kind occur is it for the court or jury to determine what the real contract is? And if for the latter, have they a right to consider all the evidence, written as well as oral, bearing upon the subject? The general rule undoubtedly is that the construction of all written documents is a question of law for the court, and, when a contract is sought to be made out from such documents alone, it is for the court to ascertain and determine its construction, whether the documents are many or few. So, where technical terms are used in a written contract, and parol testimony is introduced as to the meaning of such terms, which necessarily goes to the jury, the court will give them conditional instructions as to the effect of the contract, according as they may find the meaning of such terms to be. But this is not a case of that character. The question here is, upon the assumption that this contract was partly in writing and partly by parol, Are the jury at liberty to determine from all the evidence in the cause, written as well as oral, what the contract actually was? We are not aware of any case in Maryland in which this precise question has arisen and been decided; but it would seem to be well settled by decisions of the highest authority elsewhere. Thus in *Bolckow* v. *Seymour*, 17 C. B. N. S. 107, the suit was on a contract, and there had been a long correspondence and various interviews between the parties, of which parol evidence was given. At the trial, *Lord Chief Justice* Erle left it to the jury to say whether, taking the whole of the correspondence and the parol evidence together, there was any such contract as that declared on. This ruling was affirmed by the court of common pleas on motion for a new trial on the grounds of misdirection, and that the verdict was against the weight of evidence, Keating, *J.*, saying: "I think it is clear that parol evidence was admissible to show what was the real contract between the parties, and, that being so, the whole must necessarily be a question for the jury."

Again, in *Moore* v. *Garwood*, 4 Exch. 681, it was held by the court of exchequer chamber that, as the evidence in the case did not depend altogether upon written instruments, but upon other matters of fact, it was a question for the jury, and not for the judge, to determine what was the contract between the parties.

In *Foster* v. *Mentor L. Assur. Co.*, 3 El. & Bl. 79, it was said by *Lord* Campbell, *Ch. J.*: "If there was any parol evidence on which the issue was to depend, then, according to the well-known rule clearly stated by Patteson, *J.*, in delivering the judgment of the exchequer chamber in *Moore* v. *Garwood*, the whole was for the jury." Also, as bearing on the same subject, reference may be made to *Smith* v. *Thompson*, 8 Man. Gr. & S. 44, and *Power* v. *Barham*, 4 Ad. & El. 473.

Counsel for the appellee have also cited a large number of cases decided by the federal and state courts of this country to sustain the same position. Among them, reference may be made to *Etting* v. *Bank of U. S.* 24 U. S. 11 Wheat. 76, 6 L. ed. 419; *Brown* v. *McGran*, 39 U. S. 14 Pet. 479, 10 L. ed. 550; *Goddard* v. *Foster*, 84 U. S. 17 Wall. 142, 21 L. ed. 589; *Farwell* v. *Tillson*, 76 Me. 239; *Smith* v. *Faulkner*, 12 Gray, 256; *Jennings* v. *Sherwood*, 8 Conn. 127; *Edwards* v. *Goldsmith*, 16 Pa. 43;

McKean v. *Wagenblast*, 2 Grant, Cas. 466; *Foster* v. *Berg*, 104 Pa. 324; *Fagin* v. *Connoly*, 25 Mo. 94.

The same doctrine is also stated by the text-writers. Thus in 1 Taylor on Evidence, § 36, it is said that "where a contract has to be made out partly by letters, and partly by parol evidence, the jury must deal with the whole question." So, in 1 Story on Contracts, § 18, it is said: "If a contract is to be made out partly by written documents, and partly by oral evidence, the whole becomes a question for the jury." The law is also stated to the same effect in 1 Thompson, Trials, § 1083.

It is to be observed that the seventh instruction does not leave it to the jury to construe the contract, but simply to find what it was, and we are of opinion the court below committed no error in granting it.

The appellants' first prayer asserts among other things that "by the contract bearing date February 27, offered in evidence, the defendant became bound, personally, to account to the plaintiffs for the money to be advanced by them under said contract, according to its terms and conditions, and the jury are not at liberty to consider the testimony of the defendant, Charles J. Bonaparte, on the stand in this case, which was received, subject to exception, to the effect that he did not so become personally responsible under said contract." If this part of the instruction is erroneous, the court was clearly right in rejecting it. It must be noticed that the particular part of the testimony of Mr. Bonaparte here referred to is the only testimony which was asked to be excluded from the jury, and this court is not at liberty to consider the admissibility of any of the other testimony taken in the case. It is true it is stated in the bill of exceptions that a great deal more of it was taken, subject to exception, but in such case it is incumbent on the party objecting, before or at the close of the evidence, to apply to the court, either by motion or prayer, to exclude the portion to which he objects, and thus have the question of its admissibility definitely disposed of by the court below by its ruling on such application. If this is not done, the benefit of the original objection cannot be availed of in this court. "The mere statement in a bill of exceptions that certain evidence was offered and objected to, but admitted, subject to the objection, to be disposed of at a subsequent stage of the trial, does not, by any means, raise the question here as to the admissibility of such evidence." *Basshor* v. *Forbes*, 36 Md. 154.

The admissibility of this particular part of the testimony being then the only subject of review, let us see what the two papers of the 27th of February, 1888, which the appellants insist contain the entire contract, and with which this testimony is supposed to conflict, really are. As set out in the record they are as follows:

"Paper No. 1, signed by Mr. Bonaparte:

"'Thomas Roberts & Co. are hereby authorized to sell, on their regular commission account and terms, the following goods, pack of 1888, furnished them by Thomas Clagett, of W., Upper Marlborough, Md.:

"3,000 cases Weston 3d tomatoes,	92½
6,000 cases Weston 2d corn,	90
6,000 cases Meadow Grove 2d corn,	85

All sales made f. o. b. Marlborough St., if possible, or Baltimore, if not possible, at through freight rates.

"'T. R. & Co. agree to guaranty the sale of the above goods at prices named, subject to the conditions indorsed hereon, which are parts of the contract. Charles J. Bonaparte.

"'Conditions of this order.

"'(1) Whenever a shipment is made, T. R. & Co. are to be charged the prices named, less 5% commission, and 95-100% discount, and interest at 6% is to be computed on such charge to final settlement.

"'(2) A final settlement is to be made on March 1, 1889, or as soon previously thereto as the business of the year is entirely closed up.

"'(3) T. R. & Co. are further to guaranty the sales at the above prices of any other goods of the foregoing classes, which T. C. of W. shall pack by their written advice, or with their consent, in writing, unless other prices shall be at the same time agreed to between them in writing.

"'(4) This order is given in consideration of an agreement of like date signed by T. R. & Co., with interlineations and additions by C. J. B., and is dependent for its validity thereon.'

"The second paper signed by the appellants is this:

"'In consideration of a sales order of even date herewith, we do hereby agree with Chas. J. Bonaparte, Esq., to furnish him the following amounts, in addition to advances mentioned in note hereto, of money, for the purpose of enabling Thomas Clagett, of W., to pack corn and tomatoes at the Weston factory, at 6 per cent interest per annum during the season of 1888:

"$	3,000	previous to July 1.
	3,000	during July.
	4,000	" August.
	4,000	" September.
	6,000	" October.
$	20,000	

"'We further agree to sell all the pack of the Weston cannery at the best possible prices, on our regular commission account, viz.: 5 pr. ct. All goods sold on sixty days' credit from time of shipment.

"'Thomas Roberts & Co.

"'Note. It is further agreed that if the said Charles J. Bonaparte should be, at any time, without funds necessary for packing corn and tomatoes at the said factory, Thomas Roberts & Co., shall, upon five days' notice thereof, advance him such funds, during the year 1888, on the terms above set forth as to the advances specifically mentioned, the intent hereof being that the said Charles J. Bonaparte shall be expected to invest no capital in the business.'"

It is manifest that these papers are ambiguous and uncertain in many important particulars, and need the aid of extrinsic evidence to render them intelligible. It is, moreover, a familiar principle that courts, in the construction of contracts, look to the language employed, the subject matter and the surrounding circumstances. They are never shut out from the

same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, so as to judge of the meaning of the words, and the correct application of the language to the things described. *Nash* v. *Towne*, 72 U. S.5 Wall. 699, 18 L. ed. 529.

Here there is enough on the face of these papers to show that, in order to give them a proper construction, according to the intention of the parties, the court should be informed as to what was and had been the relation of Clagett to the parties respectively, what was his interest in the canning business referred to, and how and to what extent Bonaparte and Roberts & Co. became connected with it. A mass of testimony bearing on these subjects was offered, and, without going into details, the material facts thus disclosed, as we understand them, are as follows: Clagett and wife owned an estate containing over 600 acres of land near Upper Marlboro in Prince George County, and near the line of the Baltimore & Potomac Railroad. They had mortgaged this estate for the sum of $18,000 to Mr. Bonaparte, a member of the Baltimore bar, actively engaged in the practice of his profession, and a gentleman of large fortune. On this farm Clagett established a canning factory, and had sold his products, chiefly canned corn and tomatoes, through Roberts & Co., who were wealthy and extensive merchants in Philadelphia, engaged in the business of buying and selling canned goods on commission. In this way, the products of this cannery, with Clagett's labels or trade-marks on them, became extensively known, and had acquired a very favorable reputation in the market. Properly conducted, this business was a profitable one, but Clagett, who seems to have been improvident, careless and speculative, fell into financial embarrassment, and became insolvent. The farm was sold under the mortgage, and bought in by Mr. Bonaparte for $10,000, leaving some $7,000 or $8,000 still due on the mortgage debt. After his purchase, Bonaparte leased the farm to Clagett for five years, thereby giving him the opportunity, by carrying on the canning business, to make money enough, if he could, to buy back the farm. It became necessary, however, that Clagett, who was most anxious to carry on the business, should have pecuniary aid from someone. Roberts & Co. were willing to advance him the money, provided they received the products of the cannery for sale and reimbursement for their advances. But the difficulty in the way was the fact that Clagett's creditors might attach these products as Clagett's property, and it therefore became necessary that the legal title, both to the cannery and machinery, as well as the products thereof, made by the means of such advances, should be placed in someone who could rightfully and lawfully protect them from the claims of such creditors. Bonaparte consented to aid in removing this difficulty, and thereupon Clagett and wife executed to him a bill of sale of all the personal property on the farm, including the cannery and its machinery, in consideration of a release by him of the balance due on his mortgage. The five years' lease was canceled by mutual consent, and he gave, and Clagett accepted, a lease of the property by the month, at a monthly rent of $90, amounting yearly to the interest on the original mortgage debt of $18,000. He thus placed himself in a position in which, by allowing his name to be used in conducting the business, that is to say, by having the advances to Clagett made through him, and by his giving the sales orders for the products, the interference of Clagett's creditors could be effectually prevented. Under such an arrangement, the business for the year 1887 was conducted, and more than $40,000 was furnished by Roberts & Co. through Bonaparte, who signed a sales order similar to that contained in the first of these papers, dated the 27th of February, 1888. In this transaction for the year 1887, the personal liability of Bonaparte was expressly limited to that of acting "as Clagett's security for advances in money to the extent of $2,500, to purchase tins." He had no interest in the profits of the business, if any should result. These were all to go to Clagett, and he charged nothing for the use of his name, or for the trouble he had in transmitting the money he received from Roberts & Co. to Clagett, and keeping the accounts between them. When the time approached for making an arrangement for the year 1888, when it was expected that a much larger sum of money would be required, several letters passed between the parties, in which Bonaparte insisted, as one of the conditions on which he would do anything, that he "should not be called upon to make any investment of capital," and to this Roberts & Co assented. The negotiations by correspondence failed, and, after Bonaparte had informed them by letter, dated the 25th of February, that he understood that negotiations between them were at an end, he had an interview with them, at their request, on his way through Philadelphia. At this interview, which took place on the 27th of February, the day these papers are dated, though they were not actually signed till some days afterwards, the differences between them were adjusted, and these papers were subsequently signed.

Now, in the light of these facts and circumstances, it becomes clear that the clause in the paper signed by Roberts & Co. by which they agree to "furnish Bonaparte the following amounts, in addition to advances mentioned in note hereto, of money for the purpose of enabling Thomas Clagett, of W., to pack corn and tomatoes at the Weston factory, at 6 per cent interest per annum during the season of 1888." does not mean that they were to loan him this money at 6 per cent in order to enable him to carry on this canning business. Such an interpretation would, in fact, nullify the subsequent clause, which says: "The intent hereof being that the said Charles J. Bonaparte shall be expected to invest no capital in the business," as well as the obvious intention of the parties, gathered from all the surrounding facts and circumstances. If he borrowed this money for the purpose of carrying on this business, he invested his capital in it just as much as if he had used his own money in it. Besides, it is not only improbable, but almost absurd, to suppose that Bonaparte, who had abundance of money lying in bank, for which

he was receiving but 3 per cent, would borrow from Roberts & Co. at 6 per cent for the purpose of engaging in this business. We therefore think that a verbal agreement to the effect that the personal responsibility of Bonaparte, in regard to the funds to be supplied by Roberts & Co. should be limited to seeing that they were applied by Clagett to the canning of corn and tomatoes at this factory, is not only not in conflict with the terms of these papers, properly construed, but in entire harmony therewith, and we are clearly of opinion that the testimony of Bonaparte that such an agreement was actually made at the Philadelphia interview was admissible in evidence. It follows that the court below was not in error in rejecting this first prayer of the appellants. The appellants' third prayer was also properly rejected, if for no other reason, because the evidence shows that it was not the fault of the appellee that the tomatoes therein referred to were not supplied to the appellants, but of Clagett, who was to furnish them, in not packing them.

Judgment affirmed.

COLORADO SUPREME COURT.

James B. ARTHUR, Admr., etc., of John Arthur, Deceased, *Plff. in Err.*,
v.
Abbie A. ISRAEL.

(.....Colo.....)

1. **A decision that a woman is not prevented from sharing in her deceased husband's estate** by the fact that he had procured a decree of divorce against her, which was void because she was not at the time within the jurisdiction of the court, will not prevent the contesting of her claim on the ground of her immoral conduct and acceptance of the divorce decree by afterwards marrying another man.
2. **If a woman, without cause, deserts her husband** and for years lives in adultery with another man, whom she marries after learning of a decree of divorce against her, which is void for failure to serve her with process, and with whom she lives until the death of her deserted husband, she will not be permitted to set up the invalidity of the divorce decree for the purpose of sharing in the decedent's estate.

(October 17, 1890.)

ERROR to the Larimer County Court to review a judgment sustaining a demurrer to the answer in an action brought to obtain possession of the estate left by plaintiff's deceased alleged husband. *Reversed.*

Statement by **Helm, *J.*:**

The case at bar was once before considered upon writ of error by the supreme court. *Israel* v. *Arthur*, 7 Colo. 5. It was then reviewed, and reversed, upon a record presenting the following facts: Defendant in error in May, 1881, filed her petition in the county court alleging that John Arthur died intestate and without children; that petitioner was his widow; that plaintiff in error, as administrator, being in possession of the property, was speculating with the funds in his own business, and failing to account for interest, profits, etc.; that certain other parties, as brothers, sisters and descendants of a deceased sister, claimed to be entitled to the estate as heirs-at-law; that petitioner was, on the contrary, sole heir and distributee, under the Statute, of said estate. She demanded that her rights in the premises be recognized, and the administrator be required to render his accounts accordingly. An answer was duly filed by the defendants named, in which petitioner's relationship and right to inherit, as the widow of Arthur, deceased, and the misappropriation of the estate, were denied. As a separate defense, defendants, admitting the intermarriage of petitioner with Arthur, alleged that on February 9, 1875, a decree of divorce was entered by the Probate Court of Larimer County, in favor of the said Arthur and against petitioner. And for a further defense, defendants alleged that on June 12, 1877, a second decree of divorce was duly made and entered in said court, in favor of said Arthur and against complainant. Replication was filed denying the new matter in the answer. The proofs upon the trial were confined to the issues thus made. The two decrees of divorce mentioned in the answer were offered and received in evidence, over petitioner's objection. A judgment was duly rendered in favor of the defendants. Upon reversal by the supreme court, of the case thus presented, and by leave of the county court to which it had been remanded, petitioner filed an amendment or supplement to her original petition, in which the facts of such proceeding, on error and reversal, together with the conclusion reached by the reviewing tribunal in the premises, were duly set forth. Afterwards, plaintiff in error, also by leave of court, filed a supplemental answer to the original and supplemental petitions. In this supplemental answer it was averred, among other things, that after the divorce decrees were entered, the said petitioner, with full knowledge thereof, and under and in pursuance thereof, and in the lifetime of the said Arthur, "entered voluntarily into a contract of marriage with one James H. Israel, and caused and procured the said contract of marriage to be duly and legally solemnized, and, thereunder, took upon herself and assumed the relations of wife to the said James H. Israel, and thenceforward, and at all times thereafter, continuously, by virtue of the said solemnization of said marriage contract, lived and cohabited with the said James H. Israel, as his wife, until, and ever since, the death of the said John Arthur." That prior to the reversal of said cause, although plaintiff in error had continuously, from the commencement of the suit, made diligent and persistent efforts to ascertain the exact relationship existing be-

NOTE.—Married woman, how far bound by doctrine of estoppel. See Wilder v. Wilder (Ala.) 9 L. R. A. 97, and cases referred to in *note* thereto.

tween petitioner and the said Israel, he had been wholly unable to discover the foregoing facts, and for this reason alone did not plead them in bar at an earlier period. That he would sooner have ascertained these facts, but for the following reasons, viz.: That, in October, 1873, petitioner abandoned the said Arthur, and eloped and fled to remote and unknown parts with the said Israel, and thereafter, and until the divorce decrees were entered, and the marriage contract was solemnized, lived and cohabited with said Israel in a state of adultery, representing herself as his wife. That upon learning of the decrees of divorce, and procuring the solemnization of marriage, as aforesaid, both petitioner and Israel refrained from making the same public because of the desire to conceal and secrete "from their acquaintances and neighbors the illicit and adulterous relations previously sustained towards each other, and to prevent the scandal and disgrace which must necessarily have arisen from a public marriage, or from a marriage taking place at their usual place of abode," and in the usual way. And, finally, that it was only through confidential confessions of petitioner to certain friends, which were kept secret until after the determination of her writ of error, that plaintiff in error became aware of the facts connected with her said marriage to Israel. To the matters contained in said supplemental answer petitioner demurred on the ground that they were not sufficient in law to constitute a defense. Upon the hearing, the court below sustained this demurrer; and, as leave to plead over was not requested, entered final judgment against plaintiff in error. To reverse this judgment, the present proceeding was instituted.

Messrs. **L. S. Dixon, E. A. Ballard, T. M. Robinson** and **Ephraim Love** for plaintiff in error.

Messrs. **Westbrook S. Decker** and **A. B. S. Hayes,** with *Mr.* **T. D. W. Yonley,** for defendant in error:

The decrees of divorce being void, they had no effect to dissolve the bonds of matrimony theretofore existing between John Arthur and the defendant in error, and she remained his wife until his death.

Williamson v. *Parisien*, 1 Johns. Ch. 395, 5 N. Y. Ch. L. ed. 1089; *Glass* v. *Glass*, 114, Mass. 565; *Williams* v. *Williams*, 46 Wis. 475; *Israel* v. *Arthur*, 7 Colo. 5; *State* v. *Whitcomb*, 52 Iowa, 85.

The decrees cannot estop the defendant in error to claim that she had been married to John Arthur and was his wife at the time of his death. If relied upon by the way of plea, the answer would be that there is no record of any such decrees.

Freeman, Judgm. §§ 116, 117; *Eaton* v. *Badger*, 33 N. H. 228; *Voorhees* v. *Bank of U. S.* 35 U. S. 10 Pet. 475, 9 L. ed 500.

If relied on in evidence, they must be excluded.

Israel v. *Arthur, supra.*

Since she was Arthur's wife she could not and did not become the wife of Israel.

Kenley v. *Kenley*, 2 Yeates, 207; *Williamson* v. *Parisien, supra; Campbell* v. *McCahan*, 41 Ill. 45; *Eaton* v. *Badger*, 33 N. H. 228.

A void decree cannot be ratified, confirmed, approved or availed of, for the reason that a void judgment is no judgment.

Israel v. *Arthur, supra; Pryor* v. *Downey*, 50 Cal. 388, 19 Am. Rep. 656; Cooley, Const. Lim. 383; *Nelson* v. *Rountree*, 23 Wis. 370; *McDaniel* v. *Correll*, 19 Ill. 228.

The marriage relation and the duty of defendant in error as the wife of Arthur were established by her marriage to him, and they continued to be so established until his death; no act of the defendant in error could dissolve the one or destroy the other.

1 Bishop, Mar. and Div. §§ 4, 8; *Maguire* v. *Maguire*, 7 Dana, 181.

No question of either religion or morals can be invoked to work out a forfeiture of her marital rights where no such forfeiture is denounced by the law against the wrongs done by the defendant in error. No difference how much her conduct violates the rules of morals, religion or Christianity, so long as the Statute remains silent as to any consequences arising therefrom, and denounces no penalty or forfeiture on account of this immorality, unchristian or irreligious conduct.

Bitting's App. 17 Pa. 211; *Haverly Invincible Min. Co.* v. *Howcutt*, 6 Colo. 576; *Sidney* v. *Sidney*, 3 P. Wms. 275.

There are in this case none of the elements of an estoppel *in pais.*

See *notes to Doe* v. *Oliver* and the *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. 5th Am. ed. 642; *Welland Canal Co.* v. *Hathaway*, 8 Wend. 480; *Dezell* v. *Odell*, 3 Hill, 221; *Reg.* v. *Ambergate, N. & B. & E. J. R. Co.* 1 El. & Bl. 372; *Stace & Worth's Case*, L. R. 4 Ch. App. 682; *Scovill* v. *Thayer*, 105 U. S. 150, 26 L. ed. 972; *Williams* v. *Williams*, 63 Wis. 58.

The impediment of an existing marriage renders the second marriage void, in distinction from voidable.

1 Bishop, Mar. and Div. § 300; *Kenley* v. *Kenley*, 2 Yeates, 207; *Williamson* v. *Parisien*, 1 Johns. Ch. 389, 5 N. Y. Ch. L. ed. 1089; *Fenton* v. *Reed*, 4 Johns. 52; *Sellars* v. *Davis*, 4 Yerg. 503; *Young* v. *Naylor*, 1 Hill, Eq. 383; *Smith* v. *Smith*, 5 Ohio St. 32; *Martin* v. *Martin*, 22 Ala. 86; *Spicer* v. *Spicer*, 16 Abb. Pr. N. S. 112; *Carmena* v. *Blaney*, 16 La. Ann. 245; *Glass* v. *Glass*, 114 Mass. 563; *Clark* v. *Clark*, 19 Kan. 522; *Shaak's Estate*, 4 Brewst. 305; *Tefft* v. *Tefft*, 35 Ind. 44; *Reeves* v. *Reeves*, 54 Ill. 332; *Drummond* v. *Irish*, 52 Iowa, 41; *Heffner* v. *Heffner*, 23 Pa. 104; *Higgins* v. *Breen*, 9 Mo. 497; *Ponder* v. *Graham*, 4 Fla. 23; *Janes* v. *Janes*, 5 Blackf. 140; *Lady Madison's Case*, 1 Hale, P. C. 693; *Riddlesden* v. *Wogan*, Cro. Eliz. 858; *Hemming* v. *Price*, 12 Mod. 432; *Rex* v. *Penson*, 5 Car. & P. 412; *Rawdon* v. *Rawdon*, 28 Ala. 565; *Donnelly* v. *Donnelly*, 8 B. Mon. 113; *Williams* v. *Williams, supra.*

A forfeiture cannot be worked out by means of an estoppel *in pais.*

Freeman v. *Cooke*, 2 Exch. 654.

Whatever may have been the enormity of the conduct of the defendant in error, and however reprehensible, nay criminal, her conduct and relation with Israel may have been, no forfeiture can be imposed except in conformity with some law denouncing a forfeiture on account of what she has done.

Doe v. *Pritchard*, 5 Barn. & Ald. 765; 4 Bl. Com. *377; *Bitting's App.* 17 Pa. 211.

Neither the adultery nor the abandonment and adultery of the wife would forfeit her right to the statutory provisions made for her in lieu of dower.

Smith v. *Woodworth*, 4 Dill. 587; *Lakin* v. *Lakin*, 2 Allen, 45; *Bryan* v. *Batcheller*, 6 R. I. 543; *La Compte* v. *Wash*, 9 Mo. 551.

Notwithstanding the void divorce decrees, the immoral and adulterous conduct of the defendant in error and her void and illegal marriage to Israel, under the law, as it is written (*Darrow* v. *People*, 8 Colo. 417), the defendant in error is entitled to what she claims in her petition.

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

The present controversy has been once before submitted to this court for adjudication. There was then, however, nothing in the record to show that Mrs. Israel, after deserting Arthur, and prior to the divorce decrees, had been guilty of immoral conduct; neither was there anything, aside from these decrees, to indicate that she had not, up to the commencement of proceedings therefor, conducted herself as a good, true and affectionate wife, or that subsequent to the entry thereof, and with knowledge of the same, she had, during Arthur's lifetime, remarried, and lived and cohabited with another man as his wife. The single question then presented, wholly unembarrassed by any of these considerations, was whether or not the decrees, which were void because the records showed affirmatively that there was no jurisdiction over the person, should have been received in evidence and given the same force and effect as if valid and binding. The court held that they should not, and for error in their admission reversed the judgment.

The record now before us, on the contrary, discloses a voluntary acceptance by petitioner of the privileges resulting from the divorce decrees, as well as antecedent conduct on her part that is highly reprehensible from both a legal and a moral standpoint. That petitioner's purpose was to secure the estate of deceased, was known then as now; but the question as to whether she may accomplish this purpose obviously rests at the present time upon very different considerations from those formerly brought to our attention. We cannot accept the assertion of counsel for defendant in error that the decision of the court upon the former case is decisive of the present review. We still adhere to the opinion that the decrees in question were void and not merely voidable; but assuming such invalidity, and giving to the declaration of this court reciting that fact all the force and effect of a final adjudication thereof, we feel warranted in holding that petitioner's right to the estate of Arthur may still be inquired of. It is to be hoped, for her sake, that the conduct of petitioner is not correctly set forth in the supplemental answer; but the averments of this pleading in that behalf are, by the demurrer, temporarily confessed, and for the purposes of the present decision must be treated as true. The question, therefore, now presented for determination may be stated as follows: When the wife without cause deserts her husband and home, and for years lives in adultery with another man, and afterwards, upon learning that a divorce has been obtained by her deserted husband, causes a marriage ceremony with her paramour to be solemnized, and continuously lives and cohabits with him as his wife, may she, upon the subsequent decease of her abandoned husband, take advantage of the fact that the divorce decree is void for want of proper service of process, and successfully assert against other heirs her right under the Statute of Descents and Distributions to the deceased's estate, as his widow? An affirmative answer to this question would be so shocking to good morals, to sound public policy and to the simplest principles of justice, that we shall decline to give it unless coerced into doing so by cogent and firmly established rules of law. As a matter of law, petitioner must, under the circumstances, be presumed to have known before Arthur's death that the divorce decrees were invalid; and it is fair to assume that such in fact was the case, as, besides the grounds upon which the legal presumption rests, she so promptly after that event asserted their invalidity. Had she properly challenged those decrees during the lifetime of Arthur, she would have incurred the hazard of a restoration of conjugal relationship, or of his procurement of a binding divorce. Either of these results was evidently objectionable to her, and both were carefully avoided. She voluntarily elected to postpone action until such time as she might secure all the benefits of the marriage contract, without discharging any of its burdens. Abandoning for years the performance of every marital obligation and duty, she awaited until death had rendered such performance impossible, and then boldly hastened to seize all the pecuniary advantages conferred by law upon the faithful wife and bereaved widow. Under these circumstances, petitioner cannot complain if we insist upon treating the present controversy as one relating solely to property rights, unaffected by those legal considerations which give to marriage and the family their peculiar status, with accompanying special privileges and protection. *Zoellner* v. *Zoellner*, 46 Mich. 511.

But if the divorce decrees receive the same treatment as judgments or decrees in ordinary controversies relating to damages or property, petitioner's action must fail; for one who accepts and retains the fruits of a void judgment cannot afterwards repudiate his action and take advantage of its invalidity. *Denver City Irrigation W. Co.* v. *Middaugh*, 12 Colo. 434, and cases cited; *Duff* v. *Wynkoop*, 74 Pa. 300. The foregoing principle has numerous other salutary applications,—as, for instance, that one, having accepted the benefits of an unconstitutional law, cannot, as a general rule, rely upon such unconstitutionality as a defense, even though the invalidity has been adjudicated in another suit. *Daniels* v. *Tearney*, 102 U. S. 415, 26 L. ed. 187, and cases. Also, that a corporation, having exercised the privileges of its franchise, when sued for its negligent or malicious tort, shall not successfully invoke, as a defense, the plea of *ultra vires*. *First Nat. Bank* v. *Graham*, 100 U. S. 699, 25 L. ed. 750. And that in many cases the same inhibition applies after the benefits of otherwise binding corporate contracts have

been enjoyed. *Ohio & M. R. Co.* v. *McCarthy*, 96 U. S. 258, 24 L. ed. 693.

We discover, upon principle, no sufficient reason why petitioner's conduct in the premises should not produce just as effective an estoppel as if she had received the proceeds of a void judgment for money. By her subsequent marriage with Israel during Arthur's lifetime, she accepted, so far as was within her power, the benefits or privileges of the divorce decrees. The fact that she did not then know that those decrees were void is a matter of no more consequence than is the ignorance in this respect of one who, knowingly in all other particulars, receives the fruits of an ordinary void judgment at law. That, at the time of her marriage with Israel, she understood the decrees to be valid, is, if true, only an additional earnest of her acquiescence in the result, and sincerity in accepting and taking advantage of the benefits supposed to follow. Besides, had she believed them void, her obliquity would be even deeper than it is; because to her other alleged offenses would be added that of intentional fraud upon Israel, who may have thought that he was contracting a valid marriage. We are not unmindful of the fact that the analogy between accepting the fruits of void judgments at law, and accepting the pecuniary benefits, if any there be, together with the privileges of void divorce decrees, is not perfect in all respects. But the importance and justice of recognizing an estoppel in the latter case may be far more weighty than in the former. The immediate parties are not alone concerned. The public is always, and other individuals are usually, profoundly interested. Public policy, as well as private interest, requires that, so far as may be consistent with fundamental principles of law, one who has attempted to profit by a supposed divorce, and has exercised the resulting privilege of remarriage, shall not, for the mere purpose of obtaining property, be permitted to repudiate his election and thus demonstrate the invalidity of his second marriage, together with the unconscious adultery of his second wife, and the illegitimacy of her children, if any she had by him. Were petitioner attempting, in the light of the present record, to have the divorce decrees held void, her attempt would be futile. And the fact that upon another and different record this court was induced to declare such nullity is, as already suggested, not conclusive of her right to the property in question. It clearly appears from the admitted averments of the supplemental answer that petitioner herself is responsible for the failure of defendant to sooner plead in bar the facts which operate in the nature of an estoppel by conduct; and since, if these matters had been known in the first instance, petitioner would not, for the purpose of securing Arthur's estate, have been permitted to show the invalidity of the divorce decrees, we unhesitatingly conclude that she should not now be allowed to take advantage of such invalidity, in order to accomplish the same result.

The application of a doctrine analogous to that of equitable estoppel to cases which, in essential particulars, strongly resemble the one at bar, is by no means a novelty. *Ellis* v. *White*, 61 Iowa, 644; *Garner* v. *Garner*, 38 Ind. 139; *Prater* v. *Prater*, 87 Tenn. 78; *Duke* v. *Reed*, 64 Tex. 705; *Odiorne's App.* 54 Pa. 175; *Bourne* v. *Simpson*, 9 B. Mon. 454; *Baily* v. *Baily*, 44 Pa. 274; *Richeson* v. *Simmons*, 47 Mo. 20; *Yorston* v. *Yorston*, 32 N. J. Eq. 495; *Sedlak* v. *Sedlak*, 14 Or. 540; *Nichols* v. *Nichols*, 25 N. J. Eq. 60.

In two or three of the foregoing cases, the principle of estoppel was applied where wives had abandoned their husbands and formed adulterous relations with other men, or had simply renounced the marriage tie and forsaken the marital obligations, but where in fact no divorce proceedings were instituted. In at least two of the others, the learned judges who prepared the opinions dwell upon laches as well as acquiescence. These decisions are, in the main, well considered, and we have no disposition to reject the particular reasons, so far as applicable, given in support thereof, but we prefer to rest our conclusions especially upon the specific grounds hereinbefore considered. Petitioner's demurrer to the supplemental answer should have been overruled.

The judgment of the court below is accordingly reversed, and the cause remanded for further proceedings.

ILLINOIS SUPREME COURT.

CONSOLIDATED ICE MACHINE CO. *et al., Appts.,*
v.
Anton KEIFER, Admr., etc., of John Keifer, Deceased.

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

1. Where a contractor undertakes to place a structure on foundations to be furnished by the landowner, and the landowner knowingly furnishes an insufficient foundation, and the contractor knowing of such insufficiency directs his employés to work upon the structure, whereby they are injured in consequence of the giving way of the foundation, a joint recovery for injuries to one of such employés may be had against the contractor and landowner.

2. The record of a person's testimony at a coroner's inquest upon the body of an employé killed through his employer's negligence is admissible in an action against the employer to recover damages for such death for the purpose of impeaching such person as a witness, where he has testified in the negligence action as to certain facts also testified to by him before the coroner, and, upon having his attention called to his testimony before the coroner, has stated that he did not recollect how he then testified.

3. In an action against a landowner and contractor to recover damages for injuries resulting to an employé of the contractor through the insufficiency of a foundation which was to be furnished by the landowner

to sustain a structure to be built by the contractor, evidence that the contractor's foreman informed the landowner that the support was not strong enough is admissible as tending to show that both the contractor and landowner had notice of the insufficiency of the support.

4. **In a joint action against two for the commission of a tort,** evidence is admissible if competent as against either party. If incompetent as against the other, its use and application must be limited by proper instructions.

5. **In an action by the personal representative of a deceased employe** of a corporation to recover damages from the corporation for the death of such employé through the alleged negligence of the corporation, its president, who is also one of its stockholders, is incompetent to testify generally on behalf of the corporation and adversely to the plaintiff.

6. **In an action against a corporation for damages for personal injuries** resulting from the insufficiency of a certain structure, defendant cannot exonerate itself from liability by showing that the servant, whom it directed to construct such structure, disobeyed orders, and that such disobedience was the cause of the structure's being insufficient.

(November 5, 1890.)

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

Statement by **Shope, J.:**

This was an action on the case brought by Anton Keifer, administrator of the estate of John Keifer, deceased, against the Consolidated Ice Machine Company and the Heine's Brewing Company, both defendants being private corporations, to recover damages for causing the death of the intestate. The declaration contains two counts, the first of which alleges in substance that on December 28, 1886, the intestate was, with other persons, in the employ of the defendant the Ice Machine Company as a laborer in the erection of a refrigerator plant at the brewery of the defendant the Heine's Brewing Company, and, in the performance of his duties as such laborer, and by the direction of the officers and servants of the defendants, he was required to go upon the roof of the engine-house of said brewery, upon which was erected a large tank of great weight, and which was a part of said refrigerator plant, and which tank was supported by beams and a chain called a "hog chain;" and that it then and there became and was the duty of said defendants to exercise care and prudence in providing supports for said tank so that the same should not give way and fall and produce injury to persons engaged in working in the erection of said refrigerator plant, but that said defendants neglected their duty in this regard, and negligently and carelessly failed to provide supports of sufficient strength to support said tank, and while the said John Keifer was upon the roof of said engine-house, as aforesaid, and in the exercise of due care on his part, and without knowledge as to the insufficiency of said supports for said tank, because of the insufficiency of said support, said tank gave way and fell, taking with it a portion of the roof of said engine-house upon which the said John Keifer was standing at the time, as aforesaid, precipitating said John Keifer into said engine-house, whereby he was then, etc., killed. The second count alleges, in substance, that the intestate, with others, was in the employ of the said Consolidated Ice Machine Company as a laborer in the erection of a refrigerator plant at the brewery of the defendant, said Heine's Brewing Company, and, at the request of said Heine's Brewing Company, and as such laborer, and by the direction of the officers and servants of said Consolidated Ice Machine Company, he, the said John Keifer, was directed to go upon the roof of the engine-house at said brewery, upon which was erected a large tank of great weight, and which was a part of said refrigerator plant, and which tank was supported by beams, and a chain called a "hog chain." And the plaintiff avers that said support for said tank was provided and erected by said defendant, the Heine's Brewing Company, and it then and there became and was the duty of said last-named defendant to exercise care and prudence in providing supports for said tank; and it then and there became and was the duty of said Ice Machine Company not to undertake the erection of said refrigerator plant upon insufficient supports for the same, and to exercise care and prudence in seeing that said supports were sufficient to support said tank before undertaking the erection of said refrigerator plant, so that the same would not give way and fall, and produce injury to persons engaged in the erection of such plant. But that said defendants neglected their duties in this regard, in this: the said Heine's Brewing Company negligently and carelessly failed to provide supports of sufficient strength to support said tank; and that the Ice Machine Company negligently and carelessly undertook and attempted the erection of said refrigerator plant when it knew, or might have known, by the exercise of ordinary care and prudence, that the supports of said tank were wholly insufficient, and while the said John Keifer was upon the roof of said engine-house, as aforesaid, etc.,—concluding as in the first count. Each defendant pleaded the general issue, and, at the April Term, 1887, the cause was tried before a jury, who returned a verdict finding both defendants guilty, and assessing the plaintiff's damages at $2,500. The court overruled motions for a new trial, and rendered judgment on the verdict. Separate appeals were prayed to the appellate court and allowed. The appellate court affirmed the judgment, and each of the defendants appealed from such judgment of affirmance.

Mr. **M. Millard** for appellant Brewing Company.

Messrs. **Leo Rassieur** and **W. C. Kueffner** for appellant Ice Machine Company.

Messrs. **G. B. Burnett** and **R. A. Halbert,** with *Messrs.* **Flannigan & Rafter,** for appellee.

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

The judgment of affirmance rendered by the appellate court is conclusive upon all questions of fact. It must be presumed that the

facts were found to be sufficient to maintain the plaintiff's cause of action against each of the defendants, and that the negligent conduct of each contributed to the death of the intestate.

The principal question arises upon objection to the first instruction given at the instance of plaintiff. That instruction told the jury in effect that if the evidence warranted they might find either or both of the defendants guilty, and was, as said by counsel, "based upon the supposition that there was a joint liability." It is insisted with great earnestness that these defendants could not be jointly liable, because, as it is said, they did not co-operate and unite in the commission of a tort, and, in respect of their negligence, that the Brewing Company owed the deceased no duty; and that, where negligence is relied upon as the ground of recovery, the duty must be joint in order to make the liability joint. If this was so, it would necessarily be presumed from the judgment of affirmance that the facts sustained the right of recovery. Upon looking into the evidence, however, it will be found that it sustains the allegations of the declaration. It is shown that the Ice Machine Company undertook to erect a refrigerator plant for the Brewing Company, at its brewery, which included a large iron tank. The Brewing Company was to fix the location for the plant, and make, and put in, proper supports for the tank. It selected its engine-room for this purpose, and the iron tank was to be set upon supports 18 or 20 feet from the ground. To do this, part of the roof of the engine-house was cut away, and one side of the tank was to rest upon one wall of the engine-room, and the other was supported by a truss made of two wooden beams, 14 inches wide and 7 inches thick, 24 feet long, bolted together, and these beams were further strengthened by a hog chain. The hog chain consisted of two iron rods, anchored, one in the north and the other in the south wall of the engine-room, and joined together in the center of the supporting beams by a swivel. Timbers were laid from this truss to and upon the east wall of the engine-house, and upon this structure the iron tank was placed, extending three feet over the beam, so that the greater portion of the weight of the tank rested upon the truss. It is shown that, when the truss was completed, the superintendent of the Ice Machine Company told the president of the Brewing Company that it was insufficient and never would support the tank, who replied, in substance, that it would do. Without further objection, the Ice Machine Company placed the tank on the support, as intended by the Brewing Company. After the tank was up, the superintendent of the Ice Machine Company directed the intestate, with others, to go upon the roof of the engine-house and fit in it the heater. The tank was at the time being filled with water, and while the intestate was on the roof, in compliance with such direction, the truss gave way, and the tank fell, taking with it part of the roof of the engine-house, and precipitating Keifer to the floor of the engine-room, whereby he was killed.

Under the state of facts alleged and shown it was the duty of each of the defendants, in the performance of their several parts of the work, to use reasonable care to avoid injury to the servants of either, and to third persons. If Dennerty, the superintendent of the Ice Machine Company, knew, as he told Heine, that the truss provided by the Brewing Company would not support the tank, he was guilty of negligence in sending the intestate to work upon the tank while it was being filled with water. On the other hand, it was the plain duty of the Brewing Company, when it undertook to provide the support, to make it sufficient to sustain the tank when filled with water. The purpose of the erection of the tank was that it might be filled with water, and the disastrous consequences of an insufficient support could be readily foreseen. That the tank fell because of the insufficient support furnished by the Brewing Company is determined by the judgment of the appellate court, but, if this were not so, there is evidence tending to show it was wholly insufficient, and that knowledge thereof was brought home to the Brewing Company before the tank was placed thereon.

It is, however, claimed that if either defendant has been guilty of negligence, resulting in injury to the intestate, it is their several negligence, and cannot be charged against the other defendant. The evidence shows beyond dispute that both defendants, in respect to the matters being considered, were acting together to accomplish a common purpose. It is true, the work was apportioned among them, but this does not change the common purpose and object of their several acts. The Brewing Company, as we have seen, was to fix the location of the plant, and provide the truss or support for the tank. When this was done, the Ice Machine Company was to erect a plant and put the tank upon the support so furnished. The parts acted by each company looked alone to the erection and completion of the refrigerator plant. As said by the appellate court: "The Brewing Company was negligent in providing a structure which was unsafe and insufficient, whereby deceased incurred an extra peril, when at his work not incident to his employment. The Ice Machine Company was negligent in directing deceased to work in this place of danger, it having knowledge, and he being without notice or knowledge, of such danger, and the successive concurrent negligence of appellants thus united in causing the death of Keifer."

In Cooley on Torts, 1st ed. 684, it is said: "In general, the negligence of third parties concurring with that of the defendant to produce an injury is no defense. It could, at most, only render the third party liable to be sued also, as a joint wrong-doer." *North Pennsylvania R. Co.* v. *Mahoney*, 57 Pa. 187; *Cleveland, C. & C. R. Co.* v. *Terry*, 8 Ohio St. 570.

In Hilliard on Remedies for Torts (p. 170), the law is thus stated: "One injured by the concurrent negligence of two persons may maintain a joint action against them. Thus, where the trains of two companies using the same track come in collision, an action is maintainable against them jointly for injuries incurred." *Colegrove* v. *New York & H. R. Co.* 20 N. Y. 492.

Deering, in his work on Negligence (§ 395), says: "An action lies against two persons jointly superintending a work which was so negligently done that it caused injury to the

plaintiff; and it makes no difference that one rendered his services to the other gratuitously." *Hawkesworth* v. *Thompson*, 98 Mass. 77. And again: "When separate and independent acts of negligence of two persons are the direct cause of a single injury to a third person, it is impossible to determine in what proportion each contributes to the injury. Either is responsible for the whole injury, and this though his act alone might not have caused an injury, and though, without fault on his part, the same damages would have resulted from the act of the other." See *Slater* v. *Mersereau*, 64 N. Y. 138.

In Wharton on Negligence (§ 788), the rule is stated to be that, "if two or more persons are jointly concerned in a particular act, . . . they may be sued jointly;" and so, if several persons are jointly bound to perform a duty they are jointly and severally liable for omitting to perform, or for performing it negligently. All persons who co-operate in an act directly causing injury are jointly liable for its consequences if they acted in concert, or united in causing a single injury, even though acting independently of each other. 1 Shearm. & Redf. Neg. § 122.

In *Cuddy* v. *Horn*, 46 Mich. 596, it was held that an act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them, without concert, renders them liable. And it was held that if a passenger on one vessel is injured by its collision with another, in consequence of the negligence of the officers of both, he has a right of action against them jointly. See also *Stone* v. *Dickinson*, 5 Allen, 31; *Cooper* v. *Eastern Transp. Co.* 75 N. Y. 116; 2 Thomp. Neg. p. 1088.

In *Wabash, St. L. & P. R. Co.* v. *Shacklet*, 105 Ill. 364, which was a case where a passenger upon one train of cars was killed by the collision with the train of another company using the same track, through the mutual negligence of the servants of the two companies, we said: "We are of opinion that public interests will be best subserved by adhering strictly to the long and well established principle that where one has received an actionable injury at the hands of two or more wrong-doers, all, however numerous, are severally liable to him for the full amount of damages occasioned by such injury, and the plaintiff in such case has his election to sue all jointly, or he may bring his separate action against each, or any one, of the wrong-doers." There can in such case be no apportionment of damages, as between the several parties whose negligent acts and conduct have contributed to the injury. Nor can one of the wrong-doers compel contribution from the others. There can be but one recovery for the damages sustained, and this, as we have seen, may be several as against each wrong-doer, whose acts or negligent conduct has contributed to produce the injurious result. And where the negligence of two or more persons directly concurs to produce the injury, although one may have undertaken one part, and another another part, and the negligence occurs in the performance of each of the several parts of the work, which directly contributes to produce the injury, all will be jointly liable. The test seems to be whether or not the negligence of each directly contributed in producing the injurious result. Here the Brewing Company intended that its defective support should be used as it was used, and, it having express notice of the insufficiency thereof, it became responsible to anyone injured, while exercising due care, from the use to which it was thus applied by its direction and supervision. And the Ice Machine Company, with knowledge of its insufficiency, went on and placed the tank thereon, and thereby became responsible for injuries to any of its servants it might send to work upon the tank, without giving them notice of the danger to which they were exposed. Here, the negligence of each of three defendants directly concurred in producing the death of Keifer.

It is urged that the court erred in the admission of evidence. The witnesses Marion and Gaines testified at the trial that if the swivel in the hog chain had not been defective, the truss would have supported from sixty to a hundred thousand pounds. On cross-examination, plaintiff showed by them that they testified at the coroner's inquest upon the body of Keifer, and, having identified the transcript of their testimony, as taken down by the coroner, and signed by them, they were asked if they did not state in that examination that the hog chain, if perfect, would have sustained about thirty tons, to which they answered they did not recollect. Plaintiff, in rebuttal, introduced in evidence that portion of the witnesses' testimony to which their attention had been called, which showed they did so testify. Their deposition before the coroner had been read to, and signed by, these witnesses, and on cross-examination their attention had been particularly directed thereto. This evidence was offered by way of impeachment, and was entirely competent. The mode of examination seems to have conformed to the rule in reference to examination in respect of written instruments. 1 Greenl. Ev. §§ 463–465.

It is also insisted by the defendant Brewing Company that the statements and declarations of Dennerty, the superintendent of the Ice Machine Company, were improperly admitted in evidence. The testimony to which this objection applies is that of the witness Stith, who testified that he heard Dennerty tell the man who built the tank and brought it to the brewery to put it where the Brewing Company told him to put it, and to Dennerty's own testimony that he told Heine that the supports were not strong enough to sustain the weight of the tank. In respect of the latter, it is clearly competent against both defendants, as tending to show that each, prior to the erection of the tank, had notice of the insufficiency of the truss to sustain the weight to which it was to be subjected. The testimony of Stith was clearly competent as against the Ice Machine Company. Dennerty was its superintendent in charge of the work, and his direction was the direction of his company. If incompetent, as against the Brewing Company, the rule would be, that it must be admitted against the defendant in respect of whom it is competent; and its use and application limited by proper instructions. If the testimony was proper for any purpose, its admission was not error.

The plaintiff here sues in a representative ca-

pacity, and the defendants, if natural persons, would have been incompetent to testify as a witness in the cause. The Brewing Company was a corporation, and Heine, being its president and a stockholder therein, was interested, and therefore incompetent to testify generally on behalf of the corporation when called adversely to the plaintiff. At common law, a stockholder, being interested in the event of the litigation, was not allowed to testify generally in favor of the corporation. *Thrasher* v. *Pike County R. Co.* 25 Ill. 393.

It is urged that the court erred in refusing to allow the defendant, the Brewing Company, to prove its directions to its foreman to build a sufficient truss. This is not error of which that Company can complain. Its foreman did afterwards testify, without objection, to the directions given him. But if this was not so, the master is liable for the acts of his servant within the scope of his employment. The act of the servant in providing the structure was in law that of his employer, and the servant's failure to obey instruction will not exonerate the master. *Chicago & N. W. R. Co.* v. *Swett*, 45 Ill. 197; Wood, Mast. and S. 860; Beach, Contrib. Neg. § 130; Wharton, Neg. § 232, *note;* Patterson, Railway Accident Law, 329, 330.

We have carefully considered the several points made by counsel, and are of opinion that *there is, in this record, no error requiring a reversal of the judgment of the Appellate Court, and it will accordingly be affirmed.*

NEW JERSEY SUPREME COURT.

STATE of New Jersey, *ex rel.* James A. DEMPSEY,

v.

MAYOR, etc., OF the City of NEWARK.

(....N. J. L. ....)

*1. **The alteration of the wards** of a city by special legislation is unconstitutional.

2. **Such alteration is likewise unconstitutional** whether the same be effected by one statute or by the joint operation of two going into force successively.

3. **The effect of the mistake** in the description of the boundary of one of the assembly districts in the City of Newark noticed.

(November, 11, 1890.)

PETITION for a writ of mandamus to compel respondents to proceed under an Act of the Legislature to fix the boundaries of the wards in the City of Newark. *Denied.*

The facts are stated in the opinion.

Messrs. **Price, Runyon & Stevens** for relator.

Mr. **Henry Young,** with *Mr.* **Joseph Coult,** *City Counsel,* for respondents.

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

The question presented in this instance for decision is whether or not the recent Act of the Legislature, approved the 18th of April, 1889, relating to the co-ordination, in certain circumstances, of the boundaries of the wards of cities and those of assembly districts, be constitutional. The pertinent section of that Act is in these words: "That in any city of this State, which now or hereafter shall contain more than two assembly districts within any such city, which assembly districts are completely and exclusively within the limits of such city, and embrace no territory outside of such city, it shall be the duty of the mayor and common council, or other municipal board, corresponding thereto, and such mayor and common council, or other municipal board, of every such city are hereby directed, by resolution, to divide such city into wards corresponding in number and boundaries to such assembly districts exclusively embraced, as aforesaid, within the limits of such city." This Act, according to its terms, went into effect immediately, but at that time there was no city in which it could operate, as there was no one containing "more than two assembly districts wholly within it." On the 4th of July of the same year, this requisite was supplied by the coming into operation of the Act approved 27th of March, 1889, and which rearranged the assembly districts of the State, creating wholly within the City of Newark several of such districts. It produced this effect within no other city. It will be observed, therefore, that the effect of this legislation, if it be enforceable, is to alter certain of the ward lines in the City of Newark, and that it has no effect whatever elsewhere. Under these circumstances, the Mayor and Common Council have refused to divide, by resolution, according to the section of the Act already cited, this city into wards corresponding in number and boundaries to these new assembly districts; hence the application for a peremptory mandamus. In justification of this recusancy on the part of the City, its counsel insists that the legislative regulation so repudiated, applying as it does to the City of Newark alone, is void on the ground that it is inconsistent with that particular provision of the Constitution which prohibits local and special legislation regulative of the internal affairs of cities. Before entering into the discussion of the subject thus presented, it seems to me proper to premise that there are two lines of argument, quite elaborately urged in behalf of the City, which have been altogether discarded. One of these is the attempt to show, by an historical examination of a series of statutes relating to the City of Newark, that the present legislation is a designed contrivance fabricated by the law-makers, in furtherance of an illegitimate purpose, to violate the constitutional provision in question, and, in the second place that the policy of the Acts thus criticised is adverse to the public well being. It will require but little reflection to satisfy anyone that such considerations as these are wholly foreign to the inquiry before us. The Legislature is a branch of the government co-ordi-

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

See also 19 L. R. A. 584; 23 L. R. A. 525.

nate with the judiciary, and it would be both highly indecorous as well as highly illegal for either to criticise, in a moral point of view, the conduct of the other. On such occasions as the present, the sole and exclusive question is whether the given legislation is consistent or not with constitutional requirements,—an inquiry that cannot be forwarded in the least degree by a knowledge of the purpose, whether good or bad, that led to its enactment. And, in like manner, a decision of the question whether the policy embodied in a statute be consistent or inconsistent with the public welfare is in no wise a judicial, but altogether a legislative, function. Consequently, in matters of this kind, it must be assumed as postulates not to be questioned that the challenged statute was passed from proper motives, and that if put in force it will be conducive to the well-being of the community. Passing these irrelevancies I find three important subjects discussed in the briefs before me. These subjects are: (1) the question whether the legislation now in question is local and special in the constitutional sense; (2) If it be such, is it within the interdiction of the Constitution? and (3) What is the effect of a certain alleged imperfection of the Assembly District Act, an imperfection which will be specified in the sequel? These questions will be briefly considered in the order in which they are thus stated.

Is this legislation "special," in the constitutional sense of that term? On the part of the City of Newark it is insisted that this question must be answered in the affirmative, inasmuch as the Act affects the political organization of that City only. That the Statute has, under present circumstances, no scope beyond this cannot of course be denied; for there is no other city in the State that has more than two assembly districts wholly within its boundaries, and that is the quality of the situation that calls into operation the statutory regulation now impugned. That an alteration of the boundaries of the wards of a city constitutes a regulation of its internal affairs is a proposition that is entirely indisputable. Nor is any attempt made in the argument in this case to put it in question; for the contention of the counsel of the relator is that upon the assumption of this Statute having the effect thus ascribed to it, and that at present its operation is localized in this particular City, nevertheless, it is in point of law a general, and not a special, Act. In support of this position the course of reasoning was to this effect, viz.: That this law, according to its terms, is made applicable to every city in the State, and that, although it is at the present moment operative in the City of Newark alone, under future legislation recasting the assembly districts, it may become operative in other places; and that when the law in question went into effect there was no place in the State which it affected; and that, being then constitutional, it could not be bereft of such legality for the reason that the Assembly District Act subsequently caused it to be operative in the City of Newark alone. That the Statute under consideration when it first went into force was constitutional may well be conceded. The system it established was a general one, and by appropriate legislation might have been established in every city in the State; and, under such circumstances, the legislation would have been plainly unobjectionable. But it is manifest, being in its inceptive stage absolutely inert, it was possessed of a potentiality of becoming, in effect, either general or special, as extrinsic legislation might dictate, and the inquiry therefore supervenes, What is the constitutional complexion of the Statute when such extrinsic legislation has imparted to it a purely local and special force? Primarily, it was possessed of no operative force; now, with the assistance of the Assembly District Act, it has force in the City of Newark alone. Granting validity to these two Statutes, it is plain that by their co-operation the internal affairs of this City will be subjected to a special and exclusive regulation. As this end, it is conceded, could not be accomplished by the force of a single statute, the question at this point to be passed upon is whether it can be accomplished by the concurrent force of two or more. It does not seem to me that the affirmative of this proposition can be reasonably maintained. Constitutional provisions are not to be subtly treated, nor construed in the narrow sense of their letter, but liberally, according to their manifest purpose and spirit. Nothing can be more conspicuous than that, by the constitutional provision under criticism, it was intended that when the internal affairs of a city could be regulated by a general law they should be so regulated; and in every such case special legislation was prohibited, whether such regulation be effected by one statute or by many. The nature and pernicious qualities of such special legislation are the same, whether it be embodied in a single statute or in a multiplicity of statutes. In the present instance, the forbidden transaction has been produced by the conjoint action of these two Statutes, and, consequently, it is that duplex legislation that is interdicted. This constitutional provision is a regulation of the legislative power in whatever form or forms it may exert itself, whether directly, through the instrumentality of a single statute, or indirectly, by the co-efficiency of several. I unhesitatingly conclude, on this point, that the legislation now in question is liable to precisely the same constitutional objections as it would have been had the force inherent in these two Acts been deposited in one of them. But it was insisted that, upon the admission of the correctness of this view, nevertheless, this legislation is no more special than that which received the sanction of the court of errors in *State* v. *Scott*, 50 N. J. L. 585, 1 L. R. A. 86.

This is what is known as the "*Local Option Case.*" But if we pay attention to the legal principles respectively applied in the present case, and in the reported case, we will at once perceive that the two have no analogy to each other. In the instance in hand, a statute, general in its terms, has been made special and localized in its operation by the Legislature itself, by force of a second statute; whereas in the reported case, the Statute being also general according to its terms, was made special and local by the independent action of the people of the several localities. In the one case, the legislation, by its own intrinsic force, is special; in the other, intrinsically considered, it was general. The reported case, and others of the same class, have manifestly

no affinity in point of legal basis with the case now under examination.

Concluding, then, that this legislation is special, and that it regulates the internal affairs of the City of Newark alone, the second of the questions above stated arises,—Is such legislation within the interdiction of the Constitution? It will be observed that the inquiry here is whether the Legislature cannot, by a special law, alter the boundaries of certain of the wards of the City of Newark. When the case of *State* v. *Newark*, 40 N. J. L. 550, was before the court of errors, this particular question was reserved, as it was not necessarily involved. On the present occasion, this problem is directly before us for decision. In my opinion the solution of this question depends entirely on the settlement of the fact whether these ward boundaries are in point of fact susceptible of modification by force of general legislation; for, if they cannot be so altered, a special Act for that purpose would not be objectionable. The construction of the Constitution from which this opinion proceeds is not, with me, a novelty. When the constitutional clause now in question was first presented (in the case of *State* v. *Parsons*, 40 N. J. L. 1) to this court for exposition, I was led, after a careful examination of the subject, to the conviction that it was only such internal affairs of municipalities as could be regulated by general legislation that were required so to be. This was the language, in this respect, then used: "In laboring this point in their argument, the counsel of the relators seemed to incline to the conclusion that a special or local law could in no case be passed, the purpose of which was to regulate the internal affairs of any municipality. But I cannot agree to this view. According to my reading of the constitutional clause in question its purpose was not to limit legislation, but to forbid only the doing by special or local laws those things that can be done by general laws." And this exposition appears to be the only one that will harmonize with the language of the clause, or with any purpose that can be reasonably ascribed to the people in its enactment. It does not seem credible that it was the popular intention to deprive the Legislature of the power to alter or amend those parts of the structures or methods of the municipalities of the State that cannot be altered or amended by general laws. This was the view on this subject expressed in the case from which a citation has already been made: "The intent here, I think, is perfectly plain, and it was to require, within this department, all things that could be effected by general statutes to be effected in that way; but there is no intent to abrogate the legislative power outside of this field. The opposite interpretation would be full of impracticabilities, not to say absurdities. By its prevalence the peculiar imperfections inherent in the frame of any existing public corporation would at once be made unalterable and irremediable; the boundary of every city, township and county would become unsusceptible of change, and the constitution of such bodies, with respect to matters unique, and therefore not to be reached by general laws, would be beyond the hand of improvement or modification." The view thus expressed, it seems to me, is fortified and confirmed by the context of the clause under discussion. The section is thus constructed: It first designates certain matters that are not to be effected by special laws, and then, towards its close, it declares that "the Legislature shall pass general laws for the cases enumerated in this paragraph,"—a form of expression that demonstratively implies that the things thus enumerated can be accomplished by general legislation. We cannot well suppose that the Legislature is enjoined to do that which is impossible to be done. That there are certain regulations of the internal affairs of cities, townships and counties that cannot be effected by general legislation is self evident. It does not seem possible to establish any general plan or mode whereby the exterior lines of any of such political districts can be altered; and every such alteration must, in the nature of things, be a regulation of its internal affairs. In fact, every such modification must not only be a regulation of its internal affairs, but must be one touching vital interests; for it must either add to or detract from the voting population.

When the municipalities of Chambersburgh and Millham were recently incorporated with the City of Trenton, it does not appear to me that it can rationally be denied that the internal affairs of the latter city were regulated. By this consolidating Act new wards were fashioned out of the territory that was added to the capital, and were adjusted so as to harmonize with its old wards. This Act was accomplished by a special statute, and, according to my exposition of the constitutional clause in question, as above explained, such a statute was plainly legitimate for the reason that consolidation of these three places could not be effected by any other means. No general law could have been devised adapted to the exigence; hence special legislation was properly resorted to. No other ground is perceived whereby the transaction is to be vindicated. But while there are junctures in which special legislation can be thus exceptively resorted to, such junctures will be of unfrequent occurrence. Most things of this kind can be accomplished by general legislation, as, for example, legislative directions touching the streets of municipalities, their system of sewers, water, lights and matters of that kind. With regard to such urban instrumentalities there can be no difficulty. But, as we have seen, a different state of affairs will sometimes arise when it becomes expedient to modify a part of the organization of the government of the city; as, for example, in the instance already presented of a necessity to extend the municipal area. As we have seen in the latter class of exigencies, special legislation, from the necessity of the case, is allowable, while in the former classes, the necessity that would alone justify such restricted legislation being absent, the purposes in view can be executed by the use of a general law only.

The inquiry therefore presses, Are the boundaries of municipal wards susceptible of alteration through a general law?—and this, in my apprehension, is the only point of real difficulty in the present case. That such a system or rather aggregation of wards as are exhibited at present in the cities of this State could not be fabricated by virtue of a general law seems to be obvious. The ward divisions in each city,

as they now exist, constitute a specialty; they are unlike those of every other city; and it is not too much to say that no two wards in the entire State can, in any material respects, be assimilated. It is impossible to conceive of such particularities being created or modified except by a special Act for the purpose. How can a general law be framed that must possess in each city a different force from what it has in every other city? It is plain that such an end cannot be more lawfully reached by a delegation of the necessary power to each of these cities; for this would be virtually saying to each separate municipality, you may alter your organization in this respect to suit your own notions; and if such delegated authority in this particular were held legitimate, it would necessarily follow that a similar capacity could be conferred severally on these cities to modify at will other parts of its organization, the result being that instead of uniformity in the municipal governments of the State, as the Constitution designs, we would have infinite multiplicity. The result of this line of considerations is this: that if the wards of cities could be constituted not otherwise than as we now find them, and consequently could not be the creatures of general legislation, I should be constrained to hold that the Legislature by special law could legitimately alter or readjust such political precincts at its will. As a general Act effective of the purpose would be an impossibility, a special Act would not be interdicted by the Constitution. On this basis I should have held the Act now in question, and which modifies some of the wards of the City of Newark, to be unobjectionable. But upon mature reflection, I have come to the conclusion that, although it is an impossible thing either to create or to modify, by a general statute, the present distribution of the areas of the cities of the State into wards as they now exist, nevertheless, it is practicable, by general legislation, to establish in such cities a general system, and that, consequently, these municipal instrumentalities cannot be readjusted or affected in any other mode. For example, if a law should be enacted distributing the cities of the State into classes on the basis of population, declaring that each class should have a certain number of wards, and that such wards should be so set off that each should contain as nearly as practicable the same number of voters, it is not perceived how such a scheme could be reasonably objected to. A conviction that this, or some other plan of the kind, is feasible, of course inevitably leads to the conclusion that special legislation in this field is out of place, and that the Act under consideration is void on the ground of its unconstitutionality.

This conclusion renders it unnecessary to consider the error that exists in the description of the boundary between the old seventh and fifth districts in the City of Newark in the Assembly District Re-apportionment Act, approved 27th March, 1889. If that description be exactly followed, a small parcel of territory is left out, and is unembraced by any of the remodeled districts. As I have examined this subject with some care, it may not be amiss to express my opinion on the subject, which is that the small parcel of territory in question belongs and goes with that portion of old district No. 7, which is taken therefrom for the purposes of readjustment. The intention to embrace the entire territory of Newark in the new system, and the parcel of land in question being in express terms excluded from district No. 5, it becomes manifest that it was omitted from the portion of No. 7, above mentioned, by pure error in running the boundary of that tract. Under such a condition of facts, the error comes within the curative effect of the rule *falsa demonstratio non nocet.*

Reed and **Dixon**, *JJ.*:

So far as the opinion of the chief justice intimates that in cases where the internal affairs of towns or counties cannot be regulated by general laws they may be regulated by special or local laws, we are not prepared to concur therein. The point is not necessarily involved in the decision of the cause.

ARKANSAS SUPREME COURT.

WARDS & Dudley, *Appts.*,
v.
SPARKS & Mitchell.

(.....Ark.....)

1. **Premature presentment for payment of a sight draft entitled to grace will not be presumed** in an action to recover thereon, from the facts that it was drawn at Cherry Valley, Arkansas, March 15, on parties in Kansas City, Missouri, was protested for nonpayment on the 19th of the same month and bears an undated indorsement for deposit in Memphis, Tennessee, where the complaint alleges its due presentment for payment.

2. **That notice of dishonor was given to the drawers** of a draft is sufficiently alleged by a statement in a complaint to recover thereon that the draft was protested for nonpayment under statutes which provide that the holder shall have his action when protest has been properly made.

(November 15, 1890.)

APPEAL by defendants from a judgment of Circuit Court for Crittenden County in favor of the plaintiffs in an action upon a draft. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. **N. W. Norton**, for appellants:

There is no allegation of notice of the protest and dishonor to the defendants. Nothing was more material to the plaintiffs' case than that defendants should have had this notice. *Gracie* v. *Sandford*, 9 Ark. 233; *Adams* v. *Boyd*, 33 Ark. 33; *Minehart* v. *Handlin*, 37 Ark. 276.

From the indorsements it is clear that grace was not allowed and that it was prematurely protested. Payable "at sight" it was entitled

to grace according to the reason for the rule and the weight of authorities.

1 Dan. Neg. Inst. § 617; *Adams* v. *Boyd*, *supra*.

Demand before or after third day of grace will not charge drawer or indorser.

1 Dan. Neg. Inst. § 614.

Messrs. **Sanders & Watkins,** for appellees:

The object of protesting a draft is to give notice to the drawer of its nonpayment.

Rapalje & L. Law Dict. p. 1030.

Throughout the entire chapter 14 Mansfield's Digest, on bills of exchange and promissory notes, the word "protest" is used as including all the steps necessary to hold the drawer of a bill of exchange on the failure of the drawee to accept or pay.

See *Townsend* v. *Lorain Bank*, 2 Ohio St. 345; 2 Dan. Neg. Inst. 929; *Chrisman* v. *Jones*, 31 Ark. 609; *Haynes* v. *Butler*, 30 Ark. 69; *Ward* v. *Barrows*, 2 Ohio St. 242; *Bank of U. S.* v. *Dandridge*, 25 U. S. 12 Wheat. 64, 6 L. ed. 552.

The indorsement across this draft raised the presumption that the notary performed his entire duty in making the protest, and if he failed to do so, appellant should have established such failure by direct proof in the lower court.

Stillwell v. *Ham*, 97 Mo. 579; *Shahan* v. *Tallman*, 39 Kan. 185; *Missouri Pac. R. Co.* v. *Morrow*, 36 Kan. 495; *Guthrie* v. *Olson*, 32 Minn. 465.

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

From a judgment by default rendered against the appellants as drawers of a foreign bill of exchange this appeal is prosecuted. It is contended that the allegations of the complaint do not disclose a cause of action, for the reasons: *first*, that it appears that the draft was presented for payment prematurely; *second*, that it is not alleged that notice of dishonor was given to the appellants. The bill which was filed with the complaint as the basis of the action is as follows:

"$562.50. Cherry Valley, Ark., March 15, 1888.

At sight, pay to the order of Sparks & Mitchell five hundred and sixty-two and 50-100 dollars, value received, and charge to account of Wards & Dudley. To B. F. Pratt & Co., Kansas City, Mo."

Across the face is written:

"Protested for nonpayment Mch. 19th, 1888. Edwin C. Meservey, Notary Public."

It bears the following indorsements:

"Sparks & Mitchell."

"For deposit only with the Union Planters' Bank, Memphis, Tenn., for account of Hill, Fontaine & Co."

The complaint is as follows: "The plaintiffs for cause of action herein against the defendants state that they are indebted to them in the sum of five hundred and sixty-two dollars and fifty cents, evidenced by their certain draft dated at Cherry Valley, Arkansas, Mch. 15, 1888, and due at sight, and drawn on B. F. Pratt & Co., Kansas City, Mo., and which was duly presented for payment to B. F. Pratt & Co., and payment refused, and which was protested for nonpayment March 19, 1888. The original draft is hereto attached and made a part of the complaint. Wherefore, the premises considered, plaintiffs pray judgment for the amount of said draft and all costs."

1. That a bill payable at sight is entitled to grace seems to be held by the current of authorities; it has been so ruled by this court. Tiedeman, Com. Paper, § 315, and cases cited; *Craig* v. *Price*, 23 Ark. 633; 1 Dan. Neg. Inst. § 611. The complaint alleges that the bill was "duly presented for payment,"—that is to say, that it was presented in all respects as it should have been. But it is contended that the indorsement in the bill contradicts the averment and to support the contention it is said that the bill was executed in Arkansas on the 15th of March; that it was held in Memphis at a time unfixed; that it was presented for payment in Kansas City on the 19th of the same month; and that this precludes the idea that days of grace were given the drawee. Under the law the bill should have been presented to the drawee for sight (1 Dan. Neg. Inst. § 617), and should then have been presented for payment after the term of grace expired. We cannot say that the bill did not pass to a party in Memphis, and still reach Kansas City in time to be exhibited to the drawee on the 16th, in order to fix the time of actual maturity on the 19th; nor does it appear by the indorsement that it may not have been in Memphis after its dishonor.

2. The complaint alleges that the bill was protested for nonpayment. In its original technical sense, protesting a bill was proving to a notary that due steps had been taken by the holder to protect him against loss by reason of nonacceptance or nonpayment by the drawee. In its popular sense it includes all the steps necessary to fix the liability of the drawer or indorser. 2 Dan. Neg. Inst. § 929.

The statutes of Arkansas seemed to have adopted the popular use of the term "protest," since by them it is provided that the holder shall have his action when protest has been properly made. Mansfield, Dig. § 469. The pleader used the term as it is employed in the Statute, and, as all pleadings are to be liberally construed with a view to substantial justice, we think the complaint sufficient.

The judgment will be affirmed.

SOUTH CAROLINA SUPREME COURT.

William T. AKERS *et al.*
v.
Samuel W. ROWAN, Sheriff, etc., *et al.*

Robert W. SHAND, Assignee of J. S. Robbins,
v.
CENTRAL NATIONAL BANK of Columbia.

SAME
v.
Samuel W. ROWAN *et al.*

(....S. C.....)

1. **Insolvency, as that term is used in the Assignment Law,** means an insufficiency of the entire property and assets of an individual to pay his debts.

2. **Though an attorney or director of a corporation may be its agent,** yet knowledge which such an officer has acquired while acting for himself, or for a third person, and not for the corporation, cannot be imputed to his principal; especially where such knowledge cannot be communicated to the principal without a breach of confidence on the part of the agent.

3. **That drafts drawn upon a person were sent back unpaid,** and that some of his creditors had brought suits against him, is not sufficient to establish knowledge by the bank, or reasonable cause to believe, that such person was insolvent, where the president, cashier and several of the directors, and prominent business men in the place, testified that they had no such knowledge and entertained no such belief.

4. **A mortgage given in renewal of a prior mortgage** is not invalid as an unlawful preference under the Assignment Law, if the prior mortgage was valid under such law; it it is merely a change of securities.

5. **A mortgage of after-acquired property is good** and valid; and the lien of the mortgage attaches so soon as the property is acquired by the mortgagor.

6. **Assignments to a mortgagee of bills, notes and accounts,** being the proceeds of the sales of the mortgaged property, cannot be held to be made in fraud of the Assignment Act, although made within the prohibited time before a general assignment, where the mortgage was made previous to that time and was valid under such Act.

7. **A mortgage giving a preference,** made by an insolvent debtor within ninety days before a general assignment, is, under the Assignment Act, a nullity, having no vitality or lien.

(October 22, 1890.)

CROSS-APPEALS by Robert W. Shand, plaintiff, and the Second National Bank of Columbia, defendant, in the second and third of the above-entitled actions from a decree of the Common Pleas Circuit Court for the County of Richland settling the priorities of certain claims to the assets of the insolvent

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NOTE.—*Notice to agent is notice to principal.*

The general rule is that notice to an agent, while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal. Suit v. Woodhall, 113 Mass. 391; National S. Bank v. Cushman, 121 Mass. 490; Sartwell v. North, 4 New Eng. Rep. 51, 144 Mass. 188; The Distilled Spirits, 78 U. S. 11 Wall. 356, 20 L. ed. 167.

This rule applies to corporations and their officers. New Hope & Del. Bridge Co. v. Phœnix Bank, 3 N. Y. 156; Washington Bank v. Lewis, 22 Pick. 24; Huntsville Branch Bank v. Steele, 10 Ala. 915; North River Bank v. Aymar, 3 Hill, 262; National Security Bank v. Cushman, 121 Mass. 490; New Milford First Nat. Bank v. New Milford, 36 Conn. 93.

If the board of directors or trustees of a corporation makes a director or other officer its agent to act for it, notice to such agent is notice to the corporation. Fairfield Sav. Bank v. Chase, 72 Me. 226; Logansport v. Justice, 74 Ind. 390; National Bank v. Norton, 1 Hill, 573; General Ins. Co. v. United States Ins. Co. 10 Md. 517; Farmers & C. Bank v. Payne, 25 Conn. 444; Smith v. South Royalton Bank, 32 Vt. 341; Washington Bank v. Lewis, 22 Pick. 24; Commercial Bank v. Cunningham, 24 Pick. 270; Housatonic & Lee Banks v. Martin, 1 Met. 386; Hoover v. Wise, 91 U. S. 308, 23 L. ed. 393.

So it is generally true that if a director of a bank or other corporation has knowledge of the fraud or illegality of a transaction while he acts for the bank, his act is that of the bank, and it is affected by his knowledge. National Security Bank v. Cushman, 121 Mass. 490.

But this principle does not apply where he assumes a position conflicting entirely with the idea that he represents the bank, and where his individual interest is distinctly antagonistic; or where he acts for another with whom he is interested in any transaction. Wickersham v. Chicago Zinc Co. 18 Kan. 481; Stevenson v. Bay City, 26 Mich. 44; Winchester v. Baltimore & S. R. Co. 4 Md. 231; Stratton v. Allen, 16 N. J. Eq. 229; Barnes v. Trenton Gas Light Co. 27 N. J. Eq. 33; Hightstown Bank v. Christopher, 4 N. J. L. 435; Seneca County Bank v. Neass, 5 Denio, 329; Third Nat. Bank v. Harrison, 10 Fed. Rep. 243.

Nor does it apply where the act of the assumed agent is not for the benefit of his principal; but where, on the contrary, the agent forms a plan to cheat his principal in his act in pursuance of that plan, he does not bear the character of agent, although his position as agent may enable him to carry out his plan. Such cases are: Davis Imp. Wrought Iron W. W. Co. v. Davis Co. 20 Fed. Rep. 699; DeKay v. Hackensack Water Co. 38 N. J. Eq. 158; Cave v. Cave, L. R. 15 Ch. Div. 639; Kettlewell v. Watson, L. R. 21 Ch. Div. 685.

Limitation to the rule.

Where certain information comes to the president of a corporation casually while acting as agent, without any intimation that it was intended or designed to give notice to him, or the company, or that he as president, or the company as his principal, should take notice, it does not bind the company as notice. Miller v. Illinois Cent. R. Co. 24 Barb. 332.

If a president or director, while engaged in his private business or otherwise, incidentally learns a fact when there is nothing concerning the affairs of the bank apparently connected with such fact, such knowledge is not to be imputed to the corporation. Getman v. Oswego Nat. Bank, 23 Hun, 503; Miller v. Illinois Cent. R. Co. 24 Barb. 332; Westfield Bank v. Cornen, 37 N. Y. 320; Atlantic State Bank v. Savery, 18 Hun, 36.

See also 11 L. R. A. 424; 20 L. R. A. 600; 24 L. R. A. 197, 524; 33 L. R. A. 821.

estate of J. S. Robbins. *Reversed in part and affirmed in part.*

The report of the master in these cases was as follows: "The three actions above entitled were separately brought, but by a single order of reference were referred to me 'to take the evidence, and hear and determine all the issues, both of law and of fact,' therein, and were, by consent of counsel, tried together, the same evidence being considered as offered in all the cases. A pressure of other matters prevents my discussing the evidence, or stating my reasons for my findings and conclusions. I find the following to be the facts of the case: (1) That for a year or more prior to the month of March, 1886, J. S. Robbins, who is named as a party defendant in the action first above entitled, was engaged in the mercantile business in the City of Columbia as a wholesale and retail dealer in provisions, groceries, hay, etc., doing all of his banking business with the defendant, the Central National Bank of Columbia. (2) That he was permitted to overdraw his account in said Bank from time to time, upon the security of bills of lading for merchandise at the various railroad depots in the City of Columbia, which were taken up by said Bank, until, on the 16th day of March, 1886, such overdrafts amounted to nine thousand one hundred and eighty-five dollars ($9,185), when said Bank advanced to him the further sum of eighteen hundred dollars ($1,800) to pay certain acceptances of his, then maturing, taking therefor his note for the said eighteen hundred dollars ($1,800), and a chattel mortgage to secure the said note and the overdraft above mentioned, the Bank surrendering its bills of lading, and he promising to deposit all his funds in the said Bank, and to transfer to it as security certain bills and accounts; but he was to be allowed to check against his deposits for such sums as would be necessary to run his business, the net balance only of the deposits to go to the reduction of his overdraft, which it was expected would be paid up within forty days. (3) That on the 30th day of April, 1886, having reduced his overdraft to five thousand nine hundred and fourteen and 58-100 dollars ($5,914.58), but not having paid anything on the note, he gave a renewal note for the same amount, payable at thirty days, and executed a new mortgage as a renewal of the first one, which was surrendered to him, but was probably not marked 'satisfied' or canceled.' (4) That both of these mortgages were executed in good faith by Robbins, and the officers of the Bank had no reason to believe him to be insolvent, as he really was, but neither of the said mortgages was ever recorded, because it was so requested by him. (5) That during the month of May, 1886, Robbins became more and more embarrassed, many drafts upon him being returned dishonored, some of them through the Central National Bank, and many suits were commenced against him, which was known to some of the officers of the Bank. (6) That from the execution of the first mortgage he was required, in pursuance of his promise, to deposit all his funds in said Bank, whether in the shape of cash, or bills and notes, the net amounts going as payments on account of his said over-

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Yet if afterwards it becomes his duty to act upon that knowledge in the business of the bank his principal would be chargeable with notice of the facts of which he had acquired the knowledge while acting in another capacity than as agent of the bank. Holden v. New York & E. Bank, 72 N. Y. 295; Tagg v. Tennessee Nat. Bank, 9 Heisk. 486.

The authority of bank officers is limited to binding the corporation to acts and contracts within the ordinary sphere of their duties and the scope of their ordinary business. Lyons First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 292; Dixon v. Beach, 8 Daly, 288; Minor v. Mechanics Bank, 26 U. S. 1 Pet. 46, 7 L. ed. 47; Fleckner v. Bank of U. S. 21 U. S. 8 Wheat. 338, 5 L. ed. 631.

A bank discounting a note is not chargeable with the knowledge of its illegality or want of consideration, acquired by one of its directors in other than in his official capacity. Fulton Bank v. New York & Sharon Canal Co. 4 Paige, 127, 3 N. Y. Ch. L. ed. 372.

Notice of the loan to the cashier of the bank is not notice to its board of managers, but merely notice to the cashier of an act done under an authority given by him, which he had no power or right to give. New Hope & Del. Bridge Co. v. Phœnix Bank, 3 N. Y. 158.

It has been held that the knowledge of a director of what was held to invalidate a contract is to be imputed to the bank, where he acts for the person contracting with the bank, thereby securing to himself important advantage (Bank of U. S. v. Davis, 2 Hill, 451; Union Bank v. Campbell, 4 Humph. 394); but this has been dissented from in numerous subsequent cases.

Exceptions to rule as to imputed notice.

Although it is a general rule that knowledge of an agent is ordinarily to be imputed to the principal, yet there are exceptions to this imputation, as where the communication of a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating. Innerarity v. Merchants Nat. Bank, 139 Mass. 333, citing Kennedy v. Green, 3 Myl. & K. 699; Cave v. Cave, L. R. 15 Ch. Div. 639; *Re* European Bank, L. R. 5 Ch. 358; *Re* Marseilles Extension R. Co. L. R. 7 Ch. 161.

Or where the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. Allen v. South Boston R. Co. 5 L. R. A. 716, 150 Mass. 206; Innerarity v. Merchants Nat. Bank, 139 Mass. 332; Dillaway v. Butler, 135 Mass. 479; Atlantic Cotton Mills v. Indian Orchard Mills, 6 New Eng. Rep. 587, 147 Mass. 268; Howe v. Newmarch, 12 Allen, 49; Espin v. Pemberton, 3 De. G. & J. 547; Rolland v. Hart, L. R. 6 Ch. 678; Kettlewell v. Watson, L. R. 21 Ch. Div. 685.

Neither the acts nor knowledge of an officer of a corporation will bind it in a matter in which the officer acts for himself, and deals with the corporation as if he had no official relations with it. Wickersham v. Chicago Zinc Co. 18 Kan. 481; Winchester v. Baltimore & S. R. Co. 4 Md. 231.

That a director of a corporation acting avowedly for himself, or on behalf of another, with whom he is interested in any transaction, cannot be treated as the agent of the corporation therein, is well sustained by authority. Innerarity v. Merchants Nat. Bank, *supra*, citing Barnes v. Trenton Gas Light Co. 27 N. J. Eq. 33; Hightstown Bank v. Christopher, 4 N. J. L. 435; Winchester v. Baltimore & S. R. Co. 4 Md. 231; Wickersham v. Chicago Zinc Co. 18 Kan. 41; Seneca County Bank v. Neass, 5 Denio, 329; Third Nat. Bank v. Harrison, 10 Fed. Rep. 243; Stevenson v. Bay, 26 Mich. 44; *Re* Marseilles Extension R. Co. *supra*.

So an officer of a corporation, who undertakes

draft. (7) That from about the 15th day of June, 1886, the officers of the Bank had reasonable cause to believe that Robbins was insolvent, in the legal sense of the term, but the payments and deposits made by him were made in pursuance of his previous promise, and in the regular course of his business with said Bank, and they considered that they were requiring of him only what he was legally and morally bound by his promise to do. (8) That, for the purpose of gaining time, Robbins employed counsel to stave off judgments in all of the suits against him, except in the case of N. K. Fairbanks & Co., which he seems to have inadvertently overlooked, having put the papers in his desk to hand to his counsel, which he forgot to do. (9) That on the 20th day of July, 1886, having reduced his overdraft to two thousand seven hundred and thirty-one and 39-100 dollars ($2,731.39), Robbins executed a new mortgage to secure the same, and a renewal of the eighteen hundred dollar note, such mortgage being intended as a renewal of the previous mortgages, and not as a change thereof, said mortgage, as the previous ones had done, covering all goods then in his store, and at the several railroad depots, or elsewhere in the City of Columbia, and all goods to be thereafter acquired and added to said stock. (10) That, in the interim between the date and maturity of the mortgage of the 30th of April, the stock of goods had been materially changed by sales and purchases, and Robbins had contracted some debts, which have not been paid. This is also true of the interim between the maturity of said mortgage and the execution of the mortgage of July 20, 1886. (11) That in pursuance of the promise made when the Central National Bank surrendered the bills of lading held by it in March, Robbins, on the —— day of August, 1886, transferred to said Bank certain of his book accounts, upon which considerable sums have since been collected by said Bank. (12) That said accounts had not been transferred prior to the said —— day of August, 1886. (13) That, in making such transfer of these accounts, Robbins must be held to have intended the necessary consequences of his act—a preference to the Bank over his other creditors, in fraud of chapter 72 of the General Statutes of 1882,—and the Bank had reasonable cause to believe that he so intended. The same would be true of the mortgage of the 20th July, if it stood as an isolated transaction, but I have already found that it was a renewal of the mortgage executed previous to the ninety days preceding the 2d day of September, 1886, and conferred no new rights. (14) That N. K. Fairbanks obtained an order for judgment in the case above referred to on the —— day of July, 1886, but did not enter up judgment or issue execution until the 30th day of August, having postponed doing so at the earnest solicitation of Robbins, although there was no collusion between them, and Robbins did not contribute in any way to the obtaining of said judgment, or connive at their getting any advantage over their other creditors. (15) That, Robbins' condition steadily growing worse, said Bank, on the 30th day of August, 1886, by S. W. Rowan, as its agent, seized, under the mortgage of July 20, all the goods

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for a shareholder to obtain a release or cancellation of his subscription, becomes, as to that matter, the agent of the shareholder, who must assume the responsibility of his agent's acts. Cartwright v. Dickinson, 7 L. R. A. 706, 88 Tenn. 478.

"Insolvency" defined.

Insolvency is an inability to fulfill one's obligations according to his undertaking, and a general inability to answer in court for all liabilities existing and capable of being enforced; and not merely an absolute inability to pay at some future time upon settlement of business. Silverton First Nat. Bank v. Walton, 5 L. R. A. 765, and *note*, 13 Colo. 265.

A debtor is insolvent, within the meaning of the Insolvency Laws, when he is unable to pay his debts from his own means as they mature. Sacry v. Lobree, 84 Cal. 41. See *note* to *Re* Dalpay, 6 L. R. A. 108, 41 Minn. 532.

What operates as an assignment for creditors.

Under U. S. Rev. Stat., § 4192, an assignment for the benefit of creditors is a conveyance which must be recorded as provided by statute, to give assignee a right as against third persons without notice. Haug v. Detroit Third Nat. Bank, 77 Mich. 474.

A written conveyance to a trustee, by a debtor, of his stock of merchandise, to be sold within a certain time, the proceeds to be used in paying specified debts, and the balance to be returned to the debtor, is void as to other creditors. State v. Depuy, 52 Ark. 48.

An instrument authorizing any person, for the benefit of creditors, to take possession of all the debtor's property, and apply the proceeds *pro rata* to his debts, returning the balance, if any, to him, is an assignment in fact for creditors. Bonns v. Carter, 22 Neb. 495.

But a direction by a solvent debtor to another person to pay to certain creditors the moneys belonging to such debtor which should come to his hands under a certain contract is not a voluntary assignment for the benefit of creditors, within the Statute. Little Wolf River Imp. Co. v. Jackson, 66 Wis. 42.

Form of assignment.

A general disposition by an insolvent debtor of all his property and effects, thereby putting himself in such a situation that it is impossible for him to continue such business, is a voluntary assignment, whatever its form. Straw v. Jenks (Dak.) Nov. 8, 1889.

A debtor can make an assignment for the benefit of all his creditors, or for the benefit of those who will accept their dividends and discharge the debtor. He must choose which course he will follow; and the law does not authorize him to assign for the benefit of all and a part, or for the benefit of all or a part. McWilliams v. Cornelius, 66 Tex. 301.

Assignment by bill of sale.

Bills of sale and mortgages are assignments for creditors, where the effect of the transaction is that of a general assignment. King v. Gustafson, 80 Iowa, 207.

An instrument in the form of a bill of sale, conveying the seller's entire property absolutely, with full power of disposition and conversion by the vendee, and, with the exception of expenses, being solely for the benefit of creditors, is an assignment for the benefit of creditors. *Ibid.*

Whether a sale, absolute upon its face, of all the property of a debtor in embarrassed circumstances, to a creditor who agrees out of the purchase price to cancel his claim against the debtor and to pay other preferred claims, is in reality an assignment

See also 14 L. R. A. 198; 18 L. R. A. 281.

covered thereby that could be found; and at the same time said S. W. Rowan, as sheriff of Richland County, levied upon the same goods under the execution issued upon the judgment of N. K. Fairbanks & Co., and also levied under said execution upon a horse, wagon and harness, and some money not covered by said mortgage. (16) That on the 2d day of September, 1886, Robbins executed and delivered to Robert W. Shand, Esq., as assignee, a deed of assignment of all his property for the benefit of his creditors, without preferences, drawn strictly in accordance with the provisions of chapter 72 of the General Statutes of 1882. (17) That Robbins did not intend, by any of his transactions with the Bank, to make a general assignment of his property for the benefit of creditors, but intended only to secure said Bank, and the officers of said Bank were guilty of no act inconsistent with honesty and fair dealing, and supposed that they were requiring only what the Bank had a legal and moral right to demand and receive. (18) That the plaintiffs, in the action first above entitled, are bona fide creditors of Robbins to the amounts alleged in the complaint therein.

"I conclude, as matters of law, (1) that the two mortgages executed by Robbins in March and April, 1886, respectfully, were valid, and having been executed more than ninety days previous to the execution of the deed of assignment are not open to attack, even by the assignee; (2) that the terms 'insolvent' and 'insolvency' are used in chapter 72 of the General Statutes of 1882 as indicating 'a condition of present inability to meet one's just obligations as they become due;' (3) that the judgment in the case of *N. K. Fairbanks & Co.* v. *J. S. Robbins* is valid as against all parties, but that the lien of the levy of the execution thereon did not attach to any of the goods covered by the mortgage to the Bank, and, even if that mortgage should be set aside as against the assignee, it would not operate to give to that levy a lien which it has never possessed; (4) that the mortgage of July 20, 1886, if standing as an isolated transaction, would have been avoided by the assignment of September 2, 1886, but inasmuch as it was a mere renewal of the previous mortgages, and conferred no right or lien which the Bank did not claim by virtue of the previous ones, it cannot be held to have given undue preference to the Bank in fraud of chapter 72 of the General Statutes of 1882, and the Bank is entitled to the proceeds of the sale of the mortgaged goods; (5) that inasmuch as the payments and deposits of money made by Robbins were made in his regular course of business, and in pursuance of a promise made previous to the ninety days preceding the assignment, they were not avoided by the assignment, and the assignee is not entitled to recover the amount thereof; (6) that the assignment of the accounts in August, and all transfers of notes, bills and accounts, between the 15th day of June, 1886, and the 2d day of September, 1886, although made in pursuance of a promise made more than ninety days preceding the assignment, were avoided by the said assignment, and the assignee is entitled to an accounting for the proceeds of collections thereon, and to have all uncollected turned

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Such a mortgage will be declared a general assignment at the instance of the other creditors, if it conveys substantially all of his property that is subject to the satisfaction of his debts; but the burden of proof on this issue is on them. Ordway v. White, 80 Ala. 244.

Where the mortgage is in a sum sufficient to swallow up his entire estate, the fact that the mortgagee regarded the debtor as amply solvent, and that the debtor himself "expected to pull through," will not authorize the belief that insolvency was not contemplated, and that there was no design to prefer. Hoffman v. Brungs, 83 Ky. 400.

Such a mortgage, although given to secure a debt contemporaneously contracted, was declared and enforced as a general assignment, enuring to the benefit of the creditors equally: and the amendatory Statute, not appearing to be retroactive in its operation, will not be construed to apply to mortgages executed prior to its enactment. Warten v. Matthews, 80 Ala. 429.

Under Kentucky statutes a mortgage given by an insolvent to secure a debt, a portion of which is created at the time of the execution of the mortgage, is valid to the extent of such portion, although the balance of the consideration of the mortgage is a pre-existing debt. McCutchen v. Caldwell (Ky.) June 7, 1890.

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A creditor may take a mortgage to secure a bona fide indebtedness, and is not affected by the fraudulent intent of the mortgagor. Eureka I. & S. Works v. Bresnahan, 10 West. Rep. 194, 66 Mich. 489.

Voluntary conveyances of real estate made by debtors to creditors, that were intended as security for existing indetebdness, are good as against subsequent creditors, unless it is shown that they were made by the debtors and accepted by the creditors with the intent on the part of the debtors to contract debts with the subsequent creditors, and to defeat the payment of the debts so contracted. Peoria First Nat. Bank v. Jaffray, 41 Kan. 694.

Where there was a subsisting indebtedness sufficient to sustain a mortgage, that measure of proof necessary in the reformation of written instruments is required to show by parol that such indebtedness was not the real consideration of the mortgage, but that it was executed for the accommodation of the mortgagee. Bray v. Comer, 82 Ala. 183.

Mortgage to secure creditors will not be vitiated by a subsequent general assignment. Gage v. Parry, 69 Iowa, 605.

Where the creditors to be secured were not aware of the debtor's insolvency or a contemplated assignment by him, they will be held valid, although he, on

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Exceptions were taken to this report, and after considering them the court made the following decree:

"These three cases were heard together before the master, who makes one report on them, and they come before me on exceptions to the findings of fact and conclusions of law in the two cases last above entitled. There being no exceptions to the report on the part of Akers & Bros. *et al.*, plaintiffs, in the suit first above entitled, the report must be confirmed as to them, and their complaint in that action is hereby dismissed, with costs. I will here discuss only the points as to which I differ with the master:

"*First.* The master fixes the 15th day of June, 1886, as the date when the Central National Bank had notice of the insolvency of Robbins. In this, my conclusion is that he erred, and my finding is that the Bank had such notice for the whole period of ninety days preceding the 2d day of September, 1886, the date of assignment; that is, from the 4th day of June, 1886, inclusive, his actual insolvency having existed when he executed the mortgage in March, and continued up to the assignment. If the master's definition of the term 'insolvency' is correct, *i. e.*, that it is 'a condition of present inability to meet one's just obligations as they become due,' it follows, as the night the day, that the Bank knew of it when the first mortgage was taken, and its board of directors refused to allow his overdraft to stand, except upon such conditions as deprived him of ability to pay any other debt without its consent. I do not think, however, that our courts have adopted so harsh a construction; and my own opinion is that an

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A mortgagee is protected, as well as the purchaser of the absolute title, by the Texas Statute excepting from invalid preferences by an insolvent "the purchaser of any such property bought" of the assignor in good faith. Simmons Hardware Co. v. Kaufman, 77 Tex. 131.

By chattel mortgage.

A mortgage by a debtor of his entire stock of goods and store furniture to secure certain creditors, and an assignment "in pledge" of all notes, accounts and choses in action to the same parties as security for the same debts, constitute a general assignment for benefit of creditors. Richmond v. Mississippi Mills, 4 L. R. A. 413, 52 Ark. 30.

Where one or more instruments are executed by a debtor, in whatsoever form or by whatsoever name, with the intention of having them operate as an assignment, and with the intention of granting the property conveyed absolutely to a trustee to raise a fund to pay debts, the transaction operates as an assignment. *Ibid.*

Four chattel mortgages given at the same time were held not to constitute a voluntary assignment, it not appearing that they covered all of the debtor's property, and there being no assignment of his accounts, assets or things in action, and no fraudulent intent on the part of mortgagor or mortgagees. Hoey v. Pierron, 67 Wis. 262.

Where an insolvent debtor executed two mortgages on its entire stock to two of its creditors whose claims were past due, delivering the mortgages to the creditors' attorney, and afterwards executed a third mortgage to its remaining creditors, and upon the delivery of the first two mortgages the attorney took possession and sold the property, paying the first creditors and afterwards surrendering the possession of the remainder of the assets to the remaining creditors, there being no agreement for the intervention of a trustee, and none of the mortgagees being answerable for the proceeds to anyone but the mortgagor,—the transaction did not constitute an assignment. Fecheimer v. Robertson (Ark.) March 29, 1890.

A debtor in failing circumstances cannot make a valid conveyance of all his personalty greatly in excess of sufficient security, thereby hindering and delaying other creditors. Morse v. Steinrod (Neb.) March 11, 1890.

A mortgage upon all his stock of general merchandise, which greatly exceeds in value alleged notes purporting to be secured thereby, is fraudulent where there is in fact no debt due the mortgagee, where the mortgage is in the nature of an indemnity, and there is no proof that the mortgagee has paid, or will be required to pay, any portion of the notes. *Ibid.*

An instrument in writing, claiming to be a chattel mortgage, held to be an assignment for creditors, and not being made in conformity with the statute, is void. Bouns v. Carter, 29 Neb. 566.

Creditor taking mortgage security not protected as a bona fide purchaser.

To constitute a bona fide purchase, for a valuable consideration, the receiving of a conveyance by way of mortgage to secure the payment of a pre-existing debt is not sufficient. Busenbarke v. Ramey, 53 Ind. 503; 2 Pom. Eq. Jur. 706; Van Heusen v. Radcliff, 17 N. Y. 580; Powell v. Jeffries, 5 Ill. 387; Morse v. Cohannet Bank, 3 Story, 364; Alexander v. Caldwell, 55 Ala. 517; Johnson v. Graves, 27 Ark. 557; Cary v. White, 52 N. Y. 138; Hart v. Farmers & M. Bank, 33 Vt. 252; Padgett v. Lawrence, 10 Paige, 170, 4 N. Y. Ch. L. ed. 931; Manhattan Co. v. Evertson, 6 Paige, 457, 3 N. Y. Ch. L. ed. 1060.

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insolvent debtor is one who does not own a sufficiency of property, when reduced to cash by the ordinary legal processes, to pay his debts, with accrued costs and interest. But, in the view I take of the case, it is not necessary for me to decide this, as, in my own opinion, Robbins was insolvent for the period named in any sense of the term, and the Bank had reasonable cause to believe him so prior to the 4th day of June, 1886. In March, he owed the Bank $9,185, and to get $1,800 more he mortgaged all that he had, and all that he expected to get, in the shape of goods and merchandise, and promised to assign all his choses in action, stipulating that at its pleasure only he might use some money in the conduct of his business. He failed to pay up his indebtedness within the time stipulated, and on the 30th day of April, 1886, gave a new mortgage to secure the balance. Neither of these mortgages was recorded, because he requested that they should not be, and this was known to the president and board of directors. Prior to the 4th day of June, numerous suits were commenced against him and were defended only for the purpose of delay. Col. John T. Sloan, Jr., one of the directors of the Bank, and its solicitor, knew of these facts, and filed the answer for Robbins, and in argument it is urged that he did not and could not communicate his knowledge to the Bank on account of his relations to Robbins; but Robbins had employed him, knowing him to be a director of the Bank, and the solicitor through whom the Bank acted in taking the several mortgages. Notice to Sloan in these capacities is notice to the Bank. In such matters the director is the Bank. Suppose Robbins had owed Sloan as an individual, and had given him the same information as an attorney, could Sloan, the individual, have said that he was ignorant of the knowledge that Sloan, the attorney, had? Surely not. Nor can Sloan, the Bank, claim to be ignorant of the knowledge of Sloan, the attorney. Moreover, the Bank itself had for collection, and returned unpaid, many claims against Robbins prior to the 4th day of June, and it is held to the knowledge of those facts; for, although such acts may have been performed by subordinate officers, the acts of such officers, within the scope of their employment, are the acts of the Bank. In this case the acts of the subordinate officers were entered of record on the books of the Bank, and were reported to its cashier, the chief executive officer thereof. Notice to a subordinate officer may not be notice to the Bank, but when by a subordinate officer, it performs an act, it is clearly the act of the Bank which it is bound to know.

"*Second.* The master found that the payments made by Robbins within the ninety days preceding his assignment were made in the regular course of his business, and concluded that they were therefore valid as against his assignee. Payments made under the circumstances detailed by all of the witnesses could not be said to have been in the regular course of a merchant's business, and I find that they were not. But, even if so made, the fact would be pertinent only to the inquiry whether the Bank had reasonable cause to believe him to be insolvent, and I have found that it had such grounds from other evidence. The Statute makes no exception in favor of any payments, but is applicable to all made under the circumstances named in the Statute. Such payments were preferences in fraud of the Act, and are void as against the assignee.

"*Third.* The master found that the mortgage of July 20, 1886, was a mere renewal of the previous ones, and concluded that therefore it did not confer a preference in fraud of the Act. I find that it was not a mere renewal, and that it did confer additional rights upon the Bank. The forty days allowed by law for the recording of the mortgage of April 30, 1886, had expired on the 9th of June, and as to all subsequent creditors and purchasers it had ceased to exist as a lien, although there was a possibility of its being instilled with new life, and becoming a new lien by being recorded. The mortgage of July 20, gave them to the Bank what it did not then hold as to such creditors who are now represented by the assignee. It comes directly under the provisions of the Act, and it must be held to have been avoided by the assignment, although good as between the parties.

"*Fourth.* The master found as matter of fact that the levying of the execution of N. K. Fairbanks & Co., and the seizure by the sheriff of the goods and effects of Robbins, were contemporaneous. In this I concur, but I cannot agree with the master that in the event of the mortgage given to the Bank being set aside, it would not give Fairbanks' levy a lien on the goods covered by said mortgage. I hold that the property of Robbins, so far as Fairbanks was concerned, was as if no mortgage whatever was on the property, and there is no reason why the levy was not good to the amount of the judgment.

"It is therefore ordered, adjudged and decreed (1) that the report of the master be and the same is hereby confirmed in all respects in which it is not hereby modified; (2) that the defendant, the Central National Bank of Columbia, do account before the master for all sums paid to it by Robbins on account of prior indebtedness, from the 4th day of June, 1886, up to the time of his assignment, and for the proceeds of all notes, bills, drafts, accounts or other evidences of indebtedness assigned or turned over to it by him within said period, except in so far as it may have paid him actual cash or its equivalent therefor at the time of such assignment or transfer, and that it do also account for all goods and merchandise or other things of value turned over to it within the same period under like circumstances, together with interest on all such sums; (3) that Samuel W. Rowan, Esq., as sheriff of Richland County, do apply the proceeds of the sale of the mortgaged goods in his hands first to the satisfaction of the execution of N. K. Fairbanks & Co., and then pay over the balance to the plaintiff, Robert W. Shand, as assignee of J. S. Robbins; (4) that N. K. Fairbanks & Co. have their costs of the action out of the plaintiff, and that the plaintiff have his costs of both actions out of the defendant, the Central National Bank of Columbia."

"J. J. Norton,
Presiding Judge."

Messrs. **Clark & Muller,** for Robert W. Shand, assignee:

The sense in which the term "insolvent" is used in section 2015 of our General Statutes is a present inability to meet one's obligations as they become due.

Webster, Dict. title *Insolvency;* Bouvier, Law Dict. title *Insolvency;* 2 Kent, Com. 389, *note a;* 3 Sugd. Vend. 318; *Thompson* v. *Thompson.* 4 Cush. 134; *Vennard* v. *McConnell,* 11 Allen, 562; Burrill, Assignm. § 63; *Wager* v. *Hall,* 83 U. S. 16 Wall. 599, 21 L. ed. 505; *Dutcher* v. *Wright,* 94 U. S. 557, 24 L. ed. 131; *Merchants Nat. Bank* v. *Cook,* 95 U. S. 346, 24 L. ed. 414; Bump, Bankruptcy, 8th ed. 793–795.

Robbins was insolvent in this sense during all the period to which this suit relates.

In showing that the Bank had knowledge of the pending suits, evidence is admissible to show that Col. Sloan knew of these suits because he defended them, and because, he being solicitor and director of the Bank, his knowledge was the Bank's knowledge.

2 Pom. Eq. § 672, and *note; Pritchett* v. *Sessions,* 10 Rich. L. 298; *The Distilled Spirits,* 78 U. S. 11 Wall. 356, 20 L. ed. 167.

Where a debtor is insolvent in fact, he is chargeable by law with knowledge of such condition, and if he pays or secures one creditor, leaving others unpaid and unsecured, the transfer or payment necessarily operates as a preference, and he is held to intend the natural and logical consequences of his acts.

Bump, Bankruptcy, 798–801; *Hall* v. *Wager,* 5 Nat. Bankr. Reg. 184, affirmed, 83 U. S. 16 Wall. 602, 21 L. ed. 506; *Campbell* v. *Traders Nat. Bank,* 3 Nat. Bankr. Reg. 124, 125, affirmed, 81 U. S. 14 Wall. 98, 20 L. ed. 834; *Clarion Bank* v. *Jones,* 88 U. S. 21 Wall. 337, 338, 22 L. ed. 545; *Wagener* v. *Boynton,* 29 S. C. 393, 394.

The validity of the payments must be judged of and determined with reference to the state of things existing at the time they were made, and without reference to the previous promise.

Leavenworth Bank v. *Hunt,* 78 U. S. 11 Wall. 393, 394, 20 L. ed. 190; *Forbes* v. *Howe,* 102 Mass. 435; Bump, Bankruptcy, 803, and cases cited.

The mortgage of July 20, 1886, was not a mere renewal of the previous ones. It conferred additional rights upon the Bank, and coming directly under the provisions of the Act it was avoided by the assignment.

Burnhisel v. *Firman,* 89 U. S. 22 Wall. 170, 22 L. ed. 766; *King* v. *Fraser,* 23 S. C. 543; *Carraway* v. *Carraway,* 27 S. C. 576.

Personal property covered by a mortgage is not subject to levy and sale under execution against the mortgagor.

Reese v. *Lyon,* 20 S. C. 21; *Levi* v. *Legg,* 23 S. C. 282; *Williams* v. *Dobson,* 26 S. C. 113; *Ex parte Knobeloch,* 26 S. C. 336; *Newberry Nat. Bank* v. *Kinard.* 28 S. C. 101, 109, 110; *Simonds* v. *Pearce,* 31 Fed. Rep. 137.

Messrs. **Lyles & Haynsworth** also for Robert W. Shand, assignee.

Mr. **John T. Sloan, Jr.,** for Central National Bank:

Robbins and the Bank must have brought home to them by proof a guilty collusion between them to evade the law, before these transactions in this case can be said to be in violation of law.

Wilks v. *Walker,* 22 S. C. 111; *Austin* v. *Morris,* 23 S. C. 405; *Verner* v. *McGhee,* 26 S. C. 249; *Magovern* v. *Richard,* 27 S. C. 284; *Lamar* v. *Pool,* 26 S. C. 441; *Meinhard* v. *Strickland,* 29 S. C. 491; *White* v. *Cotzhausen,* 129 U. S. 331, 32 L. ed. 678.

The making of the mortgage by Mr. Robbins to the Bank, and the recording of the same by the Bank within the ninety days before the deed of assignment, was not the execution of a preference forbidden by section 2015 of the General Statutes, and is therefore valid.

Clark v. *Iselin,* 88 U. S. 21 Wall. 374, 22 L. ed. 572; *Rogers* v. *Palmer,* 102 U. S. 263, 26 L. ed. 164; *Burnhisel* v. *Firman,* 89 U. S. 22 Wall. 177, 22 L. ed. 768; *Barbour* v. *Priest,* 103 U. S. 293, 26 L. ed. 478; *Clark* v. *Hezekiah.* 24 Fed. Rep. 663; *Merchants Nat. Bank of Charlotte, N. C.* v. *Williams,* U. S. C. C. Charleston, 1886; *Williams* v. *Neilly,* U. S. C. C. Charleston, 1886.

Whether one security operates as payment of another is a question of fact, dependent upon the intention of the parties. If the intention is that the new security shall operate as payment or extinguishment of the other, then such will be the effect of the transaction.

Mars v. *Conner,* 9 S. C. 70; *Bolt* v. *Dawkins,* 16 S. C. 214; *Kaphan* v. *Ryan,* 16 S. C. 360; *Murray* v. *Witte,* 16 S. C. 516; *Ex parte Williams,* 17 S. C. 396.

Renewed notes are not payment unless it is shown by the party alleging payment that there was an express agreement that they should be so received, or unless they produce payment.

National Bank of Chester v. *Gunhouse,* 17 S. C. 499; *Sullivan* v. *Sullivan Mfg. Co.* 24 S. C. 347.

A mere exchange of securities, not made to secure an unsecured debt, or to give any preference, is not void under the Bankrupt Law, although made within four months before the petition in bankruptcy.

Clark v. *Iselin,* 88 U. S. 21 Wall. 360, 22 L. ed. 568; *Burnhisel* v. *Firman, supra; Sawyer* v. *Turpin,* 91 U. S. 114, 23 L. ed. 235.

The assignee takes the title of the property of the bankrupt subject to all equities, liens or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt.

Stewart v. *Platt,* 101 U. S. 731, 25 L. ed. 816; *Yeatman* v. *New Orleans Savings Inst.* 95 U. S. 764, 24 L. ed. 589; *Gibson* v. *Warden,* 81 U. S. 14 Wall. 244, 20 L. ed. 797; *Donaldson* v. *Farwell,* 93 U. S. 631, 23 L. ed. 993; *Jerome* v. *McCarter,* 94 U. S. 734, 24 L. ed. 136; *Winsor* v. *McLellan,* 2 Story, 492; *Clark* v. *Iselin, Sawyer* v. *Turpin* and *Burnhisel* v. *Firman, supra.*

If the new securities are adjudged invalid, the cancellation and surrender of the prior ones will have been without the shadow of a consideration. In equity, if the new securities were declared invalid, the old ones would be revived.

Dumell v. *Terstegge.* 85 Am. Dec. 470; 2 Jones, Mortg. §§ 924, 925, 927; *Cissna* v. *Haines,* 18 Ind. 496; *Walters* v. *Walters,* 73 Ind. 425; *Pouder* v. *Ritzinger,* 102 Ind. 571; *Schum-*

pert v. *Dillard*, 55 Miss. 348; *Hutchinson* v. *Swartzweller*, 31 N. J. Eq. 205; *Gregory* v. *Thomas*, 20 Wend. 17; *Jones* v. *Parker*, 51 Wis. 218; *Packard* v. *Kingman*, 11 Iowa, 219; *Burns* v. *Thayer*, 101 Mass. 426; *Swift* v. *Kraemer*, 13 Cal. 526; Story, Eq. 1035*c*, 1035*e*; *Ex parte Ames*, 7 Nat. Bankr. Reg. 231.

Unless the Bank is party or privy to some fraud or preference, this mortgage is valid, however insolvent Robbins may have been at the time of giving it in July.

Hutton v. *Crutwell*, 1 El. & Bl. 15; *Bittlestone* v. *Cooke*, 6 El. & Bl. 296; *Harris* v. *Rickett*, 4 Hurlst. & N. 1; *Burnhisel* v. *Firman*, *supra*; *Gibson* v. *Warden*, 81 U. S. 14 Wall. 244, 20 L. ed. 797; *Wilson* v. *City Bank*, 84 U. S. 17 Wall. 473, 21 L. ed. 723; *Tiffany* v. *Boatmans Sav. Inst.* 85 U. S. 18 Wall. 375, 21 L. ed. 868; *Cook* v. *Tullis*, 85 U. S. 18 Wall. 332, 21 L. ed. 933; Robson, Bankruptcy, 110; *Marvin* v. *Chambers*, 13 Nat. Bankr. Reg. 77; *Sawyer* v. *Turpin*, 5 Nat. Bankr. Reg. 345; *Stevens* v. *Blanchard*, 3 Cush. 169; *Burns* v. *Thayer*, *supra*.

In the case at bar one mortgage was merely substituted for the other, the form, terms and description of property being identically the same.

Swift v. *Kraemer* and *Packard* v. *Kingman*, *supra*; Jones, Mortg. §§ 924, 927; Story, Eq. §§ 1035*c*, 1035*e*; *Pouder* v. *Ritzinger* and *Walters* v. *Walters*, *supra*.

The agreement between Robbins and the Bank for the transfer of the accounts, notes, etc., was not only a legal transaction between the parties, but it was a valid one within the Bankrupt Act. Such a transfer did not act as an assignment, but created an obligation on the part of Robbins not to defeat the security it was intended to furnish.

People v. *Tioga C. P.* 19 Wend. 73; *Bromley* v. *Holland*, 7 Ves. Jr. 3; *Knapp* v. *Alvord*, 10 Paige, 205, 5 N. Y. Ch. L. ed. 1108.

Any promise of security which would make the security valid if given at the precise time the money is advanced is protected if given afterwards in pursuance of the obligation.

See 1 Archb. Bankr. cl. 1867, 111; *Edwards* v. *Glynn*, 2 El. & El. 29; *Sinclair* v. *Wilson*, 20 Beav. 324; *Ex parte Kindred*, 29 L. T. N. S. 250; *Bills* v. *Smith*, 12 L. T. N. S. 22; *Krehl* v. *Great Central Gas Co.* L. R. 5 Exch. 289.

When Mr. Sloan was employed to put in the answers in the cases against Robbins, he was not acting as the agent of the Central National Bank. Without this special requisite there can be no application of the principle that the principal may be affected with a constructive notice by reason of the knowledge of his agent.

2 Pom. Eq. Jur. §§ 668, 670, 671, p. 117; *Washington Bank* v. *Lewis*, 22 Pick. 24; *Commercial Bank* v. *Cunningham*, 24 Pick. 270; *Housatonic & Lee Banks* v. *Martin*, 1 Met. 294; *General Ins. Co.* v. *United States Ins. Co.* 10 Md. 517; *Louisiana State Bank* v. *Senecal*, 13 La. 331; *Wilson* v. *McCullough*, 23 Pa. 440; *Hartford Bank* v. *Hart*, 3 Day, 493.

The communications were privileged, and public policy would forbid their divulgence by the attorney.

Yates v. *Olmsted*, 56 N. Y. 632; *Weatherbee* v. *Ezekiel*, 25 Vt. 47; *McClellan* v. *Longfellow*, 32 Me. 494; *Parkhurst* v. *McGraw*, 24 Miss. 134; *Swift* v. *Perry*, 13 Ga. 138; *Johnson* v. *Sullivan*, 23 Mo. 474; *Bigler* v. *Reyher*, 43 Ind. 112; *Britton* v. *Lorenz*, 45 N. Y. 51; *Miller* v. *Weeks*, 22 Pa. 89; *Harrington* v. *United States* and *Boyden* v. *United States*, 78 U. S. 11 Wall. 356, 20 L. ed. 167.

Mr. **W. S. Monteith** for Akers *et al.*

Messrs. **Marshall & Weston** for Fairbanks & Co.

Mr. **John T. Rhett** for S. W. Rowan.

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

There being no appeal from the judgment dismissing the complaint in the case first above entitled, it may be dismissed from further consideration. It remains, therefore, only to consider the appeals in the other two cases. It appears that one J. S. Robbins, who had, for a year or more previous to the transactions here brought under review, been engaged in the mercantile business in the City of Columbia, on the 2d of September, 1886, made a general assignment for the benefit of his creditors to the plaintiff, Shand, in conformity to the provisions of chapter 72 of the General Statutes of 1882, and these two actions were brought by him, as such assignee, the one to require the Bank to account for certain payments alleged to have been made by Robbins to the Bank, on pre-existing indebtedness, and certain assignments of sundry choses in action alleged to have been made by said Robbins to said Bank as a security for such indebtedness, and the other to require Rowan, the sheriff, to pay over to plaintiff the proceeds of the sale of the goods and chattels of said Robbins, which had been seized and sold by him, as well under a mortgage executed by Robbins to the Bank as under an execution issued to enforce a judgment recovered by Fairbanks & Co. against said Robbins. These claims thus made are based upon the allegation that the payments and assignments above referred to, as well as the mortgage to the Bank, were made within ninety days before the execution of the deed of assignment, and, as against the same, are void under the provisions of section 2015 of the General Statutes, but that, the mortgage being good and valid as between the parties to it, Fairbanks & Co. could acquire no lien on the mortgaged property under a judgment entered after condition broken; and hence that plaintiff was entitled to the entire proceeds of the sale of the mortgaged property. To establish these claims on the part of the plaintiff it is necessary for him to show (1) that Robbins was insolvent at the time of the transactions had with the Bank here sought to be avoided; (2) that these transactions were entered into by Robbins "with a view to give a preference to the Bank;" (3) that the Bank had "reasonable cause to believe" that Robbins was insolvent at the time; (4) that the Bank had "reasonable cause to believe" that such transactions were made by Robbins "in fraud" of the provisions of chapter 72 of the General Statutes; (5) that these transactions took place within ninety days before the execution of the deed of assignment.

To determine whether the plaintiff has succeeded in establishing all of these material facts, a brief statement of the several transac-

tions between the Bank and Robbins, as developed by the testimony, will be necessary, though the same will be found more fully stated in the report of the master and the decree of the circuit judge, both of which should be incorporated in the report of this case. It seems that from the first Robbins was permitted to overdraw his account with the Bank, upon the security of bills of lading deposited with the Bank for merchandise purchased by Robbins. This course of business continued until the 16th of March, 1886, when it was found that the overdrafts amounted to something over $9,000, and on that day the Bank loaned Robbins on his own note the further sum of $1,800 to pay certain acceptances of his then maturing in another bank, and took from him a mortgage on his stock of goods then in the store, as well as all that might thereafter be acquired, to secure said loan, as well as the amount of the overdrafts above mentioned, and surrendered the bills of lading; the understanding being that Robbins would deposit all his funds in the Bank, and transfer to it as further "security certain bills and accounts," he being allowed to check against his deposits "for such sums as would be necessary to run his business," the balance going to the reduction of his overdrafts, "which it was expected would be paid up within forty days." This course of business seems to have continued until the 30th of April, 1886, when it appeared that Robbins had reduced his account for overdrafts something over $5,000, but had paid nothing on the note for $1,800, and on that day he gave a renewal note for the same, and "executed a new mortgage as a renewal of the first one, which was surrendered to him, but was probably not marked 'satisfied' or 'canceled.'" This mortgage was of the same tenor and form as the former one, but neither of them was ever recorded, because Robbins requested that they should not be put upon record, as it would injure his credit.

During the month of May the creditors of Robbins commenced bringing suits against him, the earliest having been commenced on the 14th of that month, but none of these suits were carried into judgment until after the transactions here brought in question occurred; and the testimony tends to show that service was accepted in most if not all of these cases, with a view to prevent its being known. At all events there is no evidence that the Bank knew anything of these suits before the last mortgage was taken, unless the notice to Sloan can be regarded as notice to the Bank, which will hereinafter be considered. It is true the cashier, Sawyer, does say in his testimony: "We knew that pressure had been brought to bear by some of his creditors, but we had confidence in his ability to pay us. We had no uneasiness." But he does not say when this knowledge was acquired, whether before or after the last mortgage was taken and the payments and assignments complained of had been made. So, too, there is a want of definiteness as to the time when the drafts drawn on Robbins through the Bank commenced to go back, and the amounts of such drafts. The cashier offered in his testimony to prepare a list of the drafts sent back, but it does not appear that any such list was ever called for by plaintiff. It also appears that Robbins employed counsel to appear in all the suits brought against him, except that of Fairbanks & Co., which seems to have been inadvertently overlooked. The result was that none of these cases were put in judgment until after the deed of assignment was executed, except that of Fairbanks & Co., in which judgment was entered on 30th of August, 1886, though the order for judgment was obtained some time in July, but at what precise date does not appear, though the inference is that it was in the latter part of the month, probably after the last mortgage to the Bank was executed. One of the counsel thus employed by Robbins was Mr. Sloan, who was then solicitor of the Bank, and also one of the directors; and one of the questions in the case is whether his knowledge, thus acquired, can be imputed to the Bank.

On the 20th of July, 1886, Robbins, having reduced his account for overdrafts to about the sum of $2,700, but having paid nothing on the $1,800 note, executed a new mortgage on his stock of goods then on hand as well as such as he might thereafter acquire, to secure these two amounts; and some time in August, 1886 (the precise date not being stated), Robbins, in pursuance of the arrangement made in March, 1886, when the Bank surrendered the bills of lading, transferred to the Bank certain of his book accounts, upon which considerable sums have been collected by the Bank. On the 30th of August, 1886, the Bank, through its agent, the defendant, Rowan, seized the stock of goods in the store of Robbins, the said Rowan, as sheriff, at the same time levying on said stock, as well as a horse, wagon and harness, together with some money found in the store, and all the property so seized and levied on, except the money, was sold by said Rowan, who now holds the proceeds subject to such decree as may be made herein. The master, to whom all the issues were referred, found, among other things, as matter of fact, that from about the 15th of June, 1886, the Bank had reasonable cause to believe that Robbins was insolvent, in the legal sense of the term, but the payments and deposits made by him were made in pursuance of his previous promise, and in the regular course of his business with the Bank, who considered that they were requiring of him only what he was legally and morally bound by his promise to do; that between the date and maturity of the mortgage of 30th of April, as well as between the date and maturity of the mortgage of 20th of July, the stock of goods had been materially changed by sales and purchases, and Robbins had contracted debts which have not been paid; that the mortgage of 20th of July was intended as a renewal of the previous mortgages, and not as a change thereof; that the officers of the Bank were guilty of no act inconsistent with honesty and fair dealing, and supposed that they were requiring from Robbins only what they had a legal and moral right to demand; and that the judgment of Fairbanks & Co. was obtained without any collusion or connivance with or on the part of Robbins, who did not contribute in any way to the obtaining of said judgment. And, as matter of law, he found, among other things, that the terms "insolvent" and "insolvency," as used in chapter 72 of the General

Statutes, signify "a condition of present inability to meet one's just obligations as they become due;" that the mortgage of 20th of July being a mere renewal of the previous mortgages, and conferring no right or lien which the Bank did not claim by virtue of the previous ones, it cannot be held to have given any preference to the Bank in fraud of the provisions of chapter 72 of the General Statutes, and hence that the Bank is entitled to the proceeds of the sale of the mortgaged goods; that inasmuch as the payments and deposits of money made by Robbins to and with the Bank were made in his regular course of business, and in pursuance of a promise made previous to the ninety days preceding the assignment, they were not avoided by the assignment, and hence the assignee is not entitled to recover the same; that the assignment of the accounts and other choses in action made in August, although made in pursuance of a previous promise, made before the ninety days commenced to run, were avoided by the assignment, and the assignee is entitled to an accounting for the same; and that the judgment of Fairbanks & Co. is valid, as against all the parties, but that the lien secured by the levy of the execution did not attach to any of the goods covered by the mortgage, and even if such mortgage should be held void as against the assignee, this would not operate to give such execution a lien on the goods embraced in the mortgage. To this report all parties excepted, and the case having been heard by his honor, *Judge* Norton, he held, among other things, (1) that the master erred in fixing the 15th of June as the date when the Bank had notice of the insolvency of Robbins, and, on the contrary, his conclusion was that the Bank had reasonable cause to believe that Robbins was insolvent, not only in the rigid sense of that term adopted by the master, but also in any sense of that term, prior to the 4th of June,—the day on which the ninety days commenced to run; and in fact he seems to think that the Bank had reasonable cause to believe that Robbins was insolvent even in the more restricted sense of that term, which he seems to prefer to that adopted by the master, viz.: "that an insolvent debtor is one who does not own a sufficiency of property, when reduced to cash by the ordinary legal processes, to pay his debts with accrued costs and interest," as far back as March, 1886, when the first mortgage was given; (2) that the master erred in holding that the payments made to the Bank by Robbins, within the ninety days prior to the execution of the deed of assignment, were made in the regular course of business, but, even if so made, they might still be avoided by the fact that the Bank had at the time reasonable cause to believe that he was insolvent; (3) that the master erred in finding that the mortgage of the 20th of July was a mere renewal of the previous mortgages; (4) that the master erred in holding that, even if the mortgage to the Bank be set aside, this would not give Fairbanks & Co. a lien on the goods embraced in the mortgage by virtue of their levy thereon. Judgment was accordingly rendered in pursuance of these views, and from that judgment both the plaintiff and the Central Bank appeal, raising the several questions which will now be considered, and first the appeal of the Bank.

If the terms "insolvent" and "insolvency," as used in our Assignment Law, can be properly interpreted as signifying "a condition of present inability to meet one's just obligations as they become due," or, to express it in other words, "a present inability to pay debts as they mature in the ordinary course of business," then it seems to me clear that the conclusion adopted by the circuit court must be affirmed unless it appears that the transactions between the Bank and Robbins, within the ninety days preceding the execution of the deed of assignment, should properly be regarded as mere renewals or exchanges of securities acquired by the Bank prior to the commencement of the currency of the ninety days. I propose, then, to inquire first whether that is the proper construction of the terms "insolvent" and "insolvency" as used in our Assignment Law. So far as I am informed, we have no case in this State which authoritatively adjudicates this question, and none such has been cited. On the contrary, reliance is placed mainly, if not entirely, upon the fact that the Supreme Court of the United States has placed such an interpretation upon those terms as used in the United States Bankrupt Law; and, under the rule that, when one sovereignty adopts an enactment of another, the interpretation of its law by the latter is usually accepted by the former, it is contended that the same interpretation should be given to those terms as used in our Assignment Law. While I do not propose to controvert the correctness of this general rule, or to indicate any of the qualifications to which it is subject, I do not think it is applicable to the present case, for the simple reason that our Assignment Law cannot be regarded as in any sense a Bankrupt or an Insolvent Law. Burrill, Assignm. 4th ed. § 47, p. 67; *Mayer* v. *Hellman*, 91 U. S. 496, 23 L. ed. 377; *Beck* v. *Parker*, 65 Pa. 262.

Hence it seems to me that the rule does not require us to adopt the construction which the courts of one sovereignty have placed upon the terms of an Act, adopted for one purpose, in construing our Act, adopted for a different purpose, even though some of the terms used in both Acts may be practically the same. On the contrary, as I understand it, one of the primary rules in the construction of a statute is that the words used therein should be taken in their ordinary and popular signification, unless there is something in the Statute requiring a different interpretation. Cooley, Const. Lim. 58, 59; Potter, Dwar. Stat. 127–146. This is really nothing more than a rule of common sense, for it must be supposed that the Legislature, in enacting a statute, intended that the words used therein should be understood in the sense in which they are ordinarily and popularly understood by the people for whose guidance and government the law was enacted, unless there is something in the statute showing that the words in question were used in some other sense. Now, it cannot be denied that the usual and popular signification of the terms "insolvent" and "insolvency" is not that which it is here proposed to attribute to them, but, on the contrary, those terms are

generally used to denote "an insufficiency of the entire property and assets of an individual to pay his debts;" and this is admitted by Field, *J.*, in *Toof* v. *Martin*, 80 U. S. 13 Wall. 47, 20 L. ed. 482, to be the "general and popular meaning" of those terms. It seems to me, therefore, that this is the proper interpretation to be given those terms in our Assignment Law, as I am unable to find anything in that Statute indicating an intention that a more rigid and narrow interpretation should be given to them. Especially should this be so when, so far as I am informed, there is no instance where the courts of this State have shown any disposition to give to the terms "insolvent" and "insolvency" any such narrow and rigid interpretation as that adopted by the Supreme Court of the United States in construing their Bankrupt Law. On the contrary, so far as I am informed, our courts, whenever called upon to consider the question of insolvency in any form, have invariably treated it as that condition in which a debtor is found when his property is insufficient to yield a fund sufficient to pay his debts through the agency of the process of law. It seems to me, therefore, that the fundamental error on this branch of the case is in imparting to the terms "insolvent" and "insolvency" a more narrow and rigid interpretation than they should bear.

It is true that the circuit judge, while not expressly overruling the master's conclusion of law as to the proper signification of those terms, does express his preference for the signification which I have adopted, but holds that in any sense of those terms Robbins was insolvent, and that the Bank had reasonable cause to believe him to be so at the time the transactions here sought to be avoided were entered into. Without stopping to inquire when Robbins became insolvent in the proper sense of that term,—a matter as to which the testimony seems to be very indefinite,—and assuming, for the purpose of this inquiry, that Robbins was insolvent at that time, the important question still remains whether the Bank had then reasonable cause to believe him to be so. The circuit judge seems to base his conclusion as to this question upon two points: (1) The fact that Col. Sloan, being the solicitor of the Bank and one of its directors, and knowing that a number of suits had been brought against Robbins, his knowledge must be imputed to the Bank. (2) That drafts drawn on Robbins through the Bank had been returned unpaid prior to the 4th of June, and the Bank must be held to knowledge of those facts, as they were entered on the books of the Bank and reported to the cashier by the collection clerk, Berg. As to the first of these points, it seems to me that the circuit judge overlooked the qualifications to the admitted general rule that notice to the agent is notice to the principal. Sloan, though he was at the time the solicitor of the Bank and one of its directors, did not acquire knowledge of the fact that suits were commenced against Robbins while acting in either of those capacities. On the contrary, he acquired it as the attorney of Robbins, and therefore, so far from being under any obligation to communicate such knowledge to the Bank, it would have been a violation of the professional confidence reposed in him by Robbins for him to have done so. The manifest purpose of Robbins was "to stave off" action by his creditors and to conceal, as far as practicable, the fact that he was being sued; and hence it would have been a clear breach of confidence on Sloan's part to have communicated to the Bank knowledge that he had acquired as the attorney of Robbins, and it cannot for a moment be assumed that he had done so. As is well said by Bradley, *J.*, in the *Case of The Distilled Spirits*, 78 U. S. 11 Wall. at page 367, 20 L. ed. 171: "The general rule that a principal is bound by the knowledge of his agent is based upon the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject matter of negotiation, and the presumption that he will perform that duty. When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence; and his principal ought not to be bound by his agent's secret and confidential information." See also *Wickersham* v. *Chicago Zinc Co.* 18 Kan. 481; *First Nat. Bank* v. *Christopher*, 40 N. J. L. 435; *Fairfield Sav. Bank* v. *Chase*, 72 Me. 226, 39 Am. Rep. 319, especially the note to the last-named case, where there is an elaborate review of the authorities, both English and American. See also 2 Pom. Eq. Jur. §§ 666–676, and the cases there cited.

These authorities show, beyond all dispute, that the conceded general rule that notice to the agent is notice to the principal is subject to qualification, and that, though an attorney or director of a corporation may be its agent, yet knowledge which such an officer has acquired while acting for himself or for a third person, and not for the corporation, cannot be imputed to his principal; and more especially is this so where such knowledge cannot be communicated to the principal without a breach of confidence on the part of the agent. I think it is clear, therefore, that any knowledge which Sloan acquired when acting as attorney for Robbins cannot be imputed to the Bank.

As to the second point upon which the circuit judge seems to rely to sustain his conclusion that the Bank had reasonable cause to believe Robbins was insolvent prior to the 4th of June, to wit: the fact that many drafts drawn on him through the Bank were sent back unpaid, it does not seem to me that there is any sufficient evidence to sustain it. The testimony upon this subject comes mainly from the collection clerk, Berg, and his testimony is very indefinite, as well as to the amounts of the drafts, their number and when they were sent back; and when we find that the cashier had offered to prepare a list showing these facts, and that no such list appears to have been called for; and when we remember that it was incumbent upon the plaintiff to prove such facts as would warrant the inference that the Bank had reasonable cause to believe Robbins to be insolvent,—it does seem that there is a failure of testimony as to this point. I can very well understand how the