LAWYERS' REPORTS, ANNOTATED.

BOOK VIII.

ALL CURRENT CASES

OF

GENERAL VALUE AND IMPORTANCE

DECIDED IN

THE UNITED STATES, STATE AND TERRITORIAL COURTS,

WITH FULL ANNOTATION

BY

ROBERT DESTY, EDITOR.

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REPORTERS,

THE PUBLISHER'S EDITORIAL STAFF, AND THE SEVERAL REPORTERS AND JUDGES OF EACH COURT, ASSISTING IN SELECTION.

(8 L. R. A.)

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SUPPLEMENTAL TABLE

OF ALL

CASES REPORTED IN LAWYERS' REPORTS, ANNOTATED,

BOOK 8,

NOT OFFICIALLY REPORTED WHEN THIS BOOK WENT TO PRESS.

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LAWYERS' REPORTS,

ANNOTATED.

INDIANA SUPREME COURT.

Edward ASZMAN, *Appt.*,
v.
STATE OF INDIANA.

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

1. One who is intoxicated to the extent of being deprived of the mental capacity to deliberate or premeditate cannot commit a crime of which the statute makes premeditation an essential element, if he had formed no purpose to commit the crime prior to the time he became so intoxicated; hence upon the trial of a person charged with having committed murder in the first degree, of which premeditation is an essential element, the fact that the accused was drunk at the time he committed the crime may be considered for the purpose of determining whether or not there was premeditation.

2. Instructions by the trial court which are designed to cast discredit or suspicion upon a defense which is recognized by the law as legitimate, and which an accused person is making in apparent good faith, are not regarded with favor, even although such defense be that of insanity.

(Elliott and Coffee, JJ., dissent.)

3. An instruction as to the individual responsibility of the jurors to be fully satisfied of the guilt of a person accused of crime before concurring in a verdict of guilty should be given if seasonably requested.

4. An accused person is not entitled to a special instruction to the effect that the mere finding of an indictment against him does not raise any presumption of guilt, where that idea is conveyed by the general charge of the court.

(April 22, 1890.)

NOTE.—*Voluntary intoxication in extenuation of crime.*

It is well settled that voluntary drunkenness is no excuse for crime. United States v. Clarke, 2 Cranch, C. C. 158; United States v. Drew, 5 Mason, 28; United States v. McGlue, 1 Curt. 1; Respublica v. Weidle, 2 U. S. 2 Dall. 88 (1 L. ed. 301); 1 Russ. Cr. L. 9th ed. 12; 1 Wharton, Cr. L. 8th ed. § 51; Desty, Cr. L. 26a; Williams v. State, 81 Ala. 1; Ford v. State, 71 Ala. 385; Tidwell v. State, 70 Ala. 33; State v. Bullock, 13 Ala. 413; Mooney v. State, 33 Ala. 419; Casat v. State, 40 Ark. 511; People v. Belencia, 21 Cal. 544; People v. King, 27 Cal. 507; People v. Williams, 43 Cal. 344; 1 Green, Cr. L. Rep. 412; People v. Lewis, 36 Cal. 531; Mercer v. State, 17 Ga. 146; Estes v. State, 55 Ga. 31; Hanvey v. State, 68 Ga. 612; Golden v. State, 25 Ga. 527; Jones v. State, 29 Ga. 594; Marshall v. State, 59 Ga. 154; Henry v. State, 33 Ga. 441; McIntyre v. People, 38 Ill. 514; Rafferty v. People, 66 Ill. 118; Upstone v. People, 109 Ill. 169; Reed v. Harper, 25 Iowa, 87; Smurr v. State, 88 Ind. 504; Gillooley v. State, 58 Ind. 182; Sanders v. State, 94 Ind. 147; Dawson v. State, 16 Ind. 428; State v. White, 14 Kan. 538; State v. Horne, 9 Kan. 119, 1 Green, Cr. L. Rep. 718; Curry v. Com. 2 Bush, 67; Tyra v. Com. 2 Met. (Ky.) 1; Kriel v. Com. 5 Bush, 362; Blimm v. Com. 7 Bush, 320; Shannahan v. Com. 8 Bush, 463, 1 Green, Cr. L. Rep. 373; Smith v. Com. 1 Duv. (Ky.) 224; Golliher v. Com. 2 Duvall, 163; State v. Coleman, 27 La. Ann. 691; Com. v. Malone, 114 Mass. 295; Com. v. Hawkins, 3 Gray, 464; People v. Garbutt, 17 Mich. 19; State v. Welch, 21 Minn. 22; Kelly v. State, 3 Smedes & M. 518; Mix v. McCoy, 4 West. Rep. 894, 22 Mo. App. 488; State v. Dearing, 65 Mo. 530; State v. Sneed, 3 West. Rep. 797, 88 Mo. 138; Schaller v. State, 14 Mo. 502; State v. Harlow, 21 Mo. 446; Whitney v. State, 8 Mo. 165; State v. Lowe, 11 West. Rep. 910, 93 Mo. 547; Smith v. State, 4 Neb. 277; State v. Thompson, 12 Nev. 140; People v. Pine, 2 Barb. 566; People v. Rogers, 18 N. Y. 9; Kenny v. People, 31 N. Y. 330; Flanigan v. People, 86 N. Y. 554; State v. John, 8 Ired. L. 330; State v. Wilson, 104 N. C. 868; Com. v. Hart, 2 Brewst. 546; Pennsylvania v. McFall, Addison, 255; Kelly v. Com. 1 Grant, Cas. 484; McGinnis v. Com. 102 Pa. 66; Jones v. Com. 75 Pa. 403; Keenan v. Com. 44 Pa. 55; State v. Paulk, 18 S. C. 514; State v. McCants, 1 Speers, L. 384; State v. Stark, 1 Strob. L. 479; State v. Bundy, 24 S. C. 439; Lancaster v. State, 2 Lea, 575; Cornwell v. State, Mart. & Y. 147; Clark v. State, 8 Humph. 671; Outlaw v. State, 35 Tex. 481; Scott v. State, 12 Tex. App. 31; Jeffries v. State, 9 Tex. App. 598; Carter v. State, 12 Tex. 500; Com. v. Jones, 1 Leigh, 598; Com. v. Haggerty (Pa.) Lewis, U. S. Cr. L. 402; Burrow's Case, 1 Lewin, Cr. Cas. 75; Rennie's Case, Id. 76; Reg. v. Moore, 3 Car. & K. 319; Rex v. Meakin, 7 Car. & P. 297; Pearson's Case, 2 Lewin, Cr. Cas. 144; Rex v. Thomas, 7 Car. & P. 817; Reg. v. Doody, 6 Cox, Cr. Cas. 463.

Evidence of drunkenness; when admissible.

Intoxication at the time of the act committed by the accused is a fact which may affect both physical ability and mental condition. Ferrell v. State, 43 Tex. 503.

It is admissible to prove the mental status of the accused to determine the degree of the offense, where the offense is divisible into degrees. People v. Odell, 1 Dak. 197; Colbath v. State, 4 Tex. App. 76; Brown v. State, Id. 275; McCarty v. State, Id. 461; Payne v. State, 5 Tex. App. 35; Pocket v. State, Id. 552.

One accused of murder in the first degree may give evidence of facts showing that his state of mind was such as to render him incapable of de-

See also 24 L. R. A. 555.

APPEAL by defendant from a judgment of the Criminal Circuit Court for Marion County entered upon a verdict convicting him of the crime of murder in the first degree. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. **Duncan & Smith,** for appellants:

The accused was entitled to an instruction that each juror must be satisfied of his guilt beyond a reasonable doubt before there could be a conviction.

Castle v. *State*, 75 Ind. 146.

The accused was entitled to the instruction that the mere return of the indictment by the grand jury did not raise any presumption of guilt.

Ibid.

The court erred in instructing that the defense of insanity should be very carefully scrutinized by the jury.

Unruh v. *State*, 2 West. Rep. 632, 105 Ind. 117.

The defendant could not be rightfully convicted of murder in the first degree if at the time of the commission of the alleged offense his mental condition was such that he was not capable of deliberate thought and rational determination though his mental state was the result of mere intoxication.

Fahnestock v. *State*, 23 Ind. 231; *Hopt* v. *Utah*, 104 U. S. 631 (26 L. ed. 873); *Pigman* v. *State*, 14 Ohio, 555; *Jones* v. *Com.* 75 Pa. 403; *State* v. *Johnson*, 40 Conn. 136; *Dawson* v. *State*, 16 Ind. 428; *Bradley* v. *State*, 31 Ind. 494; *Rogers* v. *State*, 33 Ind. 543; *Cluck* v. *State*, 40 Ind. 275; *Fisher* v. *State*, 64 Ind. 440; *Smurr* v. *State*, 88 Ind. 514; *Robinson* v. *State*, 13 West. Rep. 309, 113 Ind. 510; *Cartwright* v. *State*, 8 Lea (Tenn.) 377; *Tidwell* v. *State*, 70 Ala. 46; *People* v. *Belencia*, 21 Cal. 545.

Messrs. **Louis T. Michener,** *Atty-Gen.*, and **John H. Gillett,** *Asst. Atty-Gen.*, for the State:

If the appellant before the killing was capable of entertaining a purpose to kill, and of deliberating upon it, if only for a moment, his act, if preceded by such purpose and deliberation, was murder in the first degree; the mere fact that by intoxication appellant had deprived his reason of the power to dominate over his will does not excuse.

Roberts v. *People*, 19 Mich. 401.

To constitute premeditation there need be no appreciable space of time between the formation of the intention to kill and the killing; they may be as instantaneous as successive thoughts.

---

liberation in the commission of the act charged. State v. Johnson, 40 Conn. 136; Swan v. State, 4 Humph. 136; Pirtle v. State, 9 Humph. 663; Haile v. State, 11 Humph. 154; Boswell v. Com. 20 Gratt. 860. Compare, however, State v. Sneed, 3 West. Rep. 797, 88 Mo. 138.

It may be admitted to show that the accused was in hot blood at the time; but if the design to kill had been already formed, that he was in hot blood is immaterial as to the degree of the offense. State v. Garrand, 5 Or. 216.

In such case his intoxication furnishes no extenuation. See cases cited in first paragraph of *note*; State v. Johnson, 41 Conn. 584; Malone v. State, 49 Ga. 210; Cluck v. State, 40 Ind. 263; State v. Mullen, 14 La. Ann. 577; State v. Garvey, 11 Minn. 154; State v. Gut, 13 Minn. 341; State v. Cross, 27 Mo. 332; State v. Hundley, 46 Mo. 414; Friery v. People, 54 Barb. 319; People v. Fuller, 2 Park. Cr. Rep. 16; People v. Williams, 43 Cal. 344, 1 Green, Cr. L. Rep. 412; United States v. Cornell, 2 Mason, 91.

It is admissible to prove that the accused was incapable of forming a premeditated design (Cartwright v. State, 8 Lea, 376); and is always admissible to disprove the specific intent which is necessary to constitute the crime. Roberts v. People, 19 Mich. 401; People v. Walker, 38 Mich. 156.

It is admissible to prove that his condition was such that he could not form any intent. People v. Harris, 29 Cal. 678; People v. Eastwood, 14 N. Y. 562; Barber v. State, 39 Ohio St. 660; Cline v. State, 1 West. Rep. 81, 43 Ohio St. 332.

The fact of excessive drunkenness is admissible to reduce the grade of the crime only where the question of intent, malice or premeditation is involved. Engelhardt v. State, 88 Ala. 100.

It is admissible to prove that defendant was so intoxicated that he could not have or form the intent which is a necessary ingredient of the crime charged against him. Cline v. State, 1 West. Rep. 81, 43 Ohio St. 332.

In cases which involve intention as well as act, it may be proper to hear proof of the condition of the accused, at the time of the offense, to test his capacity to decide between right and wrong. Wenz v. State, 1 Tex. App. 36.

Drunkenness at the time of the act is a fact which may be essential in determining the nature and character of the act as well as his purpose and intent. Ferrell v. State, 43 Tex. 503.

For what purposes may be considered by the jury.

Where the very essence of the crime charged is the intention with which the act is done, it may be left to the jury to determine whether defendant was so drunk as to be incapable of forming any intention whatever. Reg. v. Cruse, 8 Car. & P. 541; Reg. v. Monkhouse, 4 Cox, Cr. Cas. 55; Com. v. Hogenlock, 1 New Eng. Rep. 105, 140 Mass. 125.

It can only be considered in cases involving the condition of the defendant's mind when the act was done. State v. Mowry, 37 Kan. 369; State v. Lowe, 11 West. Rep. 910, 93 Mo. 547.

Although the voluntary state of drunkenness cannot excuse the commission of crime, yet where, as upon a charge of murder, the question is whether an act is premeditated or not, or whether done only from sudden heat or impulse, the fact of intoxication is a circumstance proper to be taken into consideration. Rex v. Grindley, cited in 1 Russ. Cr. 2d Am. ed. 8; Rex v. Carroll, 7 Car. & P. 145.

In cases which involve intention as well as act, proof of the condition of the accused as to sobriety at the time of his offense may be considered, to test his capacity to decide between right and wrong. Wenz v. State, 1 Tex. App. 36.

Drunkenness may be considered on the question of malice, and whether his expressions manifested a deliberate purpose or were merely the idle utterances of a drunken man. Rex v. Thomas, 7 Car. & P. 817; Wilkerson v. Com. (Ky.) Sept. 13, 1888; Malone v. State, 49 Ga. 210; cases cited in first paragraph of *note*.

On the charge of murder it may be considered in determining whether there was that deliberation, premeditation and intent to kill necessary to constitute the offense. State v. Mowry, *supra*.

If accused was so drunk as to have been incapable to form a design to kill, it cannot be murder in the first degree. Cartwright v. State, 8 Lea, 376.

If the design to kill had been already formed with deliberation and premeditation, it is not material that the accused was in a passion, at the time of killing, caused by his voluntary intoxication. State v. Garrand, 5 Or. 216.

Binns v. *State*, 66 Ind. 428; *McDermott* v. *State*, 89 Ind. 187; *Koerner* v. *State*, 98 Ind. 7.

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

The Grand Jury of Marion County presented, in an indictment duly returned into the criminal court, that Edward Aszman, on a day named, did feloniously, purposely and with premeditated malice, kill and murder Bertha Elff, a human being. The defendant pleaded generally "not guilty," and specially, in writing, that he was of unsound mind when the offense was committed. He was convicted of murder in the first degree and sentenced to suffer death.

The homicide occurred on the evening of August 24, 1889. There was evidence tending to show that the accused came from Chicago, where he had been at work for some weeks, to Indianapolis, about twelve days before the homicide. There was also evidence tending to show that while at Chicago the accused exhibited some peculiarities of conduct, which indicated that he was laboring under some mental delusion or hallucination, as, for example, that he indulged the unfounded belief that he was being pursued by persons armed with long knives. It also appeared that he was addicted to the use of intoxicating drink.

The State attributed all his peculiar conduct to a condition brought on by excessive indulgence in intoxicating drink, while on his behalf it was claimed that his conduct, coupled with the circumstances under which the homicide was committed, and the attempt by the accused to commit suicide, all indicated such a state of mental disorder as rendered him irresponsible, or at least incapable of deliberate thought or rational determination.

The accused seems to have maintained relations of intimacy with Bertha Elff, the victim of the homicide, to whose society he in some way laid claim, to the exclusion of other men. The evidence tends to show that he had been drinking to excess during the day, and that while walking with the deceased during the evening, the subject of her receiving attentions from another man was under discussion. She denied the right of the accused to question her conduct in the respects mentioned, whereupon he inflicted a mortal wound upon her by cutting her across the throat with his knife, and then attempted to take his own life by inflicting a long deep wound across his own throat with the knife. She was found dead from the wound inflicted, as stated above, in a few moments afterwards, and he was found within fifty feet of her body in an unconscious condition, with a self-inflicted wound, from which the evidence tends to show death would have ensued but for timely surgical aid. It is not claimed that there was any evidence tending to show that the accused had formed the design to take the life of the deceased prior to the evening on which the homicide occurred, and that he voluntarily became intoxicated in order to prepare himself for the execution of his premeditated and previously formed purpose.

There was evidence to which an instruction relating to the mental condition of the accused, as affected by the voluntary intoxication, at the time the homicidal act was committed, was applicable. The only instruction given by the court relating to that feature of the case was the following:

"Frenzy, arising solely from the passions of anger and jealousy, no matter how furious, is not insanity. A man with ordinary will power, which is unimpaired by disease, is required by law to govern and control his passions. If he yields to wicked passions and purposely and maliciously slays another, he cannot escape the penalty prescribed by law on the ground of mental incapacity. That state of mind, caused by wicked and ungovernable passions, resulting, not from mental lesion, but solely from evil passions, constitutes that mental condition which the law abhors, and to which the term "malice" is applied. The condition of mind which usually and immediately follows the excessive use of alcoholic liquors is not the unsoundness of mind meant by our law. Voluntary drunkenness does not even palliate or excuse."

The 13th and 14th instructions asked by the accused are in legal effect the same. The 14th is as follows:

"While voluntary intoxication is no excuse or palliation for any crime actually committed, yet if upon the whole evidence in this cause you shall have such reasonable doubt whether, at the time of the killing,—if you shall find from the evidence accused did kill Bertha Elff,—he had sufficient mental capacity to deliberately think upon and rationally to determine so to kill deceased, then you cannot find him guilty of murder in the first degree, although such inability was the result of intoxication."

The propriety of the ruling of the court in refusing to give the 13th and 14th instructions, or either of them, is now before us for consideration. Section 1904, Rev. Stat. 1881, reads as follows: "Whoever purposely and with premeditated malice, or in the perpetration of, or attempt to perpetrate, any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kills any human being, is guilty of murder in the first degree, and upon conviction thereof," etc.

Other sections define murder in the second degree, and declare what shall constitute voluntary and involuntary manslaughter. The distinction between murder in the first degree and murder in the second degree has been so often stated, and is so well understood, that it would be useless repetition to reiterate it here. *Fahnestock* v. *State*, 23 Ind. 231; *Binns* v. *State*, 66 Ind. 428; *McDermott* v. *State*, 89 Ind. 187; *Koerner* v. *State*, 98 Ind. 7.

It is sufficient to say that, in order that there may be such premeditated malice as will make a homicide murder in the first decree, the thought of taking life must have been consciously conceived in the mind, the conception must have been meditated upon and a deliberate determination formed to do the act. Where a homicide has been preceded by a concurrence of will, with an intention to kill, and these are followed by a deliberate thought or premeditation, although they follow as instantaneously as successive thoughts can follow each other, the premeditator may be guilty of murder in the first degree. But as it is of the very essence of the crime that there should have been time and opportunity for delibera-

tion or premeditation, after the mind has consciously formed the design to take life, it follows, as a necessary corollary, that there must have been the mental capacity to think deliberately upon and determine rationally in respect to the nature and consequences of the act which follows. It would be a legal as well as a logical incongruity to hold that the crime of murder in the first degree could only be committed after deliberate thought or premeditated malice, and yet that it might be committed by one who was without mental capacity to think deliberately or determine rationally. As a matter of course, the rule is universal that voluntary intoxication is no excuse for crime, nor does it in any degree mitigate or palliate an offense actually committed. To hold otherwise would unbridle crime and subvert public order. On the contrary, where there is reason to believe that one has conceived the design to commit a crime, and, while harboring the unlawful purpose, voluntarily becomes intoxicated in order to blunt his moral sensibilities and nerve himself up to the execution of his preconceived design, the offense is thereby greatly aggravated. *State* v. *Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

Where, however, the essence of a crime depends upon the intent with which an act was done, or where an essential ingredient of the crime consists in the doing of an unlawful act with a deliberate and premeditated purpose, the mental condition of the accused, whether that condition is occasioned by voluntary intoxication or otherwise, is an important factor to be considered. *Smith* v. *Com.* 1 Duvall, 227; *State* v. *Garvey*, 11 Minn. 163.

Thus in *Cline* v. *State*, 43 Ohio St. 332, 1 West. Rep. 81, the learned judge, delivering the judgment of the court, said: "Where a person having a desire to do to another an unlawful injury drinks intoxicating liquors to nerve himself to the commission of the crime, intoxication is held, and properly, to aggravate the offense; but at present the rule that intoxication aggravates crime is confined to cases of that class . . . But in many cases, evidence of intoxication is admissible with a view to the question whether a crime has been committed; or where a crime consisting of degrees has been committed, such evidence may be important in determining the degree." *Pigman* v. *State*, 14 Ohio, 555; *Lytle* v. *State*, 31 Ohio St. 196; *Davis* v. *State*, 25 Ohio St. 369; *Roberts* v. *People*, 19 Mich. 401; *State* v. *Welch*, 21 Minn. 22.

In the application of this principle, the Supreme Court of the United States reversed a judgment of conviction of murder in the first degree in *Hopt* v. *Utah*, 104 U. S. 631 [26 L. ed. 873]. The court below instructed the jury to the effect that "a man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real is so often resorted to as a means of nerving a person up to the commission of some desperate act, and is withal so inexcusable in itself, that the law has never recognized it as an excuse for crime."

The accused requested the court to give an instruction similar to that requested and refused in the present case. After asserting the general rule of the common law, that voluntary intoxication affords no excuse, justification or extenuation of a crime committed under its influence, *Mr. Justice* Gray, delivering the judgment of the court, said: "But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury." *Com.* v. *Dorsey*, 103 Mass. 412; *Pirtle* v. *State*, 9 Humph. (Tenn.) 663; *Haile* v. *State*, 11 Humph. 154; *Jones* v. *Com.* 75 Pa. 403; *Keenan* v. *Com*, 44 Pa. 55; *People* v. *Belencia*, 21 Cal. 544; *State* v. *Johnson*, 40 Conn. 136; Maxwell, Crim. Prac. pp. 227–229.

So in *Buckhannon* v. *Com.* 86 Ky. 110, the court said: "A deliberate intent to take life is an essential element of murder. Drunkenness as a fact may therefore be proven as bearing upon its existence or nonexistence. It is not admissible upon the ground that in and of itself it excuses or mitigates the crime, because one offense cannot justify or palliate another, but because, under the circumstances of the case, it may tend to show that the less and not the greater offense was committed." See also *State* v. *Sopher*, 70 Iowa, 494.

In *State* v. *Johnson*, *supra*, the Supreme Court of Connecticut, in reversing a judgment of conviction of murder in the first degree, the court below having given and refused instructions similar to those involved in the present case, used the following language: "A deliberate intent to take life is an essential element of the offense. The existence of such an intent must be shown as a fact. Implied malice is sufficient, at common law, to make the offense murder, but under our Statute, to make it murder in the first degree, actual malice must be proved. Upon this question, the state of the prisoner's mind is material. In behalf of the defense, insanity, intoxication or any other fact which tends to prove that the prisoner was incapable of deliberation, was competent evidence for the jury to weigh. Intoxication is admissible in such cases, not as an excuse for crime, or in mitigation of punishment, but as tending to show that the less and not the greater offense was in fact committed." *State* v. *Johnson*, 41 Conn. 585; *Jones* v. *State*, 29 Ga. 594.

"In those States," says a learned author, "in which murder has been divided by statute into degrees, it has been held that if the accused was intoxicated to such an extent as to deprive him of the power to form a design, the offense could be no more than murder in the second degree." Lawson, Insanity, p. 74; 1 Wharton, Crim. Law, §§ 51, 52.

"Drunkenness, we have seen, does not incapacitate one to commit either murder or manslaughter at the common law," says Mr. Bishop, "because to constitute either the specific intent to take life need not exist, but general malevolence is sufficient. But where murder is divided by statute into two degrees, and to constitute it in the first degree there must be the specific intent to take life, the specific intent does not in fact exist, and the murder is

not in this degree where one, not meaning to commit homicide, becomes so drunk as to be incapable of intending to do it and then kills a man." Bishop, Cr. L. § 404.

This court, although not always enunciating it with entire accuracy, has constantly recognized the rule declared in the above cases. Thus, in *Smurr* v. *State*, 88 Ind. 504, where it appeared that the accused was excited by intoxicating drink at the time of the homicide, an instruction was approved as accurately expressing the law, in which the jury were told that "voluntary intoxication is no excuse for crime as long as the offender is capable of conceiving an intelligent design."

So in *Fisher* v. *State*, 64 Ind. 435, a prosecution for larceny, after stating the general rule that voluntary intoxication is no excuse for crime, unless the habit has been indulged to such an extent as to pervert or destroy the mental faculties, the court said: "There are cases which hold that, in prosecutions for murder, drunkenness at the time may be shown as affecting the question of premeditation." *Dawson* v. *State*, 16 Ind. 428; *Bradley* v. *State*, 31 Ind. 494; *Rogers* v. *State*, 33 Ind. 543; *Cluck* v. *State*, 40 Ind. 263; *Bailey* v. *State*, 26 Ind. 422; *Robinson* v. *State*, 113 Ind. 510, 13 West. Rep. 309.

When a homicide results from the use of a dangerous and deadly weapon, the law implies malice and an intention to kill from the effective use of the weapon, and therefore the crime is presumably murder in the second degree. No degree of mental disturbance produced by voluntary intoxication will of itself, disconnected from sudden heat or other circumstances, avail to reduce the crime to a lower grade, unless such a diseased condition of the mind has followed the habit of intoxication as to render the accused incapable of distinguishing between right and wrong, or of controlling his conduct when free from the influence of intoxicating drink. But in the absence of evidence, either direct or circumstantial, there is no presumption from the mere fact that a homicide was committed, except it be in the perpetration of the offenses mentioned in the statute, that it was done with deliberation or premeditated malice. Hence the conclusion logically follows that murder in the first degree, in which, under our Statute, premeditated malice is the distinguishing ingredient, can only be committed by one possessed of the mental capacity to deliberate and premeditate, and that a homicide committed by one who was at the time for any reason incapacitated to think deliberately or determine rationally as to the quality, character and consequences of the act, cannot be murder in the first degree. *Reg.* v. *Davis*, 14 Cox, Cr. Cas. 563, 28 Eng. Rep. (Moak's *notes*) 657.

In order that there may be no misapprehension and to prevent voluntary intoxication from being used as a cloak to shield those who, from sheer wickedness of heart and regardless of consequences, allow themselves to be driven to the commission of crimes, it should be said that mere intoxication, in the absence of such mental incapacity resulting therefrom as renders one who takes the life of another incapable of thinking deliberately and meditating rationally upon the purpose to take human life, and which leaves him with full power to know the quality of his act and to abstain from doing it, cannot of itself be regarded as sufficient to reduce a homicide from murder in the first to murder in the second degree. *Walker* v. *State*, 85 Ala. 7, 7 Am. St. Rep. 17; 1 Bishop, Cr. L. § 410.

"In other words, there must be the absence of that self-determining power which, in a sane mind, renders it conscious of the real nature of its own purposes and capable of resisting wrong impulses. Where this self-governing power is wanting, whether it is caused by insanity, gross intoxication or other controlling influences, it cannot be said truthfully that the mind is fully conscious of its own purposes and deliberates or premeditates, in the sense of the act describing murder in the first degree." *Jones* v. *Com. supra.*

Drunkenness cannot be considered as an excuse for crime, but may be taken into consideration for the purpose solely of passing on the fact of premeditation, keeping in view the fact that a man may act with premeditation while under the influence of intoxicating liquor, or he may have harbored the design to commit the crime before becoming intoxicated. *People* v. *Williams*, 43 Cal. 345; *State* v. *Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

It seems scarcely necessary to add that we are not dealing with the question of voluntary intoxication as an excuse for crime, or as rendering the accused criminally irresponsible, but only with intoxication resulting in that degree of mental disturbance or distortion that renders the accused incapable of committing murder in the first degree.

By giving the 12th instruction the court gave full recognition to the fact that the subject of the voluntary intoxication of the accused was before the jury for consideration. The jury were told, correctly enough, with what abhorrence the law looked upon frenzy arising solely from jealousy and anger, and from wicked and ungovernable passions, which did not result from mental lesion. They were also told, with eminent propriety, that the condition of mind which usually and immediately follows the excessive use of alcoholic liquors is not the unsoundness of mind meant by our law, and that voluntary drunkenness did not excuse or palliate crime.

These instructions were all well enough as far as they went, but the question back of all that was, whether drunkenness, if it existed to the extent of depriving the accused of the power of deliberation, might be considered by the jury as disproving an essential ingredient in the crime of murder in the first degree, viz., the deliberate intention to take human life.

When the accused asked the court to instruct the jury that voluntary intoxication might, in case a mental condition had resulted therefrom which incapacitated him from deliberate thought or rational determination, reduce the crime from the highest to a lower grade of murder, the court refused. The jury were then left without the means of distinguishing between voluntary intoxication as an excuse for crime and intoxication as affecting that particular condition of mind necessary to constitute the crime of murder in the first degree. After admitting evidence tending to show that

the accused was in the habit of drinking alcoholic stimulants, and that he had drank to excess on the day of the homicide, the jury were not only told that drunkenness was not only no excuse or palliation for crime, but without any explanation they were left to infer that if it had any effect, it was to aggravate the offense. Either the jury must have excluded the evidence of intoxication from their minds altogether, or they must have given it an effect prejudicial to the accused. The jury may have believed, as did the court, that although the accused may not have had the mental capacity to think deliberately or determine rationally, if his incapacity resulted from voluntary intoxication, he might be guilty of murder in the first degree nevertheless. In the absence of any claim of preconceived design, it was therefore prejudicial error to refuse the instruction asked, which contains an accurate statement of the law.

The court of its own motion charged the jury as follows: "The defense of insanity is one very frequently made in cases of this kind, and it is one which, I may say to you, should be very carefully scrutinized by the jury. The evidence to this point should be carefully considered and weighed by the jury, for the reason that if the accused was in truth insane at the time of the commission of the alleged acts, then he ought not to be punished for such acts. The evidence on this question of insanity ought to be carefully considered by the jury for another reason, and that is, because a due regard for the ends of justice and the peace and welfare of society demands it, to the end that parties charged with crime may not make use of the plea of insanity to defeat the ends of justice and as a shield to protect them from criminal responsibility in case of violation of law."

This instruction met with unqualified approval in *Sawyer* v. *State*, 35 Ind. 80, and the principle therein enunciated has been referred to approvingly in *Sanders* v. *State*, 94 Ind. 147, and *Butler* v. *State*, 97 Ind. 378.

It can hardly be said to contain the statement of any proposition of law, but is rather in the nature of a general disparagement of the defense of insanity which the accused had pleaded as provided by statute. A case might possibly arise in which such a statement could be appropriately made by the court. As the judgment in the present case must be reversed for other reasons, we do not determine whether or not it constituted reversible error in this case. It is sufficient to say that, as at present constituted, the court does not regard with favor any statements by the trial court which are designed to cast discredit or suspicion upon any defense which is recognized by the law as legitimate, and which an accused person is making in apparent good faith. In this respect we are unable to appreciate any well-grounded distinction between the defense of insanity, self-defense or alibi. *Line* v. *State*, 51 Ind. 172; *Sater* v. *State*, 56 Ind. 378; *Albin* v. *State*, 63 Ind. 599; *Simmons* v. *State*, 61 Miss. 243; *Dawson* v. *State*, 62 Miss. 241; Thompson, Trials, § 2433.

In those jurisdictions where judges are permitted to comment upon the weight and value of evidence, it has been held proper for the court to caution the jury concerning a defense which judicial experience has shown to be often attempted by contrivance and perjury. *Com.* v. *Webster*, 5 Cush. 295; Thompson, Trials, § 2434.

This rule does not prevail in Indiana. *Unruh* v. *State*, 105 Ind. 117, 2 West. Rep. 632.

At the proper time the court was requested to give instructions numbered 10 and 11, which are in the following language:

"10. The court presumes the defendant to be innocent of the commission of any crime. And this presumption continues in his favor throughout the trial of the cause, step by step; and you cannot find the accused guilty of any of the crimes covered by the indictment until the evidence in the cause satisfies you beyond a reasonable doubt of his guilt. And so long as you, or any one of you, have a reasonable doubt as to the existence of any of the several elements necessary to constitute the several crimes above defined, the accused cannot be convicted of such crime.

"11. And here the court instructs you that the mere fact that a grand jury has returned an indictment against the accused does not raise any presumption that the accused has been guilty of any crime, and you must not take the filing of the indictment as raising any such presumption until you, and each of you, are satisfied beyond a reasonable doubt, by the evidence here introduced before you, without reference to the nature of the indictment, that the accused is guilty of some of the grades of homicide covered by this indictment, there can be no conviction."

The court declined to give either of the above, and it is conceded that the subjects embraced therein were not covered by the general charge.

In *Castle* v. *State*, 75 Ind. 146, a judgment of conviction for an assault and battery with intent to commit murder was reversed for no other reason than the refusal of the court to give an instruction substantially like that numbered 10 above. While we might hesitate to reverse a judgment which was correct in all other respects, we can see no good reason why such an instruction should be refused when seasonably requested, unless the subject of the individual responsibility of each juror has been adequately covered in some other charge.

There was no error in refusing the 11th charge. It must be assumed that the jury understood from the general charge of the court that the law surrounded the accused with the presumption of innocence notwithstanding the return of an indictment against him, and that that presumption continued until it was overcome by the evidence. It must be assumed that jurors are men of ordinary intelligence and that they are possessed of the information common to well informed citizens.

After the most careful consideration of the instructions, we are impressed with the conviction that too many doubtful questions were resolved against the accused, and that prejudicial error may have intervened in the failure of the court to give the jury the instructions requested upon the subject of the mental incapacity of the accused, resulting from voluntary intoxication, to commit the crime of murder in the first degree. A judgment of a court which pronounces the extreme penalty of the law upon a human being should be free from

any error which may have resulted to the prejudice of the person condemned. Lest the one before us may, for the reasons given, not be, *it is reversed.*

The clerk will make the proper order concerning the appellant.

Elliott, *J.*:

The 19th instruction disapproved by the court is copied word for word from the instruction given in the case of *Sawyer* v. *State*, 35 Ind. 80. Worden, *J.*, delivering the unanimous opinion of the court in that case said: "The observations of the court in that respect meet our unqualified approval. As stated by the court, where the defense of insanity is interposed to a criminal prosecution, the evidence relating to it should be carefully and intelligently scrutinized and considered for the double reason that a really insane person should not be convicted, and a really sane one should not be acquitted and suffered to go unpunished for his crimes on the false theory of insanity." This is, as I am unalterably convinced, sound sense and sound law. If the decision stood alone I should be heartily for sustaining it, for I believe that it is intrinsically right. But it does not stand alone, for it has been repeatedly approved. *Butler* v. *State*, 97 Ind. 378; *Sanders* v. *State*, 94 Ind. 147; *Guetig* v. *State*, 63 Ind. 278.

Other courts have declared a like doctrine. *People* v. *Bumberger*, 45 Cal. 650; *People* v. *Dennis*, 39 Cal. 625; *Sellick's Case*, 1 City Hall Rec. 185; *McKee* v. *People*, 36 N. Y. 113.

In one of the cases cited the jury were instructed, as to the defense of insanity, that, "from its nature it ought to be received in all cases by jurors with the greatest degree of caution and circumspection." In another case the jury were instructed, concerning the plea of insanity, that "it is a plea sometimes resorted to in cases where aggravated crimes have been committed under circumstances which afford full proof of overt acts, and render hopeless all other means of evading punishment. While, therefore, it ought to be received as a not less full and complete than it is a humane defense, when satisfactorily established, it yet should be examined with great care lest an ingenious counterfeit of the malady furnish protection to guilt."

It is, as is everywhere laid down, the duty of a court to abide by its decisions unless it is demonstrated that they are against reason, and this rule ought of itself to constrain us to adhere to former decisions; but in this instance I am convinced that the court is departing from a decision not only without reason, but against both reason and authority.

The departure is, I deferentially affirm, a step in the wrong direction. Our decisions have already too greatly restricted the rights and duties of trial judges, and I am firmly convinced that it is a mistake to fetter them still more. A trial judge is, as I believe, more than a mere moderator, or a mere rehearser of stereotyped phrases, for it is his right and his duty to give the jury such advice and such cautions as shall assist them in reaching a just conclusion.

That the defense of insanity is one frequently resorted to is a matter of common knowledge, and it is so treated in the text-books and decisions, and yet the instruction before us is condemned simply because the jury are informed that it is a defense that is frequently made. This, as I understand the opinion of the court, is the only infirmity in the instruction. To me it seems an element of strength, not of weakness.

Our Statute makes the defense of insanity a peculiar one. Some of the courts hold that it must be established beyond a reasonable doubt. Other courts hold that it must be established by a preponderance of the evidence, and still others hold that it is enough if the evidence raises a reasonable doubt of the sanity of the accused; but, while the courts differ upon the points mentioned, they agree that the defense of insanity is a peculiar one, subject to be abused and meriting rigid scrutiny.

While I dissent from that part of the opinion which disapproves the 19th instruction, I concur in the conclusion that the judgment should be reversed, for I think that the very able opinion of the court prepared by the chief justice unanswerably proves that where the element of premeditation is essential to create the crime of murder in the first degree, the accused cannot be found guilty of that crime if at the time of the killing he was so completely overcome by intoxication as to be incapable of premeditation.

Coffey, *J.*, concurs with **Elliott, *J.***

OHIO SUPREME COURT.

Orris D. VROMAN *et al., Plffs. in Err.,*
v.
George O. POWERS.

(47 Ohio St.....)

1. Where a verbal will is reduced to writing, and subscribed by two witnesses, one of whom is a legatee thereunder, and the other is his wife, the husband is not a competent, disinterested witness, within the meaning of section 5991 of the Revised Statutes, and the will is invalid.

2. The two witnesses to a verbal will must be competent, disinterested witnesses at the time of their attestation, and their dis-

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NOTE.—*Will defined.*

A will is a legal declaration of a man's intention which he wills to be performed after his death. Jasper v. Jasper, 17 Or. 590.

It is an instrument whereby a person makes a disposition of his property, to take effect after his death. Cover v. Stem, 9 Cent. Rep. 108, 67 Md. 449.

The more general and popular denomination of a will or testament embracing both real and personal property is "last will and testament." Compton v. McMahan, 2 West. Rep. 189, 19 Mo. App. 494.

Although the statute requires a will to be in writing, yet where a will required certain property

qualification as witnesses, by reason of interest under the will, cannot be removed by a renunciation of such interest at the time the will is admitted to probate, or at the trial of an issue to contest the validity of the will.

3. Section 5925 of the Revised Statutes, as to the effect of a witness being a devisee or legatee under the will, is not applicable to verbal wills.

(March 18, 1890.)

ERROR to the Circuit Court for Cuyahoga County to review a judgment in favor of plaintiff rendered upon appeal from the Court of Common Pleas in an action brought to set aside a certain will upon the ground that the statutory requirements as to subscription were not complied with. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. **Alvord, Alvord & Baptiste,** for plaintiffs in error:

Rev. Stat., § 5925, controls and governs in the case of nuncupative wills, as in that of wills generally, and under its provisions Orris D. Vroman was in the very moment that he signed the will by operation of law stripped of all interest and wholly devested of the same, and thus became a disinterested witness.

The Statute devesting the husband of all interest, at the same instant devested the wife of all interest; so that she was the competent, disinterested witness named in the Statute.

Jackson v. *Woods*, 1 Johns. Cas. 163; *Jackson* v. *Durland*, 2 Johns. Cas. 314; *Winslow* v. *Kimball*, 25 Me. 493; 1 Redf. Wills, p. 258.

If the provisions of that Statute did not so operate the filing of the written renunciation and release did; and thereafter for the purposes of making the will a valid verbal last will as it pertained to the other legatees therein named, they were both competent, disinterested witnesses.

Cook v. *Grant*, 16 Serg. & R. 198, 16 Am. Dec. 564; *Burritt* v. *Silliman*, 13 N. Y. 93, 64 Am. Dec. 532; 1 Redf. Wills, pp. 256, 257; 1 Schouler, Wills, § 351, p. 359.

This is so in the case of a nuncupative will as in that of any other.

Brayfield v. *Brayfield*, 3 Harr. & J. 208.

Messrs. **William C. Rogers** and **William Robison,** with *Mr.* **H. C. White,** for defendant in error:

A bequest to a husband makes a wife incompetent to testify in behalf of the will.

Winslow v. *Kimball*, 25 Me. 493; 1 Redf. Wills, pp. 188, 189, 257, 258; *Holdfast* v. *Dowsing*, 2 Strange, 1254; *Lyon* v. *Hamor*, 73 Me. 56; *Ætna Ins. Co.* v. *Stevens*, 48 Ill. 31; *Ryan* v. *Devereux*, 26 Up. Can. Q. B. 100; 1 Woerner, Administrator, § 41, p. 72; *Pease* v. *Allis*, 110 Mass. 157; *Dickinson* v. *Dickinson*, 61 Pa. 401; Abbott, Law Dict. *Disinterested*; *Sullivan* v. *Sullivan*, 106 Mass. 476.

The release offered in evidence should have been filed in the probate court, and before probate, and not for the first time in the circuit court.

Workman v. *Dominick*, 3 Strobh. L. 591.

Witnesses to wills must be, in every way, competent at the time of signing.

Frink v. *Pond*, 46 N. H. 125; *Patten* v. *Tallman*, 27 Me. 17; *Morton* v. *Ingram*, 11 Ired. L. 368; *Higgins* v. *Carlton*, 28 Md. 117, 140; *Stewart* v. *Harriman*, 56 N. H. 25; 1 Schouler, Wills, § 351; *Pease* v. *Allis*, 110 Mass. 157; *Hawes* v. *Humphrey*, 9 Pick. 350, 20 Am. Dec. 483.

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

Mary A. Powers, the wife of the defendant in error, George O. Powers, died on the 13th day of December, 1881, leaving issue one child, Orris Irving Powers, who thereafter, and before this suit was begun, died aged six months. It was claimed that Mary A. Powers, in her last sickness, made a verbal will, which was on the 19th day of December, 1881, reduced to writing, and subscribed by Orris D. Vroman and his wife Emma J. Vroman as witnesses. The alleged verbal will was presented to and admitted to probate by the Probate Court of Cuyahoga County. By the terms of the will, Orris D. Vroman, Joseph Vroman, Albert K. Vroman and Adiram Vroman, the plaintiffs in error, brothers of Mary A. Powers, and Orris Irving Powers are named as the several legatees

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given to a person named to be distributed by him "according to private instructions I give him;" which instructions were verbal and directed payment of the property, which is in a foreign country, to relatives in that country,—equity will carry out the intention by charging the legatee with a constructive trust in favor of the beneficiaries named in the private instructions to him, as against the other heirs; and he will not be charged with a trust in favor of the latter. Curdy v. Berton, 79 Cal. 420.

Nuncupative will; rule in various States.

A nuncupative will must be strictly proved in all essential points. Scaife v. Emmons (Ga.) March 10, 1890.

To render a nuncupative will valid, it must appear that the deceased was *in extremis* when he made it; and it is invalid where deceased had plenty of time and opportunity to execute a formal written will. *Ibid.*

One of the formalities required by the Louisiana Civil Code in the confection of a testament nuncupative in form and received by public act is that the act must be received by a notary in the presence of three witnesses residing in the parish where the instrument is made. This formality must be observed; otherwise the testament is null and void. Welck v. Henne (La.) Dec. 17, 1888.

Nuncupative testaments are full proof of themselves. They must bear upon their faces the evidence that all the formalities required by law have been complied with. An omission of any formality cannot be supplied by evidence *dehors* the testament. *Ibid.*

If executed before two competent witnesses only it is invalid; and if executed before three witnesses, one of whom did not understand the language in which the will was drawn up and the testator expressed himself, it is invalid. Dauterive's Succession, 39 La. Ann. 1092.

A nuncupative will under private signature need not be shown to have been dictated by the testator when written out of the presence of the witness. Pfarr v. Belmont, 39 La. Ann. 294.

A verbal will, to be valid, must be proved by three witnesses present at the making thereof, and

of Mary A. Powers. Suit was brought by George O. Powers, in the court of common pleas, against the plaintiffs in error, to set aside the will, on the ground, among others, that it was not subscribed by two competent, disinterested witnesses. The case was tried in the court of common pleas in May, 1884, and by verdict and judgment of the court the will was set aside. The defendants appealed, and on February 15, 1887, the case was tried in the circuit court, and it was found by the verdict and judgment rendered therein that the paper purporting to be the last will of Mary A. Powers was not her last will. During the trial in the circuit court, a written renunciation of all interest under the will, made and signed February 13, 1887, by Orris D. Vroman and Emma J. Vroman, the two witnesses to the alleged verbal will, was filed in that court, which renunciation, on being offered in evidence, was ruled out by the court.

The court, among other matters, charged the jury as follows: "That if they should find from the evidence that one of said witnesses to said will, Orris D. Vroman, was the brother of the testatrix and one of the residuary legatees mentioned in said alleged will, and that said Emma J. Vroman was at the time the wife of the said Orris D. Vroman, the said witnesses to said will were not, within the meaning of the Statute of Ohio, competent, disinterested witnesses to said will, and because of that fact said will would not be the valid verbal will of the said Mary A. Powers."

It is contended in behalf of the plaintiffs in error that the circuit court erred, first, in charging the jury that Orris D. Vroman and Emma J. Vroman, under the conditions above stated, would not be competent and disinterested witnesses, within the meaning of the Statute; and second, in refusing to allow the paper containing their renunciation of interest to be put in evidence.

I. It is provided by section 5991, of the Revised Statutes that "a verbal will, made in the last sickness, shall be valid in respect to personal property, if reduced to writing, and subscribed by two competent disinterested witnesses, within ten days after the speaking of the testamentary words; and if it be proved by said witnesses that the testator was of sound mind and memory, and not under any restraint, and called upon some person present, at the time the testamentary words were spoken, to bear testimony to said disposition as his will." The Statute requires that both the witnesses shall be competent and disinterested, and not one only. In our judgment, Orris D. Vroman did not meet the requirement of the Statute as to competency and disinterestedness. He had a sufficiently immediate, beneficial interest in the will to disqualify him from becoming a subscribing witness thereto. The alleged will provided that a certain sum of money in the hands of her brother, Orris D. Vroman, belonging to the testatrix, if not used for her sickness and incident expenses, should be placed where her son could have it on arriving at the age of twenty-one years; and that if he died before the age of twenty-one years, the money should go to her brothers; and that, whatever funds were to come from her mother's estate were to go in the same manner. One of the witnesses, therefore, being incompetent and disqualified by reason of interest, there was not a compliance with the statutory requirement that the two witnesses to the verbal will should be competent and disinterested, and the will, in consequence, cannot be held to be valid. We find no error in the charge of the court.

It is urged, however, that if there was a disqualification of interest in one or both of the witnesses, it was removed by the operation of section 5925 of the Revised Statutes, which provides that "if a devise or bequest is given to a person who is a witness to the will, and

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be made in the last sickness of the testator. The term "last sickness" means *in extremis*. Carroll v. Bonham, 8 Cent. Rep. 649, 42 N. J. Eq. 625.

If decedent could have made a written will, a nuncupative one will be of no avail, and where he lived nine days after, deliberately selecting the nuncupative method, such will cannot be admitted to probate. *Ibid.*

Under N. C. Code, § 2148, a nuncupative will which is put in writing within ten days after it is made, may be proved by the witnesses thereof, either before or after the lapse of six months next after it is made; and where the proofs and examination of the witnesses are taken, and an order of citation and publication of notice made within the six months, the proceeding cannot be dismissed because the will is not admitted to probate within the six months. *Re* Haygood's Will, 101 N. C. 574.

The Texas statute authorizing any person who is competent to make a will, to "dispose of his property by nuncupative will," does not apply to real property. It must be considered as intending to re-enact the former law on the subject. Moffett v. Moffett, 67 Tex. 642.

Qualification of witness.

Where the statute requires "at least two credible witnesses" it means persons not disqualified by mental imbecility, interest or crime. Fuller v. Fuller, 83 Ky. 345.

A statute providing that a bequest shall be void when made to a subscribing witness, or the husband or wife of such, does not make void a charitable bequest for the poor of a religious society to which the subscribing witnesses belong. Goodrich's App. 57 Conn. 275.

A husband is not disqualified, on account of his interest, to act as a subscribing witness to a will, on the ground that his wife is named therein as a devisee of real estate. Bates v. Officer, 70 Iowa, 343.

Prior to Statute of 1884, a will was void when one of three witnesses was the husband of one of the legatees. Giddings v. Turgeon, 2 New Eng. Rep. 406, 58 Vt. 106.

Where the will contains a devise or legacy to a town, in trust, a taxpaying inhabitant of the town is not thereby rendered an incompetent witness to the will. *Re* Marston, 3 New Eng. Rep. 601, 79 Me. 25.

Where the will contains a legacy to an incorporated ball association, "in part to secure a liberal policy in respect to the use of the hall for objects of public interest," a stockholder in that association is not thereby rendered an incompetent witness to the will. *Ibid.*

the will cannot otherwise be proved than by the testimony of such witness, the devise or bequest shall be void, and the witness shall be competent to give testimony of the execution of the will, in like manner as if such devise or bequest had not been made."

This section, when considered in connection with the preceding sections of the chapter, including section 5916, is clearly applicable only to duly executed written wills. Section 5919 requires that "every last will and testament (except nuncupative wills hereinafter provided for) shall be in writing, and signed at the end thereof by the party making the same . . . and shall be attested and subscribed in the presence of such party by two or more competent witnesses," etc.

The sections immediately following, embracing section 5925, are so connected by obvious reference to a will in writing, as to preclude the idea of applying the last-mentioned section to nuncupative wills, which, by the Statute, are assigned to a separate and distinct class, and are subject to different requisites and conditions.

Section 5925 in providing that "the witness shall be competent to give testimony in the execution of the will," evidently refers to the full, legal formalities of a signature by the testator, and an attestation by competent witnesses who subscribe in the testator's presence, and not, as in a nuncupative will, to the testator's speaking testamentary words in his last sickness, which are to be reduced to writing and subscribed by competent and disinterested witnesses, within ten days after the words are spoken.

II. The renouncement and release by Orris D. Vroman of all right and interest was not filed until more than five years after the verbal will is alleged to have been made. Such a release did not remove his disqualification as a witness. The Statute contemplates the verbal will as made in the last sickness. Within ten days after the speaking of the testamentary words, the will must be reduced to writing, and subscribed by two witnesses who are then competent and disinterested.

The rule, it is said, which reason should now pronounce the universal one, is that the competency of witnesses, like that of the testator, is tested by one's status at the time when the will was executed. Schouler, Wills, § 351.

In *Patten* v. *Tallman*, 27 Me. 27, the court says: "The competency of an attesting witness is not to be determined upon the state of facts existing at the time when the will is presented for probate, but upon those existing at the time of the attestation."

In *Morton* v. *Ingram*, 11 Ired. L. 368, it was held, that a person named as executor is not competent as an attesting witness to a will of personalty; and that his subsequent renunciation and release will not make him so; and that he must be disinterested at the time of attestation.

In *Huie* v. *McConnell*, 2 Jones, L. 455, the court remarks: "It is well settled that an attesting witness to a will must be competent at the time of attestation, and that no subsequent release, where the objection is one of interest, can restore competency."

In *Workman* v. *Dominick*, 3 Strobh. L. 589, it was held that "credible" means competent; and the competency of the witness must be referred to the time of attestation. Frost, *J.*, said: "This point is settled. It is affirmed by all the elementary writers. . . . If the witnesses do not possess, at the time of the execution of the will, the quality required, it cannot afterwards be supplied. If any of them be not then credible, by reason of a benefit he may take by the instrument, he cannot be made credible by a future release. . . . The will would be absolutely in the power of the witness. If he consents to release, the will is established; if he refuses, the will is annulled. It is in his power to set up the estate at auction between the legatees and next of kin, and sell it to the highest bidder. And thus, being first bribed by an interest in the will to make it, he is open to another bribe to vacate it."

See *Stewart* v. *Harriman*, 56 N. H. 25; *Hawes* v. *Humphrey*, 9 Pick. 350; *Higgins* v. *Carlton*, 28 Md. 115; *Pease* v. *Allis*, 110 Mass. 157; *Allison* v. *Allison*, 4 Hawks, 141; *Tucker* v. *Tucker*, 5 Ired. L. 161; Greenl. Ev. § 691.

The rule laid down in the above citations acquires additional force and significance when applied to the attestation and establishment of verbal wills. The rule, it is true, in its application to wills in writing, is controlled by section 5925 of the Revised Statutes, but that section, as we have before observed, is not applicable to nuncupative wills.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

FREEMAN'S NATIONAL BANK *v.* NATIONAL TUBE WORKS CO.

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

1. The owner of drafts, who indorses them in blank and places them with a bank for collection, may avail himself of the benefit of a restrictive indorsement placed thereon by such bank when it transmitted them to its correspondent for the purpose of effecting such collection.

2. The legal title to commercial paper indorsed "For collection" passes only so far as to enable the indorsee to demand, receive

NOTE.—*Indorsement of note or bill deposited for collection.*

A special indorsement "For collection" on a promissory note does not transfer the ownership of the note or its proceeds to the indorsee. Sweeny v. Easter, 68 U. S. 1 Wall. 166 (17 L. ed. 681).

Where a bank on its own proposition enters into an arrangement with another bank, whereby it

8 L. R. A.

See also 9 L. R. A. 553; 13 L. R. A. 241; 15 L. R. A. 102, 498; 17 L. R. A. 291; 21 L. R. A. 753; 23 L. R. A. 161.

and sue for the money to be paid; upon such indorsement the owner may control his paper until it is paid, and may intercept the proceeds thereof in the hands of an intermediate agent.

3. **A bank's indorsement of commercial paper directing payment "for account of itself"** does not imply that it is the owner of the paper, where the indorsement of the bank from which its title was derived was of the same kind.

4. **A bank to which commercial paper has been transmitted** for collection will not be permitted to dispute the right of the owner to stop payment thereof, although it has made credits or advances to an intermediate collecting agent on account of the paper, if the same were made before the paper had been collected; nor can such advances be recovered from the owner as money paid for his use.

(May, 1890.)

REPORT from the Supreme Judicial Court for Suffolk County (C. Allen, *J.*) for the opinion of the full court of an action brought to recover the amount alleged to be due upon certain accepted drafts, the payment of which had been stopped by the owner. *Judgment for defendant.*

The National Tube Works Company operated mills at McKeesport, Pa., and had an office in Boston, where the treasurer was located and the finances of the Company were kept. For the purpose of paying the running expenses of the mills it was in the habit of drawing drafts on the treasurer in Boston, and depositing them with the People's Bank of McKeesport, of which C. R. Stuckslager was cashier, for collection.

This suit was brought upon two of those drafts, which were alike with the exception that the amounts were different. There was also a count upon an account annexed for $7,000 for money paid to defendant's use, and interest thereon, being the amount paid by plaintiff to the Penn Bank, under date May 20, 1884.

The following is a copy of one of the drafts:

$20,000. McKeesport, Pa., May 17, 1884.

At sight for value received, pay to the order of A. Chaudon twenty thousand dollars and charge this office as per margin.

National Tube Works Co.,

by E. C. Converse, *Asst. Mgr. for President.*

To Wm. S. Eaton, Treas., 8 Pemberton Square, Boston, Mass.

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undertakes to collect all paper sent it by the latter, and to transmit the proceeds at or upon designated dates; and, in addition to such agency and services, all paper transmitted for collection contains a special or restrictive indorsement, the form of which is suggested by the collecting bank, directing payment to the latter for the transmitting bank, and stating that the paper was to be collected at par and the proceeds remitted to the transmitting bank on specified dates, without exchange,—the relation thus created, both as respects the paper and the proceeds thereof after collection, is that of principal and agent, and not of debtor and creditor. Commercial Nat. Bank v. Armstrong, 39 Fed. Rep. 684; Farmer's Bank v. Owen, 5 Cranch, C. C. 504.

Where a banker has received from his correspondent a draft indorsed for collection, which is indorsed in like manner to his correspondent, he cannot appropriate the proceeds collected thereon to the latter's debt to himself, and refuse to pay the owner. City Bank v. Weiss, 67 Tex. 331; Sweeny v. Easter, 68 U. S. 1 Wall. 166 (17 L. ed. 681); White v. Miners Nat. Bank, 102 U. S. 659 (26 L. ed. 251); First Nat. Bank v. Reno County Bank, 1 McCrary, 491, 3 Fed. Rep. 257.

An indorsement by a collecting agent of a check sent to him for collection, without using the word "agent," is, in behalf of his principal, an indorsement merely for the purpose of collection, and is not a guaranty of the genuineness of the check. National City Bank v. Westcott, 118 N. Y. 468.

The indorsement of the words "For collection," on invoices accompanying bills of lading attached as collateral security to drafts discounted, implies no guaranty of the genuineness of the bills. Goetz v. Kansas City Bank, 119 U. S. 551 (30 L. ed. 515).

An indorsee of a promissory note for collection has such a title as will enable him to sue thereon in his own name, though he paid nothing for the note. Roberts v. Parrish, 17 Or. 583; Roberts v. Snow (Neb.) Oct. 3, 1889.

He holds the note subject to the same defenses that could have been made to it in the hands of the original payee. *Ibid.*

Collecting bank as agent of owner.

The bank receiving the paper for collection is the agent of the owner and not of the maker who pays it. The latter cannot recover back from the bank the money paid, on the ground that it has failed to account for it to the owner. Smith v. Essex County Bank, 22 Barb. 627; Ward v. Smith, 74 U. S. 7 Wall. 447 (19 L. ed. 207); Alley v. Rogers, 19 Gratt. 383.

It is liable for the neglect, omission or other misconduct of the bank or agent to whom the note or bill is sent by which the money is lost or other injury sustained. Allen v. Merchants Bank, 22 Wend. 215; West Branch Bank v. Fulmer, 3 Pa. 399; Ivory v. State Bank, 36 Mo. 475; Hoard v. Garner, 3 Sandf. 179; Georgia Nat. Bank v. Henderson, 46 Ga. 493.

Liability for neglect of duty to give notice.

It is liable if it fails to give notice to the indorsers in case of the maker's default, where it is the usage of banks to give such notice. Smedes v. Bank of Utica, 20 Johns. 372; Bank of Utica v. Smedes, 3 Cow. 662; Bank of Utica v. McKinster, 11 Wend. 473; McKinster v. Bank of Utica, 9 Wend. 46; Curtis v. Leavitt, 15 N. Y. 9, 157.

If the bill is payable at the place where the bank conducts its business, it is liable for any neglect of duty as to protest and notice, unless there be some agreement to the contrary, express or implied. Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Fabens v. Mercantile Bank, 23 Pick. 330; Halls v. State Bank, 3 Rich. L. 366; Caldwell v. Evans, 5 Rush, 380; Balme v. Wambaugh, 16 Minn. 120.

A notice issued by the Chicago bank to its customers, after the receipt of the notes for collection, that it would be compelled to place all funds received in payment of collections to the credit of its correspondents in such currency as was received in Chicago—to wit, bills of Illinois banks, to be drawn for only in like bills—does not change the rights of the parties. Marine Bank v. Fulton County Bank, 69 U. S. 2 Wall. 252 (17 L. ed. 785).

If a bank fails to demand payment of a bill held for collection, it makes the bill its own, and becomes liable for the amount. It is agent for the holder, not of the drawer. Bank of Washington v. Triplett, 26 U. S. 1 Pet. 25 (7 L. ed. 37).

Its failure to give notice to the drawer that the drawee was not found at home when called upon to accept the bill is not such negligence as discharges the drawer from his liability, where it is

[In the margin:] No. 6611 charge to account of ——

[Across the face:] May 19–84. Accepted E. R. Hall, Asst. Treas.

[Indorsements:] Pay to the order of C. R. Stuckslager, Cashier. A. Chaudon.

Pay Penn Bank or order for account of People's Bank, McKeesport, Pa. C. R. Stuckslager, Cashier. T. D. Gardner, As. Cash.

Pay Freeman's Nat'l Bank, Boston, or order for account of Penn Bank, Pittsburgh, Pa. G. L. Reiber, Cashier.

The drafts were deposited in the People's Bank, and on the same day they were sent by the People's Bank to its correspondent, the Penn Bank of Pittsburg, indorsed as above and inclosed in the following letter:

Penn Bank Pittsburg

Dear Sir,—We inclose for collection and credit.

W. S. Eaton, Tr. *St.* $20,000
" $9,900

Very Respectfully,
C. R. Stuckslager, Cashier.

The Penn Bank acknowledged their receipt as follows:

People's Bank
Your account has credit
Letter *17* *723.89*
Item *4*
We charge your account
Exchange
We enter for collection *Eaton* item *20,000.00*
" " " " " *9,900.*
To be used when paid.

Very Respectfully,
G. L. Reiber, Cashier.

May 17 the Penn Bank sent the drafts to its Boston correspondent, the Freeman's Bank, indorsed as above and inclosed in the following letter:

Geo. P. Tenney, Esq. Ca.
Boston, Mass.

Dear Sir,—We inclose for collection

W. S. Eaton, Trs., *No. 6611* *20,000*
" " " " *6612* *9,900*

[Stamp:] FREEMAN'S NAT'L BANK, BOSTON, MASS. MAY 19, 1884. CORRESPONDENCE.

Yours Respectfully,
G. L. Reiber,
Cashier.

Acknowledged.

The drafts were received by the Freeman's Bank May 19, and were accepted by the defendant the same day.

May 20 the Penn-Bank check for $7,000 reached the Freeman's Bank through the Boston Clearing House and was paid.

The drafts, when received by the Freeman's Bank, were entered upon its collection book, but have never been entered upon its account current or upon any other book or account to the credit of the Penn Bank.

On the 21st or 22d of May the Penn Bank failed, and the defendant's treasurer was notified by the People's Bank and the manager of the National Tube Works at McKeesport not to pay the same. Payment was accordingly refused on presentation on May 22, and this suit was thereupon commenced.

Messrs. **W. G. Russell** and **Jabez Fox,** for plaintiff:

The legal title at least passed by the indorsement "Pay Penn Bank or order for account of the People's Bank."

First Nat. Bank v. *Smith,* 132 Mass. 227; *Murrow* v. *Stuart,* 8 Moore, P. C. 267.

A second restrictive indorsement like that of the Penn Bank in the present case is just as unequivocal an assertion of title in the second indorser as if it stood alone.

Merchants Nat. Bank v. *Hanson,* 33 Minn. 40, cited in *Manufacturers Nat. Bank* v. *Continental Bank,* 2 L. R. A. 699, 148 Mass. 558.

The fact that the indorsement of the Penn Bank was restrictive would not prevent the title from passing to the plaintiff to secure the sum advanced.

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not the usage of the bank to consider the bill dishonored in such a case. *Ibid.*

A bank receiving for collection drafts drawn against shipments of cattle, on which payment is refused, and which fails to send notice of such refusal for more than twenty-four hours, cannot appropriate the proceeds of the cattle, which it collects for the drawee of such drafts, to his indebtedness to the bank on overdrafts. Gillespie v. Union Stockyards Nat. Bank, 41 Fed. Rep. 231.

The bank is responsible for the amount of the bill in case of its negligence as to notice of presentment and nonpayment. Allen v. Suydam, 20 Wend. 321; Borup v. Nininger, 5 Minn. 523; Chicopee Bank v. Seventh Nat. Bank, 75 U. S. 8 Wall. 641 (19 L. ed. 422); Essex County Nat. Bank v. Bank of Montreal, 15 Am. L. Reg. N. S. 418; Woolen v. New York & E. Bank, 12 Blatchf. 359; Indig v. National City Bank, 80 N. Y. 100; Ayrault v. Pacific Bank, 6 Robt. 337.

Liability of agent of collecting bank.

The bank receiving the note for collection, and not its agent, is liable to the owner. Hyde v. First Nat. Bank, 7 Biss. 136.

Where a person goes to a bank, in the ordinary course of business dealing, and intrusts to it the collection of a draft drawn upon some person residing at a distance, and the home bank, through the failure or dishonesty of another bank selected by itself to make the collection, never receives the money paid on such draft by the drawee, in the absence of any agreement in regard to the matter, the home bank is liable to the customer for the loss of the money. Simpson v. Waldby, 6 West. Rep. 158, 63 Mich. 439.

If a collecting bank surrenders a check to a bank on which it is drawn, and accepts a cashier's check or other obligation in lieu thereof, its liability to its depositor is fixed as much as if it had received the cash. Fifth Nat. Bank v. Ashworth, 2 L. R. A. 491, 123 Pa. 212.

If it employs some other bank or individual to collect the bill the latter becomes the agent of the former bank, and not of the owner, to which it is answerable for neglect of its duty as agent. Commercial Bank v. Union Bank, 11 N. Y. 203; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Merchants & M. Bank v. Stafford Nat. Bank, 44 Conn. 564; Reeves v. State Bank, 8 Ohio St. 465; Hoover v. Wise, 91 U. S. 308 (23 L. ed. 332).

If a party sends a bill of exchange to his agent for collection, who remits it to a sub-agent, living in the same place with the drawee, who receives the money, the holder of the bill can recover the money of the sub-agent. If the sub-agent has made no advances and given no new credit to the

A banker who has advanced money to another has a lien upon all the securities in his hands, including paper deposited for collection, to secure the amount of such advance.

Wood v. *Boylston Nat. Bank*, 129 Mass. 358; *Hackett* v. *Reynolds*, 5 Cent. Rep. 521, 114 Pa. 328; *Bank of Metropolis* v. *New England Bank*, 42 U. S. 1 How. 234 (11 L. ed. 115); *Cody* v. *City Nat. Bank*, 55 Mich. 379; *Sweeny* v. *Easter*, 68 U. S. 1 Wall. 166 (17 L. ed. 681).

It cannot be said that the People's Bank, by permitting the Penn Bank to make this assertion of its own title and to put upon the drafts this direction to collect for its own account, gave that bank a less extensive authority to deal with them than it would have had under a power of attorney "to sell, indorse and assign" the securities "on behalf" of its principal, and yet it has been held that under such a power the agent could pledge the securities for a loan upon his private account.

Bank of Bengal v. *Fagan*, 7 Moore, P. C. 61.

It could be no departure from the line of agency for the plaintiff to remit to the Penn Bank in advance of collection, and to rely upon the security of these drafts.

Where a person had purchased goods from a broker and had paid for them in part by an advance on his general account before the delivery of the goods, such payments would be allowed as against the principal, "if it was the usual practice for payments to be made from time to time, sometimes to a smaller and sometimes to a larger amount than was actually due at the time."

Catterall v. *Hindle*, L. R. 2 C. P. 368; *Fish* v. *Kempton*, 7 C. B. 692; *Warner* v. *M'Kay*, 1 Mees. & W. 591.

The money was paid to the defendant's use and at its request and we can recover independently of any question of title to the drafts.

Homes v. *Dana*, 12 Mass. 190; *Bryant* v. *Goodnow*, 5 Pick. 228; *Mirick* v. *French*, 2 Gray, 420.

Messrs. **Hutchins & Wheeler,** for defendant:

The ownership of these drafts never passed out of the National Tube Works Company.

Commercial Nat. Bank v. *Armstrong*, 39 Fed. Rep. 684; *First Nat. Bank* v. *Armstrong*, 36 Fed. Rep. 59; *Manufacturers Nat. Bank* v. *Continental Bank*, 2 L. R. A. 699, 148 Mass. 553; *Fifth Nat. Bank* v. *Armstrong*, 40 Fed. Rep. 46.

If a bill be indorsed "For the use of" or "For account of" the indorser, it is a restrictive indorsement, and is not an assignment of the security, but merely an authority to collect. The title to the bill does not pass to the indorsee, and such indorsee cannot indorse the bill so as to pass any interest in it.

White v. *Miners Nat. Bank*, 102 U. S. 658 (26 L. ed. 250); *Rice* v. *Stearns*, 3 Mass. 225, 227; *Wilson* v. *Holmes*, 5 Mass. 543; *Sigourney* v. *Lloyd*, 8 Barn. & C. 622; *Rock County Nat. Bank* v. *Hollister*, 21 Minn. 385; *Third Nat. Bank* v. *Clark*, 23 Minn. 263; *Lawrence* v. *Fussell*, 77 Pa. 460; *Williams* v. *Shadbolt*, 1 Cababé & Ellis, 529; 2 Ames, Bills and Notes, index, p. 837.

The Freeman's Bank had notice from the form of the indorsements that the Penn Bank had no interest in the drafts, and that the authority of the Penn Bank to collect might be revoked at any time before the maturity of the drafts. Therefore, if it paid the $7,000 in reliance on acceptances, it acted at its peril.

Treuttel v. *Barandon*, 8 Taunt. 100.

The People's Bank, having received the drafts simply as agents to collect, indorse them "Pay Penn Bank or order for account of People's Bank." This was a restrictive indorsement, and neither the Penn Bank nor any subsequent indorsee could claim to be holder for value without notice as against the National Tube Works, the real owners of the paper.

Treuttel v. *Barandon*, 8 Taunt. 100; *Wilson* v. *Holmes*, 5 Mass. 543; *White* v. *Miners Nat. Bank*, 102 U. S. 658 (26 L. ed. 250); *Sweeny* v. *Easter*, 68 U. S. 1 Wall. 166 (17 L. ed. 681); *Manufacturers Nat. Bank* v. *Continental Bank*, 2 L. R. A. 699, 148 Mass. 553; *First Nat. Bank* v. *Reno County Bank*, 3 Fed. Rep. 257; *Blaine* v. *Bourne*, 11 R. I. 119; *Leary* v. *Blanchard*, 48 Me. 269.

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agent on account of the remittance of the bill, he cannot protect himself against such an action by passing the amount of the bill to the general credit of the agent, although the agent may be his debtor. Wilson v. Smith, 44 U. S. 3 How. 763 (11 L. ed. 820).

In New York, a collecting agent to whom paper is sent to be collected at some place remote from his place of business has no implied authority to employ a sub-agent in the locality of the payee, and, without some express understanding to that effect or qualifying his liability, is deemed to make such selection and employment of another on his own account, and is alone chargeable for the conduct of the latter. Naser v. First Nat. Bank, 116 N. Y. 492.

Where, upon a bank's agreement to transmit money to a person in a distant city, plaintiff makes with it a special deposit of the amount for that purpose, and receives a letter of advice directed to a bank in that city, to the effect that the latter's account is credited with the money for the use of the one to whom it is to go, plaintiff may recover back the deposit in case the correspondent bank fails before receiving the letter, which is returned with the amount unpaid; and the fact that the money is credited to the account of the correspondent bank on the books of the bank of deposit is immaterial. See *note* to Cutler v. American Exch. Nat. Bank (N. Y.) 4 L. R. A. 328.

A bank holding an assignment of a policy of insurance to collect it and pay certain claims, including one of its own, therefrom, and pay the balance to the insured or his order, cannot be held liable on an order which it has accepted to be paid out of the balance, if, in the exercise of reasonable diligence and in good faith, it has settled the suit to collect the insurance for the amount merely of its own claim, after notice to the person holding the order who made no move or proposition to prosecute the suit. Meyer v. Farmers & T. Bank, 77 Iowa, 388.

Where a check was sent to a company for collection, of which fact the drawee was advised by the indorsement upon it, and the collecting company received the money from the drawee, and, prior to the time of the discovery of the fraudulent character of the check, gave the money to the company from which it was received for collection, the collecting company is not liable to the drawee as for money paid by mistake. National City Bank v. Westcott, 118 N. Y. 468.

The plaintiff may rely on the restrictive indorsement made by its agent, the People's Bank, although it had indorsed the drafts in blank.

Sweeny v. *Easter*, 68 U. S. 1 Wall. 166 (17 L. ed. 681); *Wilson* v. *Holmes*, 5 Mass. 543; *Bank of Washington* v. *Triplett*, 26 U. S. 1 Pet. 25 (7 L. ed. 37); *Lawrence* v. *Stonington Bank*, 6 Conn. 521; *Ayer* v. *Hutchins*, 4 Mass. 370.

"For the use of" or "For the account of" the indorsee, or equivalent words, is the simplest and most direct way of expressing a restrictive indorsement, and such has universally been their construction.

Snee v. *Prescot*, 1 Atk. 245, 249; *Rice* v. *Stearns*, 3 Mass. 225, 227; *Merchants Nat. Bank* v. *Hanson*, 33 Minn. 40; *Treuttel* v. *Barandon*, 8 Taunt. 100; *Wilson* v. *Holmes*, 5 Mass. 543; *Leary* v. *Blanchard*, 48 Me. 269; *White* v. *Miners Nat. Bank*, 102 U. S. 658 (26 L. ed. 250); *Lawrence* v. *Fussell*, 77 Pa. 460.

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

The indorsement from the defendant to the People's Bank, although in terms unrestricted, was without consideration, and merely for the purpose of collection. The People's Bank became the agent of the defendant, and the defendant, as owner of the drafts, can avail itself of all that its agent did for its protection. The subsequent indorsements through which the drafts came to the plaintiff were both restrictive, giving notice that the ownership had not passed beyond the People's Bank. They purported to be made only for the purpose of collection on account of the owner, and they merely passed the legal title so far as to enable the indorsees to demand, receive and sue for the money to be paid. *First Nat. Bank* v. *Smith*, 132 Mass. 227.

It is well settled that upon such an indorsement the owner may control his negotiable paper until it is paid, and may intercept the proceeds of it in the hands of an intermediate agent. *Manufacturers Nat. Bank* v. *Continental Bank*, 148 Mass. 553, 2 L. R. A. 699, and cases there cited.

The indorsement of the Penn National Bank, taken in connection with the former indorsement of the People's Bank, did not by the words "For account of Penn Bank," imply that the Penn Bank was the owner. It was a request to pay "For account of" the Penn Bank as agent of the People's Bank. An unbroken succession of such indorsements would indicate that each indorsee was acting by the direction of the next preceding indorser who was himself an agent of the owner who had before indorsed and for whom the collection was to be made.

Nothing was shown in the course of business of either of the banks necessarily to conflict with the implication to be derived from the form of the indorsements. The letter of the People's Bank, in which the drafts were sent to the Penn Bank, was simply, "We inclose for collection and credit" the drafts, describing them. The Penn Bank in its reply said, "We enter for collection" the drafts described, "to be used when paid." The drafts when received by the Freeman's Bank were entered upon its collection book, but have never been entered upon its account current, or upon any other book of account to the credit of the Penn Bank.

It has so long been held by the courts that an indorsement of this kind is restrictive, protecting the rights of the owner, that officers of banks must be presumed to have well understood the law, and, when they have honored overdrafts drawn by other banks which had sent paper for collection, must have done it trusting in part to the financial soundness of their correspondent, and in part to the probability that the drafts would be paid, and not to a supposed legal right to control the drafts against the owner. *Rice* v. *Stearns*, 3 Mass. 225, 227; *Wilson* v. *Holmes*, 5 Mass. 543; *Treuttell* v. *Barandon*, 8 Taunt. 100; *Sigourney* v. *Lloyd*, 8 Barn. & C. 622; *Leary* v. *Blanchard*, 48 Me. 269; *Sweeny* v. *Easter*, 68 U. S. 1 Wall. 166 [17 L. ed. 681]; *Bank of Washington* v. *Triplett*, 26 U. S. 1 Pet. 25 [7 L. ed. 37]; *Lawrence* v. *Stonington Bank*, 6 Conn. 521; *Bank of Metropolis* v. *New England Bank*, 42 U. S. 1 How. 234 [11 L. ed. 115], 47 U. S. 6 How. 212 [12 L. ed. 409].

One who collects commercial papers through the agency of banks must be held to impliedly contract that the business may be done according to their well-known usages so far as to permit the money collected to be mingled with the funds of the collecting bank. *Dorchester & M. Bank* v. *New England Bank*, 1 Cush. 177.

When a payment is made to his agent and the money is put with the money of the collecting bank he has a right to receive a corresponding sum, but he loses his right to the specific fund. In the absence of directions to the contrary, the collecting bank may pay it to the bank to which it should regularly be remitted, by setting it off against a debt due from that bank and giving credit for it in the account.

Very likely authority to collect would authorize the receipt of the money from the payor before maturity if he saw fit then to pay, and remittances afterwards made, whether by actual transmissions of money or by a set-off and adjustment of accounts in the usual way, would be good against the owner. In the present case no collection was made, for payment was stopped before the draft became due. The plaintiff had no right to advance the Penn Bank $7,000, or any other sum, on account of the defendant. Its only authority was to transmit or pay by adjustment and set-off money which it received for the defendant.

We are of opinion that upon the facts reported, the action cannot be maintained.

Judgment for the defendant.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF NEW YORK.

Thomas C. COOPER
v.
Philip D. ARMOUR *et al.*

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

1. An action for malicious prosecution will not lie in favor of one against whom an accusation has been preferred before a magistrate charging a criminal offense, if he was not apprehended and no process for his arrest was issued.

2. Although an action for libel or slander may be maintained in such case if the accusation was made with no bona fide intention of prosecuting it, yet an action brought for malicious prosecution cannot be retained and treated as one for libel and slander if the defamatory words are not set out in the complaint.

(April 16, 1890.)

ACTION to recover damages for an alleged malicious prosecution. On plaintiff's motion for a new trial. *Denied.*

Defendants filed an information against plaintiff before a police justice, and made application for a warrant for plaintiff's arrest, for the alleged crime of forgery in the second degree. The justice subpœnaed witnesses to appear before him and be examined to determine whether or not the warrant should issue. Counsel appeared for the respective parties and the proceedings were conducted with all the formality of a regular trial. The justice finally refused to issue the warrant, and plaintiff thereupon brought this action to recover damages for the alleged malicious prosecution.

The action was brought on for trial before *Judge* Wallace and a jury, and the judge directed a verdict for defendants.

The plaintiff thereupon filed this motion for a new trial.

Messrs. **Ward & Cameron,** for plaintiff, in support of the motion:

Defendants inflicted a great injury on plaintiff and are liable therefor in damages in an action on the case.

See *Smith* v. *Smith*, 20 Hun, 555.

There was an actual and technical prosecution.

McCardle v. *McGinley*, 86 Ind. 538, 44 Am. Rep. 343; *McPherson* v. *Runyon* (Minn.) 40 Alb. L. J. 403; *Smith* v. *Smith*, 20 Hun, 555; *Clarke* v. *Postan*, 6 Car. & P. 423; Stephens, Mal. Pros. Wood's ed. p. 8; Addison, Torts, §§ 852, 856; Townshend, Slander and Libel, p. 700, § 422; *Weston* v. *Beeman*, 27 L. J. N. S. Exch. 57.

"To put the criminal law in force maliciously and without any reasonable or probable cause, is wrongful" for which an action will lie for malicious prosecution.

Addison, Torts, §§ 852, 856; Stephens, Mal. Pros. Wood's ed. p. 5; *Clarke* v. *Postan*, *supra; Dawson* v. *Vansandau*, 11 Week. Rep. 516; Townshend, Slander and Libel, § 422, p. 700.

It is not necessary in order to maintain this action for malicious prosecution, to show there was any interference with the person or property of the plaintiff.

McPherson v. *Runyon*, *supra; McCardle* v. *McGinley*, 86 Ind. 538, 44 Am. Rep. 343.

It is not essential to the maintaining of this action that a warrant, summons or other process should actually have been issued.

Smith v. *Smith*, *supra;* Addison, Torts, § 859; Stephens, Mal. Pros. Wood's ed. p. 8.

Messrs. **Stedman, Thompson & Andrews,** for defendants:

In an action of malicious prosecution the gravamen of the charge is that the plaintiff has improperly been made the subject of legal process to his damage.

Newfield v. *Copperman*, 47 How. Pr. 87; *Lawyer* v. *Loomis*, 3 Thomp. & C. 393; *Stewart* v. *Sonneborn*, 98 U. S. 187 (25 L. ed. 116); *Wetmore* v. *Mellinger*, 64 Iowa, 741, 30 Alb. L. J. 55; *Muldoon* v. *Rickey*, 103 Pa. 110, 29 Alb. L. J. 457; *Heyward* v. *Cuthbert*, 4 McCord, L. (S. C.) 354; *Kneeland* v. *Spitzka*, 10 Jones & S. 470; *O'Driscoll* v. *McBurney*, 2 Nott & McC. 54; *Gregory* v. *Derby*, 8 Car. & P. 749.

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

The question in this case is whether an action for malicious prosecution will lie against the defendants who have preferred an accusation before a magistrate charging the plaintiff with a criminal offense, notwithstanding the plaintiff was not apprehended and no process for his arrest was issued by the magistrate.

The gist of the action of malicious prosecution is the putting of legal process in force, regularly, for the mere purpose of vexation or injury; and the inconvenience or harm resulting, naturally or directly, from the suit or prosecution, is the legal damage upon which it is founded. Some of the text-writers state that the action will lie whenever the defendant has made a charge of felony against the plaintiff with a view to induce a magistrate or tribunal to entertain it, whether any warrant or other process was issued or not. Stephens, Mal. Pros. Wood's ed. p. 8; Addison, Torts, § 856.

Actions have been maintained in the nature of conspiracy for procuring a false indictment, and even for preferring a false charge of crime upon which the grand jury refused to indict; but the only decisions cited in support of the proposition that the action of malicious prosecution will lie although a criminal proceeding has not actually been instituted by the issuing of process, where the point actually arose, are in the *Nisi Prius* case of *Clarke* v. *Postan*, 6 Car. & P. 423, and in the case of *Dawson* v. *Vansandau*, 11 Week. Rep. 516, in which, although no process was issued, the plaintiff was taken into custody and held for examination upon the charge. On the other hand it was said by Patterson, *J.*, in *Gregory* v. *Derby*, 8 Car. & P. 749, where there was a charge of stealing upon which a warrant was issued against the plaintiff, "that if the party was never apprehended no action would lie; and in *O'Driscoll* v. *McBurney*, 2 Nott & McC. 54, 55, it was said: "There can be no prosecution without an arrest."

The only injury sustained by the person accused when he is not taken into custody and no process has been issued against him is to his reputation; and for such an injury the action of libel or slander is the appropriate remedy, and would seem to be the only remedy. This is the view adopted by Hare & Wallace in their *notes* to American Leading Cases (vol. 1, p. 173); and the learned commentators state that slander or libel is the only appropriate remedy where a charge of felony has been made and a warrant was not thereupon issued, and that malicious prosecution, and not slander or libel, is the remedy whenever a warrant has been issued. The question was fully considered by the Supreme Court of South Carolina in *Heyward* v. *Cuthbert*, 4 McCord, L. 354, whether an action for malicious prosecution would lie founded on a criminal charge upon which no process was issued against the accused, and it was adjudged that it would not. In that case the charge was in the form of an information laid before the magistrate to procure a warrant for the arrest of the plaintiff. To the same effect is the case of *Kneeland* v. *Spitzka*, 42 N. Y. Super. Ct. [10 Jones & S.] 470, where the question was decided in an appellate court.

In the early case of *Ram* v. *Lamley*, Hutt. 113, it was held that an action of slander could not be maintained for an oral charge of felony made to a justice of the peace upon an application for a warrant against the plaintiff, for the reason that if words so spoken were to be held actionable "no other would come to a justice of the peace to inform him of a felony." A defamatory statement spoken or written in a legal proceeding, civil or criminal, which is pertinent and material, is so unqualifiedly privileged that its truth cannot be drawn into question or malice predicated of it in an action for slander or libel. *Revis* v. *Smith*, 18 C. B. 126; *Lea* v. *White*, 4 Sneed, 111; *Garr* v. *Selden*, 4 N. Y. 91; *Hawk* v. *Evans*, 76 Iowa, 593.

If upon considerations of public policy such an action cannot be maintained, upon the same considerations no other action should lie. Without doubt libel or slander will lie for an accusation to a magistrate when made with no bona fide intention of prosecuting it. Unless such facts can be shown by the person accused, or unless he is subjected to the vexation and expense of process against him, upon principle he ought not to be allowed to recover.

The more generally approved doctrine is that for the prosecution of a civil action maliciously and without probable cause, to the injury of the plaintiff, he may maintain an action for damages although there was no interference with his person or property. *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, 56 Am. Rep. 77; *Allen* v. *Codman*, 139 Mass. 136; *Marbourg* v. *Smith*, 11 Kan. 554; *Woods* v. *Finnell*, 13 Bush, 629; *Pope* v. *Pollock* (Ohio) 4 L. R. A. 255; *McCardle* v. *McGinley*, 86 Ind. 538, 44 Am. Rep. 343; *McPherson* v. *Runyon* (Minn.) 40 Alb. L. J. 403; *Smith* v. *Smith*, 20 Hun, 555.

The cases however which sustain this view do not countenance an action when the vexatious suit has not been actually instituted and prosecuted to such effect that the plaintiff has sustained pecuniary loss.

Inasmuch as the defamatory words, which must be set forth in an action for slander or libel, are not alleged in the present complaint, the case cannot be treated as an action for slander or libel.

The motion for a new trial is denied.

CALIFORNIA SUPREME COURT.

George A. CASE, *Respt.*,
v.
SUN INSURANCE CO., *Appt.*

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

The time for bringing suit on an insurance policy which provides that no suit or action shall be commenced unless within twelve months next after the fire, and also provides that a claim on the policy shall be due and payable sixty days after full completion by the assured of certain requirements of the policy, does not elapse with the expiration of the twelve months after the fire, where a cause of action has not then accrued by completion of such requirements, if the company has insisted on, and the insured has complied with, them as rapidly as he was able.

(March 26, 1890.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff, and from an order denying a motion for a new trial, in an action to recover the amount alleged to

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NOTE.—*Fire insurance; limitation of action on policy.*

A condition in a policy of insurance, that an action cannot be maintained upon the policy unless commenced within twelve months after the loss, is valid. Riddlesbarger v. Hartford F. Ins. Co. 74 U. S. 7 Wall. 386 (19 L. ed. 257); Ohio v. Western Assur. Co. 65 Miss. 532.

The condition is not fulfilled by a previous action commenced within that period, which was dismissed. Riddlesbarger v. Hartford F. Ins. Co. *supra*.

The statute of a State which allows a party who suffers a nonsuit in an action to bring a new action for the same cause within one year afterwards does not affect the rights of the parties in such case. *Ibid.*

The disability to sue imposed by the war relieves the assured wholly from the consequences of failing to bring suit within twelve months after the loss, as required by his policy. Semmes v. City F. Ins. Co. 80 U. S. 13 Wall. 158 (20 L. ed. 490).

Where a policy provides that no action shall be commenced after a year, and that lapse of time shall be taken as conclusive evidence against the validity of the claim, any statute of limitation to the contrary notwithstanding, the statute relative to the bringing of a second action within a year

be due under a policy of fire insurance. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. **Rhodes & Barstow** for appellant.

Messrs. **Haggin, Van Ness & Dibble,** for respondent:

Until full compliance with the provision of the policy, and the expiration of sixty days thereafter, right of action upon the policy did not accrue.

May, Ins. § 476; *Doyle* v. *Phœnix Ins. Co.* 44 Cal. 264.

The limitation clause does not apply in those cases in which, without fault on the part of the assured, and by reason of the acts of the Company, the right of action does not accrue within a year subsequent to the fire.

Friezen v. *Allemania F. Ins. Co.* 30 Fed. Rep. 352; *Vette* v. *Clinton F. Ins. Co.* Id. 668; *Ellis* v. *Council Bluffs Ins. Co.* 64 Iowa, 507; *Longhurst* v. *Star Ins. Co.* 19 Iowa, 364; *Stout* v. *City F. Ins. Co.* 12 Iowa, 371; *Barber* v. *Wheeling F. & M. Ins. Co.* 16 W. Va. 675; *Owen* v. *Howard Ins. Co.* 87 Ky. 571; *Killips* v. *Putnam F. Ins. Co.* 28 Wis. 472; *Martin* v. *State Ins. Co.* 44 N. J. L. 485; *Little* v. *Phœnix Ins. Co.* 123 Mass. 389; *Barnum* v. *Merchants F. Ins. Co.* 97 N. Y. 188; May, Ins. §§ 486, 487.

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

The policy upon which this action is based contains, among others, the following clause: "It is mutually agreed that no suit or action for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until appraisement shall be had, if demanded by this Company, and in accordance with the printed conditions of this policy, nor unless such suit or action shall be commenced within twelve months next after the fire shall occur." The fire is alleged to have occurred on the 12th day of September, 1884; and this action was commenced on the 22d day of November, 1885, more than twelve months next after the fire occurred.

The contention of appellant is that at the time of the commencement of the action it was barred by the terms of said stipulation. That contention must prevail unless the clause upon which it is based is modified by some other clause or clauses of the policy. One clause reads as follows: "The amount of loss or damage to be estimated according to the actual, cash, marketable value of the property at the time of the loss, which in no case shall exceed what it would then cost to replace the same, deducting therefrom a suitable amount for any depreciation of such property by reason of age, wear and tear, location, change of style, lack of adaptation to profitable use or other causes. The adjusted claim under this policy shall be due and payable at the company's office in San Francisco, Cal., sixty days after the full completion by the assured of all the requirements herein contained."

Among the requirements therein contained were the following: "The assured, his, her and their agents and servants, shall, whenever required, submit to an examination or examinations, under oath, by any person appointed by this Company, and subscribe to such examinations when reduced to writing, and shall also produce their books of account and other vouchers, and exhibit the same for examination at the office of this Company in San Francisco as often as required, and permit extracts and copies thereof to be made. The assured also shall produce certified copies of all bills and invoices the originals of which have been lost, and shall exhibit all that remains of the said property, damaged or not damaged, for examination, to any person or persons named by this Company, and shall also furnish such further particulars, and such certificates of a magistrate or officer charged with the duty of investigating fires, as may be required. The proofs of loss shall be made by the party insured in regular form."

It is alleged and proven that appellant exacted a compliance by the assured with all of these requirements, and that the insured complied therewith as rapidly as he was able to, and that he was unable to fully comply therewith before the 16th day of October, 1885,—more than thirteen months after the fire occurred, and more than one month after the expiration of the time within which an action could be commenced, according to the construction which the appellant's counsel insist should be given to the policy. The adjusted claim under the policy was payable sixty days after the full completion of the assured of all the requirements contained in the policy. No right of action accrued until more than three months after it was barred by the twelve-months' limitation clause, unless that clause is modified by some other clause.

In *Spare* v. *Home Mut. Ins. Co.*, 9 Sawy. 142, 17 Fed. Rep. 568, the court, Deady, *J.*, said: "On the authority of adjudged cases (*Davidson* v. *Phœnix Ins. Co.* 4 Sawy. 594; *Riddlesbarger* v. *Hartford Ins. Co.* 74 U. S. 7 Wall. 389 [19 L. ed. 259]; May, Ins. § 478), it is admitted by counsel for the plaintiff that this clause in the policy limiting the time within which a suit may be commenced thereon against the defendant is valid, but they contend that it must be read in connection with that other clause which provides

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after a reversal of the first is inapplicable. Hocking v. Howard Ins. Co. 130 Pa. 170.

Under the Iowa Statute, which provides that no action on a policy of insurance shall be brought within ninety days after notice of loss, anything in the policy or contract to the contrary notwithstanding, any provision in the policy is controlled by the Statute, and receiving proofs of loss and claiming that the policy is void cannot be regarded as a waiver of the provisions of the Statute. Vore v. Hawkeye Ins. Co. 76 Iowa, 548.

The limitation clause in a policy, followed by a clause against a waiver of any conditions unless expressed in writing signed by the president or secretary of the company, are waived by a course of conduct of the company which induces insured to believe that the loss would be adjusted and paid without suit. Dwelling-House Ins. Co. v. Brodie (Ark.) 4 L. R. A. 458, and cases cited on p. 460.

A condition, in a policy of life insurance, that suit shall be brought within six months from date of death, does not apply where the superintendent of the defendant company, before expiration of the time to sue, has promised to pay the money. Metropolitan L. Ins. Co. v. Dempsey (Md.) April 18, 1890.

that a loss does not become payable until sixty days after the proof of that fact is made; and that, taken together, the reasonable construction of them is that, the right to sue on the policy being postponed until the loss is payable, namely, sixty days after proof thereof, the twelve-months' limitation upon such right does not commence to run until that time. This construction is supported by the decided weight of authority and in my judgment is correct on principle. *New York* v. *Hamilton F. Ins. Co.* 39 N. Y. 45; *Hay* v. *Star F. Ins. Co.* 77 N. Y. 241; *Barber* v. *Wheeling F. & M. Ins. Co.* 16 W. Va. 658; *Chandler* v. *St. Paul F. & M. Ins. Co.* 21 Minn. 85; *Steen* v. *Niagara F. Ins. Co.* 89 N. Y. 315; *Killips* v. *Putnam F. Ins. Co.* 28 Wis. 472; May, Ins. § 479.

"In *Steen* v. *Niagara F. Ins. Co.*, 89 N. Y. 323, the policy contained two similar conditions; and the court, in construing them, said: 'We think the intention of the defendant was to give the insured a full period of twelve months, within any part of which he might commence his action; and having, by postponement of the time of payment, secured itself from suit, it did not intend to embrace that period within the term after the expiration of which it could not be sued. In other words, the parties cannot be presumed to have suspended the remedy and provided for the running of the period of limitation during the same time. Indeed, the actual case is stronger; not only was the remedy postponed, but the liability even did not exist at the time of the fire, nor until it was fixed and ascertained according to the provisions of the policy. Having thus made the doing of certain things, and a fixed lapse of time thereafter, conditions precedent to the bringing of an action, the parties must be deemed to have contracted in reference to a time when the insured, except for that contract, might be in a condition to bring an action. Under any other construction the two conditions are inconsistent with each other.'"

This case is distinguishable from *Garido* v. *Am. Cent. Ins. Co.* (Cal.), 8 Pac. Rep. 512, in which the plaintiff had ample time after his right of action accrued to have commenced it within twelve months after the loss occurred. In this case it was more than twelve months after the fire before an action could be commenced. We must concede, however, that *Garido* v. *Am. Cent. Ins. Co.*, *supra*, is not altogether in harmony with the cases which we follow in this case. Under the construction which we give to the policy, we think the complaint states a cause of action not barred by the provisions of the policy; and the evidence is sufficient to justify the verdict of the jury

Judgment and order affirmed.

We concur: **McFarland, *J.*; Thornton, *J.***

MINNESOTA SUPREME COURT.

Susan B. WILLARD
v.
Andrew J. FINNEGAN.

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

***1. A sale, under a power in a mortgage,** in gross as one parcel, of several separate and distinct tracts of land, is not void, but only voidable, for good cause shown, as that it was the result of fraud, or that prejudice resulted to the mortgagor or owner of the equity of redemption.

2. A. executed a mortgage to M., and subsequently conveyed to W. M. foreclosed his mortgage, and purchased the property at the sale. Neither A. nor W. redeemed from the sale, but a redemption was made by F., as a judgment creditor of A., who obtained a certificate of redemption. But before F. redeemed A. duly tendered him the amount due on his judgment, which he refused to accept. *Held*, that, as be-

Head notes by MITCHELL, *J.*

NOTE.—*Power of sale in mortgage.*

A power of sale coupled with an interest cannot be revoked by a mortgagor, and his death cannot defeat or suspend the right to execute the power. Hudgins v. Morrow, 47 Ark. 515; Way v. Mullett, 3 New Eng. Rep. 200, 143 Mass. 49.

The provision of the Montana statutes, that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable an owner of the mortgage to recover possession of the real property without foreclosure and sale," does not prevent giving to the mortgagee a power to sell the premises upon default. First Nat. Bank v. Bell Silver & Copper Min. Co. 8 Mont. 32.

It does not follow from the possession of a power of sale by the grantee in a deed absolute on its face, but in fact a mere security, that the power is to be exercised otherwise than by foreclosure. Pearson v. Sharp, 7 Cent. Rep. 494, 115 Pa. 254.

A power of sale in a mortgage or deed of trust may be so limited that a sale under the power cannot be made, and yet there may be a remedy by foreclosure. Davis v. Bessehl, 4 West. Rep. 61, 88 Mo. 439.

The sale of premises under such power will operate as a foreclosure. Way v. Mullett, 3 New Eng. Rep. 200, 143 Mass. 49.

Such sale cuts off the equity of redemption as effectually as a sale under a decree of foreclosure, leaving in the mortgagor nothing but a statutory right of redemption. Gassenheimer v. Molton, 80 Ala. 521.

The purchaser of a mortgage containing a power of sale cannot foreclose the same by advertisement under the statutes of Dakota, unless a written assignment of such mortgage has been first duly executed, acknowledged and recorded. Hickey v. Richards, 3 Dak. 345.

A purchaser purchases at the peril of the sale being void, if a material condition precedent to the exercise of the power does not exist. Hence a purchaser from a trustee under a deed of trust made to secure the payment of certain notes which had been previously paid, and the deed of trust having by its terms thereby become void, takes no title. Temple v. Whittier, 5 West. Rep. 144, 117 Ill. 282.

A mortgagee who becomes the purchaser at his own sale thereby arms the mortgagor with the option, if seasonably expressed, to disaffirm the sale

tween F. and W. (who had no interest in the property), the redemption was valid; that M., the purchaser at the mortgage sale, alone could raise the question whether the tender discharged the lien of F's judgment, so as to terminate his right to redeem.

(February 7, 1890.)

APPEAL by plaintiff from a judgment of the District Court for Hennepin County dismissing the complaint, and from an order denying a motion for a new trial, in an action brought to determine an adverse claim made by defendant to certain real estate to which plaintiff claimed title. *Affirmed.*

APPEAL by defendant from a judgment of the District Court for Hennepin County determining that he had no right to redeem certain real estate from a mortgage sale thereof, and that he had no valid title thereto. *Reversed.*

The case sufficiently appears in the opinion.

Mr. **L. E. Stetler,** for plaintiff:

The sale of the land under the mortgage as an entire tract was unauthorized and absolutely void and the sheriff's certificate of sale void on its face, and Michael Maloney acquired no title to the premises by reason thereof.

Hull v. *King*, 38 Minn. 349.

Mr. **A. D. Smith,** for defendant:

A mere tender, even if kept good, will not extinguish or pay the debt itself. It merely stops costs; it does not even suspend the remedy against the debtor, or any remedy or legal right which the creditor may have as appurtenant to the debt in the form in which it may happen. *A fortiori* a tender does not discharge a judgment.

Jackson v. *Law*, 5 Cow. 248; *Law* v. *Jackson*, 9 Cow. 641; *People* v. *Beebe*, 1 Barb. 379.

The foreclosure of the property in dispute was regular and legal, and passed the title to Michael Maloney, subject to the right of redemption.

Bottineau v. *Ætna L. Ins. Co.* 31 Minn. 125–128; *Vawter* v. *Crafts* (Minn.) June 4, 1889. See also *Abbott* v. *Peck*, 35 Minn. 499.

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

Action to determine an adverse claim of defendant to real property of which plaintiff alleges she is the owner. The defendant denies plaintiff's title, alleges that he is the owner, and asks that it be so adjudged. Plaintiff's title depends upon the validity of a sale, under a power, on a mortgage executed by her grantor, one Abbott, to the Maloneys. Defendant's title depends upon a redemption by him, as a judgment creditor of Abbott, from the sale on the Maloney mortgage. The facts are that Abbott executed to the Maloneys a mortgage on a piece of land according to government description, then constituting a single tract; but subsequently he platted the land, dividing it into urban lots and blocks, the Maloneys not joining in the plat. Under these facts the Maloneys would doubtless have had the right to sell the entire premises as one tract, as it was described in their mortgage; at least, in the absence of a request that the sale be in separate parcels, by one interested in the property, who had some equitable right to have it sold in that way in order to protect his interests. *Johnson* v. *Williams*, 4 Minn. 260 (Gil. 183); *Paquin* v. *Braley*, 10 Minn. 379 (Gil. 304); *Abbott* v. *Peck*, 35 Minn. 499.

But where the mortgagor, subsequent to the mortgage, divides the premises into separate tracts, as by platting it into lots and blocks, the mortgagee has the right to adopt this division, and sell the property, as the Maloneys did in this case, as lots and blocks, according to the descriptions in the plat. But, if he does so, properly he should sell the different tracts according to the plat separately; whereas, in the present instance, although described in the notice of sale according to the plat as separate lots and blocks, all were sold together for one gross sum. This, it is claimed, rendered the sale absolutely void. The Statute provides

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without regard to its fairness or adequacy of price; and when the sale is set aside, the decree relates back to the sale, and the parties are in the same position as if no sale had been made. Gassenheimer v. Molton, 80 Ala. 521.

Where a third party purchases for the benefit of the mortgagee, the sale is not absolutely void, but voidable only. Nichols v. Otto (Ill.) Jan. 21, 1890.

Requisites to validity of sale.

A sale under a power contained in a mortgage may be set aside for insufficient notice. Dickerson v. Small, 1 Cent. Rep. 497, 64 Md. 395.

A foreclosure sale under a power in the mortgage is not invalidated by the omission of the names of the mortgagor and mortgagee in the advertisement of sale. Cogan v. McNamara, 16 R. I.——, Index EE, 52.

An advertisement of a sale under a power contained in a mortgage which required publication of notice in some newspaper in the County of Providence, Rhode Island, was not insufficient because it appeared in a newspaper published at a place in the county other than one of two certain cities in which the record of the mortgage erroneously required notice to be published. *Ibid.*

The non-observance of a custom among auctioneers to place notices upon doors or windows of houses for sale, stating the time and place of sale, is not sufficient to set aside a sale made under a power in a mortgage. Chilton v. Brooks, 69 Md. 584.

The provision of the Montana statute for "thirty days' notice" of a sale under a power in a mortgage, by publishing once a week for three weeks successively, does not require that all three publications shall be thirty days before the sale, but only that the first one shall be. First Nat. Bank v. Bell Silver & Copper Min. Co. 8 Mont. 32.

A sale of mortgaged real property under a power is not invalid because the notice of sale does not sufficiently describe certain personal property also covered by the mortgage, especially where such description is as full as that in the mortgage. *Ibid.*

That the record of a mortgage incorrectly states the place of publication of the notice of sale will not avoid the notice, if the publication is made as provided in the mortgage. Cogan v. McNamara, *supra.*

A sale of land, under a power in a mortgage, for $1,000 or more below the market value of the property, will be set aside where it was purchased by the mortgagee, and the sale was made on a day when the weather was so inclement as to prevent purchasers from attending. Chilton v. Brooks, *supra.*

that, "if the mortgaged premises consist of separate and distinct farms or tracts, they shall be sold separately." Gen. Stat. 1878, chap. 81, § 9.

Whether a sale, contrary to the Statute, renders it absolutely void, or only voidable where it is made to appear that there was fraud, or that the disregard of the Statute resulted in actual prejudice to the mortgagor or owner of the equity of redemption, is a question upon which there is some conflict of authority, at least in the case of non-judicial sales. As early as *Tillman* v. *Jackson*, 1 Minn. 183 (Gil. 157), it was held that a similar provision as to sales on execution was only directory, and that a violation of it by the sheriff would not invalidate the sale. This case, having stood apparently unquestioned for twenty-three years, was followed and recognized as having become a rule of property in *Lamberton* v. *Merchants Nat. Bank*, 24 Minn. 281, in which this court held that a sale on execution in gross, as one parcel, of several distinct and separate tracts of land not lying in a body, is not void, but might be vacated for cause shown, as that it was the result of actual fraud, or that prejudice resulted to the owner from it, or that there was no just ground for making the sale that way. This decision was followed by the United States Circuit Court for the District of Minnesota, and the same rule applied in the case of a mortgage sale under a power. *Swenson* v. *Ballberg*, 1 McCrary, 96, 1 Fed. Rep. 444.

If this doctrine had become a rule of property thirteen years ago, it certainly is so yet, never having been, in the mean time, either overruled or questioned. There is no room for any distinction between sales on execution and sales under a power. Neither are judicial sales. A sale by a sheriff on an ordinary execution is a mere ministerial one, made by the officer by the naked authority of the writ and the requirements of the Statute. A sale under a power contained in a mortgage is made by the mortgagee or his agent pursuant to the convention of the parties. Viewed from a practical stand-point, we think the better rule is that a sale contrary to the Statute is merely voidable when fraud, prejudice or other good cause for vacating it is shown. The reasons in its favor given in *Cunningham* v. *Cassidy*, 17 N. Y. 276, although used with reference to a judicial sale, are equally applicable to one under a power. The consequences of a contrary rule would be disastrous. A great many titles would be open to question and doubt. The inquiry whether the land sold consisted in fact of separate and distinct tracts would often be attended with great difficulty. The question would be one of fact, dependent upon evidence *dehors* the record, and perhaps often doubtful or conflicting. The validity of titles ought not to be made dependent upon such extraneous facts. Our conclusion is that the mortgage sale was valid, and there having been no redemption from it by either Abbott, the mortgagor, or the plaintiff, his grantee, it follows that the latter has no interest in the property. This disposes of her appeal.

2. Defendant, a judgment creditor of Abbott, duly filed his intention to redeem, and seasonably produced to the sheriff, who made the sale, the proper proof of his right to redeem, paid to such officer the proper amount of money, and received from him a certificate of redemption. The court, however, made what, for present purposes, we may assume was a finding that before defendant made this redemption Abbott made to him a good and legal tender of the amount due on the judgment, which defendant arbitrarily refused to accept. It was on this ground that the learned judge decided adversely to the defendant, holding that this tender operated as a payment of the judgment, or at least as a discharge of its lien, so that he could not afterwards "use it for redemption purposes." Whether, as between defendant and Maloney, the purchaser at the mortgage sale, this proposition is correct or not we need not inquire. It is a question that plaintiff is in no position to raise. Maloney alone can raise it, as he alone is interested in it. Defendant has made a redemption in fact which is good on its face. At most, it is merely voidable, at the election of Maloney, on account of the existence of an extrinsic fact. The redemption is good as against the plaintiff, who has no interest in the property. Maloney is not a party to this action, and consequently his interests cannot be adjudicated or in any way affected. A judgment in this case, adjudging that defendant is the owner of the property, will only determine that he is such as between him and the plaintiff, and to such a judgment he is entitled upon the facts found. Upon his appeal, therefore, the order of the trial judge is reversed, and the cause remanded, with directions to render judgment in his favor as prayed for in his answer.

Affirmed on plaintiff's appeal, and reversed on defendant's appeal.

KANSAS SUPREME COURT.

John WALLACE *et al.*, *Plffs. in Err.*,
v.
Joseph EVANS.

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

***A party who built a dam,** causing the back water to fill a ravine across which ran a public highway, made a causeway composed of logs, brush, stone and earth at the place where the public highway ran across the ravine, and made a better way than existed before the construction of the dam. The public used it, and it was for a time maintained and repaired by the overseer of highways of the road district. *Held*, that the owner of the dam was not chargeable with its maintenance and repair, and was not liable for the value of mules whose death was occasioned by the causeway being out of repair.

*Head note by SIMPSON, C

(April 4, 1890.)

ERROR to the District Court for Norton County to review a judgment in favor of plaintiff in an action to recover damages for the loss of certain mules which was alleged to have resulted from the obstruction by defendants of a public highway. *Reversed.*

Commissioner's opinion.

The facts are fully stated in the opinion.

Messrs. **L. H. Thompson** and **C. D. Jones,** for plaintiffs in error:

Although Wallace built the dam in question and caused the water to back up into a natural ravine crossing the highway, yet if he left the highway in as good condition as he found it, he had performed all that law or justice required of him.

Venard v. *Cross*, 8 Kan. 260; *State* v. *Cummerford*, 16 Kan. 507; *State* v. *Raypholtz*, 32 Kan. 454; *Missouri, K. & T. R. Co.* v. *Long*, 27 Kan. 684.

The embankment built across the ravine was a bridge as defined by 1 Bouvier's Law Dictionary, p. 222.

By the common law counties are chargeable with the repair of all public bridges unless they can show that other persons are bound to repair particular bridges.

1 Wait, Act. and Def. § 3, p. 731.

The corporation, for whose exclusive benefit a bridge is made over a highway, must keep it in repair, and is liable for injuries caused to third persons in consequence of its being out of repair.

Dygert v. *Schenck*, 23 Wend. 446; *Heacock* v. *Sherman*, 14 Wend. 58; *Perley* v. *Chandler*, 6 Mass. 454.

A bridge, though erected by individuals, yet if dedicated to the public, used by the public and found to be of public utility, must be repaired by the public.

State v. *Campton*, 2 N. H. 513; *Requa* v. *Rochester*, 45 N. Y. 129, 6 Am. Rep. 52.

Mr. **John R. Hamilton,** for defendant in error:

Where the owner of land over which a public highway passes digs a raceway across the road and builds a bridge across the same, and an injury is sustained by anyone in consequence thereof, such owner is liable to any person so injured for damages.

4 Bl. Com. p. 6; *Dygert* v. *Schenck*, 23 Wend. 446.

Such bridge must be kept in repair by him who built it.

Heacock v. *Sherman*, 14 Wend. 58.

This is not a case where the bridge or crossing was voluntarily built. They created the necessity for such crossing, which makes a different rule applicable. They created and maintained a nuisance by obstructing a highway, and are liable for any damages as a result thereof.

Gen. Stat. chap. 89, § 17; 2 Dillon, Mun. Corp. 3d ed. §§ 710, 1032-1035, 1060.

Plaintiffs in error were the creators and maintainers of the nuisance, and they could not shift the liability for any damage which might occur by reason thereof upon the public, who cannot be made liable.

Eikenberry v. *Bazaar Twp.* 22 Kan. 556; *West Bend* v. *Mann*, 59 Wis. 69.

Simpson, *C.*, delivered the following opinion:

The plaintiff below brought his action to recover the sum of $400, the alleged value of a pair of mules, and $200 as exemplary damages. He alleged that in August, 1882, Wallace constructed a dam across a creek that caused the water to fill up a ravine across which ran a public highway that had been located, opened and traveled long before the construction of the dam; that the water had flowed into the ravine until, at the time complained of, it was ten feet deep, and was a hazardous and dangerous obstruction to travel on said highway; that Wallace had sold said dam to Railsback, who, at the time the injury occurred, owned and maintained said dam; that on the 9th day of September, 1885, the plaintiff, with his team of mules, was traveling on said highway with no knowledge of the dangerous condition thereof at the place it crossed the ravine, and that in attempting to cross said ravine his two mules were drowned in the water flowing into said ravine by reason of the construction of said dam. The defendants demurred to the petition, and their demurrer was overruled. They then answered, alleging, among other things, that, at the time the dam was built they caused a safe and suitable embankment to be made of brush, earth and other material across said ravine, on the line of said highway, thereby making a safe and suitable crossing; that this crossing was turned over to the road district, and accepted by it, and these defendants were released from any further liability, or any obligation to keep up and maintain said crossing. They also plead contributory negligence. Cause tried at April Term, 1887, to the court, who rendered a judgment for $400, a motion for a new trial being overruled. Wallace and Railsback bring the case here. They claim that the trial court erred in overruling their demurrer to the petition and evidence; that the right of action is barred by the Statute of Limitations, as the dam was constructed under § 14, chap. 66, Comp. Laws 1885; that there was a misjoinder of parties defendant; that there was an obligation resting on the road district to maintain the crossing and keep it in repair; that the evidence shows contributory negligence.

1. The petition in this case alleges that the place at which the loss occurred to the plaintiff below was a public highway, and alleges an obstruction thereof that was the cause of the loss of the mules. The erection of a dam caused the water to fill up a ravine across which the public highway ran. The man who built the dam constructed across the ravine an embankment of stone, logs, brush and earth, that made a good, safe and reliable crossing as long as it was maintained in the condition in which it was constructed. It was shown at the trial that the road overseer had caused work to be done thereon, and that for some years it was constantly used and reasonably safe. Wallace, one of the plaintiffs in error, built the dam and the embankment, and after owning the mill property, including the dam, for about one year, sold and conveyed it to one Page, who subsequently sold it to Railsback, the other plaintiff in error, who owned the dam at the time of the loss of the mules. On this state of facts it must be apparent that no liability can possibly attach to

Wallace for the loss. Putting this question in the strongest possible attitude for the defendant in error, and assuming for that purpose that the erection of the dam and the back water in the ravine was a continuing nuisance, yet still Railsback and not Wallace is responsible for the damages occasioned by it. When Wallace sold the dam, and someone else purchased it and assumed all liability, there seems to be no point of view in which Wallace could be held longer responsible. The judgment against him is wrong.

2. To constitute an obstruction to a public highway, it must appear that the public travel by reason thereof is actually hindered and endangered. No private action can be maintained if the obstruction continues and becomes a common nuisance on account of the nuisance *per se;* but if any individual suffers a more special injury than any other, from the continuance of such a nuisance, he has his action therefor. All this is alphabetical law, and affords a sure basis upon which the argument in the case must rest. The controlling question in this case is, Who is responsible for the care and repair of the highway at the point where it crosses the ravine? It is as much a part of the highway as any other portion of its length or breadth. The people at large have the right to the free and uninterrupted use of it, not upon the sufferance of the men who built the embankment, but as a matter of right. It has been held that, if a man builds a bridge that is useful to the public in general, it is the duty of the public authorities to repair it, notwithstanding it may be of benefit to the builder: *Rex* v. *West Riding of Yorkshire*, 5 Burr. 2594; *Heacock* v. *Sherman*, 14 Wend. 58; *Requa* v. *Rochester*, 45 N. Y. 129; Thompson, Highw. 3d ed. 12.

If a bridge is erected over a natural stream by a man for his own benefit, and it is of public utility, and is used by the public, the public is bound to keep it in repair; for in such case, although the bridge is of advantage to the man who built it, he did not create the necessity for it. *Dygert* v. *Schenck*, 23 Wend. 446.

Where a person erected a mill and dam for his own profit, and by so doing deepened the water of a ford, through which there was a public highway, but the passage through which, before the deepening, was very inconvenient, and the miller built a bridge over it, and the public used it, and the miller had repaired it, the court held that the county, and not the miller, was chargeable with the repair. *Rex* v. *Kent Co.* 2 Maule & S. 513.

All public bridges are prima facie reparable by the public. Most, if not all, of the earlier cases that have any bearing on this question make this distinction: If the bridge is built by a private person, and it is manifestly to the interest of the public to use it, and they do use it, and the way is better than it was before the bridge was built, the public are chargeable with its repair; but, if the improved way is not better than it was before, the public receives no benefit. This is certainly a very liberal interpretation of the law, so far as the public are concerned. If the principle of these cases is applied to the facts developed on the trial of this case, there can be no recovery against Railsback, as the duty to keep the crossing in repair is devolved upon the road district. Our statutory enactment, requiring railroad corporations to restore to its former condition any public highway it may cross in the course of its construction, seems to have this principle in view. This court, construing this provision, holds that when a railroad company restores the crossing of a public highway to the condition that existed at the time of the construction of its line across the highway, the railroad company is under no obligation thereafter, under this provision, to maintain it in a safe and sufficient state of repair. *Missouri, K. & T. R. Co.* v. *Long*, 27 Kan. 684.

It can be said that it is the Statute that relieves the railroad company from the liability to maintain the highway after it has been restored to its former condition, and that there is no statute that operates in favor of the defendants in error. While it is true that the courts in this country have almost universally refused to hold the public to a common-law liability to repair public highways, the statutes of every State establish their liability, and this is so universal that prima facie they must be chargeable therewith; but the question in this case is, Has not the public, by its acceptance and use of this road-way, and by its control and repair, assumed the liability? It cannot be successfully contended that this particular fill or causeway across the ravine is not a part of the public highway. The public has the absolute control of it. The man who built it has no right to obstruct it. If he lives in that road district, he can be compelled to contribute money or labor to its maintenance and repair. The moment he finished its construction it became a part of the public highway, and his control ceased for every purpose. It then necessarily became the statutory duty of the road district to keep it in repair. The record discloses that at the place where these plaintiffs in error filled the ravine they made a better and safer road-way than existed before. It is shown that it was used for some years by the public. There is some evidence tending to show that the road overseer of the district caused work to be done on it, and at times repaired it. It is not shown that it was located on the land, or that it was erected for the personal benefit of either of the plaintiffs in error. This case was tried and decided upon the theory that both Wallace and Railsback were chargeable with the maintenance and repair of a public highway, and this was error. We recommend that *the judgment be reversed, and a new trial granted.*

Per Curiam:
It is so ordered.
All the Justices concur.

FLORIDA SUPREME COURT.

L. B. SKINNER *et al.*, *Appts.*,
v.
W. B. HENDERSON *et al.*, Commissioners of Hillsborough County.

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

*1. **Under the Constitution and laws of this State a county cannot impose taxes** except for county purposes, and the building of a bridge in a county within the corporate limits of a municipality in which the county outside of those limits is in nowise interested, the same being for the sole benefit and advantage of the municipality, is not a county purpose.

2. **Where an injunction is sought against a county** to prevent the appropriation of its revenues to aid in the building of a bridge in a city, and the allegations of the bill are that the bridge is on a city street, and not a county road or highway, and that the county outside of the city is nowise interested in it, and that it is for the sole benefit and advantage of the city, it was error to sustain a demurrer to the bill.

3. **But the Statute authorizing the city to build bridges within its limits does not necessarily revoke** the authority given to the county by General Statute, without restriction as to locality, to build a bridge within those limits. As there may be bridges serving only a city purpose, so there may be others demanded in the same territory for county purposes; and where the circumstances create this demand, and the bridge is for the use and benefit of the people of the county at large or of some considerable portion of them, and intended and needed as well for those outside as for those inside the city, the authority of the county to build it is not annulled by the local city statute.

4. **The circumstances of each case must determine the line of authority,** even where there is assent of the municipal government; but in case of conflict between municipal and county officials, it would seem that the county should give way, in deference to the general policy against one jurisdiction clashing with another.

5. **If a county may build a bridge** within the limits of a municipality when the circumstances suit, it may also aid the municipality in building one under like circumstances, even though it is to be constructed under a contract with the municipality, and is to be under its control.

(May, 1890.)

APPEAL by plaintiffs from a decree of the Circuit Court for Hillsborough County dismissing the bill in a suit brought to enjoin defendants from applying county revenues towards the building of a bridge within the City of Tampa. *Reversed.*

The facts are fully stated in the opinion.

Mr. **William Hunter** for appellants.

Messrs. **Sparkman & Sparkman** for appellees.

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

The City of Tampa, in Hillsborough County, made a contract with a certain bridge company for the construction of a bridge within the corporate limits of the city across Hillsborough River. The cost of construction was to be $13,800. Upon petition to the County Commissioners of the County by the citizens of Tampa, and application in behalf of the city by the president of its council, said Commissioners ordered an appropriation of $4,600 towards the construction of the bridge, to be paid by the County, this amount being one third of the contract price for its construction, and contributed on the understanding that it should be a free bridge. Thereupon appellants filed a bill against the County Commissioners (appellees), praying that they be enjoined from paying out said amount for the construction of the bridge.

Besides the foregoing facts stated in the bill, it alleges, among other things immaterial here, that complainants are citizens and taxpayers of the County of Hillsborough; that the Commissioners levied a tax for the year 1887 for general revenue purposes, which will produce a large surplus, and that they did this for the purpose and with the intent of assisting the City of Tampa "to build a bridge across Hillsborough River on Lafayette Street, which is a city street, and not a county road or highway," and said bridge "is to be entirely and exclusively under the jurisdiction and control" of said city; that the County "outside of said City of Tampa, is in nowise interested in the building of said bridge, and that the same is for the sole benefit and advantage of said city;" that the County "receives no consideration" for said appropriation; that "said bridge, being wholly within the corporate limits of said city, is entirely a municipal improvement, and the expense thereof should be defrayed entirely by said city; that the revenues collected from your orators by county taxation are not levied for the purpose of making such improvements in . . . Tampa, or any other municipality, and cannot be legally expended for such purposes, as the building of said bridge in said city is not a "county purpose" within the meaning of the Constitution.

The defendant demurred to the bill for want of equity, and the demurrer was in effect sustained, though the ruling and order thereon were irregular—the order being "that the injunction be denied and the bill dismissed." Then appellants entered an appeal, but no point has been made here on this irregularity.

It is contended by appellants that the money proposed to be expended by the Commissioners to aid in the building of the bridge is not for a "county purpose," and that they have no authority to appropriate money raised by taxation for the County to any other purpose. As to their authority this is clearly correct. The Constitution (§ 5, art. 9) provides that the "Legislature shall authorize the several counties and incorporated cities or towns in the State to assess and impose taxes for county and municipal purposes, and for no other purposes." What is a county purpose, as distinguished from a municipal purpose, is a question arising here from the fact that the City of Tampa is a part of the County of Hillsborough,

*Head notes by MAXWELL, J.

and from the further fact that the County is authorized by statute to build bridges in the County without restriction as to locality, and that the city is authorized by its charter to build bridges within its corporate limits—both having authority for the same purpose there, if that given to the city does not exclude its territory from the domain within the jurisdiction of the County for such purpose. Confining ourselves to the allegations of the bill, it appears that the building of the bridge is wholly a matter belonging to the City of Tampa. The contract for building was its contract. The highway on opposite sides of the river, to be connected by the bridge, is alleged to be a city street, and not a county highway, and it is further alleged that the County outside of the city is in no wise interested in the building of the bridge, and that the bridge is for the sole benefit and advantage of the city, being wholly within its corporate limits, and entirely a municipal improvement. These facts, taken as true under the demurrer, show that the expenditure on the bridge would be for a city, and not a county, "purpose." They do not present the question, whether the County can build, or aid in building, a bridge in the city under any circumstances; or, in other words, whether the jurisdiction of the city entirely excludes the county from its territory for such work. If the Constitution will permit requirements of the county in its highways and in the interest and convenience of all its citizens to affect this question, so as to allow concurrent authority where the work will serve both a county and city purpose, that cannot determine the case here in its present shape. As there may be bridges in a city altogether for local convenience, for aught that appears before us the one in question may be of that class. The bill avers that it is. We know judicially that Tampa is the county seat of Hillsborough, and that outside of Tampa there is habitable territory on both sides of Hillsborough River; but these relations of the County to the city do not of themselves authorize the former to enter the latter for any work that answers only a city purpose, such as the bill alleges of this bridge. If allowed to enter at all, it must be for work that answers a county purpose—that is, work for the use and benefit of the people of the County at large, or of some considerable portion of them, and intended and needed as well for those outside as for those inside the city. The bill does not show that the bridge is a work of this kind, but on the contrary shows only such facts as bespeak a work for merely city use and benefit. We think the County Commissioners are not authorized to aid in such a work, and that their demurrer to the bill should have been overruled.

While this conclusion decides the case upon the present record, we find in the argument of appellant's counsel, and in that of counsel for appellees, a full discussion of the question, whether the legislative grant of authority to the City of Tampa to build bridges within its corporate limits does not intercept the general authority for that purpose given to the county, so far as the territory of the city is concerned—the counsel for appellants insisting that it does, and the counsel for appellees that it does not. Anticipating that in the further progress of the case below, this question may be more pertinently presented, our views on it now will not be out of place.

The theory of appellants is that the officials empowered to act in the management of county affairs have no authority to expend money they raise by taxation for county purposes in building bridges within the corporate limits of any municipality in the County. Whether they have or not is the question to be solved. It is admitted for appellants that if the County has the right to build the bridge, it would likewise have right to appropriate for a part of the expense, but insisted that if it could not pay in whole, it could not pay in part. Then, the problem is, Can the county officials under their general authority, and notwithstanding the special authority of the city, go into the city to build a bridge, or to act in conjunction with the city for that purpose? The rulings on this question are diverse, but they all agree that it depends on constitutional provision or legislative enactment applicable in the particular case, with general principles of law to interpret or construe these. We have mentioned all there is in the Constitution and laws of this State on the subject. Counties cannot expend money except for county purposes; and where a county and municipality cover the same ground, there is nothing which expressly directs what each may do respectively in the line of its authority. The nearest approach to any decision on the question in this State is in the case of *State* v. *Putnam Co.*, 23 Fla. 632, where it was held that the establishment of a municipality on territory over which passes part of a public road established by the road authorities of the county, does not of itself abolish the road as a public highway, nor revoke or suspend the powers and duties of those authorities in regard to it. The court was careful to go no further. But in this decision it appears that a county may, under some circumstances, have powers and duties touching highways in a city or town, for the proper exercise and enforcement of which it can be held responsible, and the same would be true of a bridge similarly situated.

There may be distinctively municipal purposes in respect to bridges within a corporation, as where a small stream, purely local, and having no connection with county highways, should be bridged for the convenience of citizens of the corporation; and it is conceivable that there may also be county purposes in the same respect therein, as where the bridge connects public highways of the county, and is of use and importance to the citizens of the county, irrespective of residence in the corporation, and especially if the court-house of the county is in the corporation. It would seem but just and reasonable in such case that the county should take or share the burden of furnishing to the public the convenience of the bridge. In this connection it is worthy of observation that all the taxpayers of the county, those in municipalities not excepted, are required to contribute to the revenue of the county for bridge purposes, without reference to residence. If residing in a municipality they must pay a bridge tax for any and every locality inside or outside thereof, if in the county; while if not residing in a municipal-

ity, if appellants' view is correct, they cannot be taxed for a bridge therein, though for a county purpose. It should not be assumed, and in the absence of assumption there is no reason to hold, that such inequality of tax burden was intended to be imposed. This involves relieving the county from the burden when a county purpose is to be subserved in a municipality, but holding the municipality liable for both county and municipal burden, whether in or out of the corporate limits. The palpable injustice of this is most striking. It is nothing more nor less than imposing a double burden upon municipal citizens, one of which is a burden for a county purpose within the municipality, and exempting other citizens of the county from any burden for such purpose, although interested in common in the object to be attained.

We hence conclude that the special authority given to any municipality to build bridges within its limits does not necessarily supersede the general authority given to the county. But as there may be a municipal purpose in which the county has no concern, and a county purpose in which all are alike, though perhaps not equally, interested, the circumstances of each case must determine the question of authority. And it seems to us that this would be so even where there is assent of the municipal government. Whether that authority should be exercised in the event of conflict between the two bodies is not involved in this case, as the city and county are in accord in the building of the bridge. In cases where such conflict would arise, we are inclined to the opinion that the County should give way, in deference to the general policy against one jurisdiction clashing with another.

As we have said, the authorities differ on the main question under discussion. But much of this difference grows out of the difference in statutes that govern. We will not undertake a review of the cases, but content ourselves with citing those which sustain the views we have expressed. In Ohio it is held that if there is nothing in the Act incorporating a town which limits the power of the county commissioners to establish a county road through or within its corporate limits, that power still exists. *Wells* v. *McLaughlin*, 17 Ohio, 99; *Butman* v. *Fowler*, Id. 101. In Connecticut (*Norwich* v. *Story*, 25 Conn. 44), it is held that the charter of a city conferring power on its common council to lay out new highways, etc., did not devest the county court of the jurisdiction given by statute for the same purpose. A similar ruling in Iowa is valuable as coming from *Judge* Dillon, one of the most eminent of American jurists and law authors now living, and valuable also as having been announced in an opinion which fully discusses the subject—*Bell* v. *Foutch*, 21 Iowa, 119. See also *Barrett* v. *Brooks*, Id. 144.

There is this difference, however, between our statutes and the statutes of Iowa: that while the authority to the counties to build bridges is the same, our statute gives authority to the City of Tampa to establish and regulate bridges within its limits, while that in Iowa (General Act) gives to cities and towns "care, supervision and control of all public . . . bridges . . . within the city, and shall cause the same to be kept open and in repair," etc. But the reasoning on which it is held that the counties are not devested of authority to build bridges in cities is equally applicable to both, with proper modification, giving due weight here to the authority of counties to act for "county purposes." We think the doctrine of these cases is to be preferred under the system established by our Constitution and statutes.

The cases cited for appellants, and maintaining the position that county revenues cannot be expended under a contract to which the county is not a party, do not seem to us to have the force attributed to them here. *Colton* v. *Hanchett*, 13 Ill. 615, simply decides that where legislative authority is given to an individual to build a toll bridge, the county officials cannot appropriate county funds to aid in its construction, because no law of the State authorizes such appropriation. If the view on which we rest our opinion, that in this State a county may build a bridge in a municipality to meet a county purpose, is correct, there is law here to authorize county appropriation of money therefor, and the authority is none the less existent because the appropriation is in aid of a municipal contract to build the bridge, if a county purpose is thereby advanced. Why should not a county expend money to aid in building a bridge, when it has authority to pay the whole expense of building it. If there is anything in the *Colton-Hanchett Case* that seems to make a distinction, it goes beyond the controversy there, for it was a case where the authority to build the bridge was not in the county officials, and of course, therefore, they could not aid therein. The other case (*Atty-Gen.* v. *Bay Co.* 34 Mich. 46), was one where county supervisors undertook to appropriate money for township roads, leaving to the townships to say to what roads it should be applied. It was held this could not be done, partly because the county board had no occasion to raise money for other than its own roads, and partly because there was no definition of purposes, as the expenditure was to be under the direction of the town officer. As to the first ground, that is fully met in this case, if the bridge answers a county purpose, and, as to the second, there is no indefiniteness of purpose to which the money is to be applied. But the court says in the case that "taxes and loans, when authorized to be raised by any public body, must be raised under the implied condition that they are to be applied to the public uses under the control or care of that body. They cannot be raised for the purposes or uses of others, unless such a power is plainly given." It will be seen, upon scrutinizing the case, that this and other similar language of the opinion applied to the action of county supervisors in respect to roads under the supervision of township supervisors, when by the statute their action was limited to "state and territorial roads."

The distinction between that case and the present is obvious. As in that it was held that county revenues could not be used for township roads, so in this we hold that county revenues cannot be used for city bridges as such, but in that the money was being applied to roads not "state and territorial," and not embraced within any authority of the county

supervisors; while in this, if the conditions suit, it will be applied to an authorized "county purpose." It does not seem reasonable that in all cases there is such necessary connection between the expenditure of money for public uses and the control ordinarily resulting from such expenditure, as to prevent the expenditure when made for a lawful purpose, because in accomplishing that purpose it is done in a way to relieve from the control that entails further liability.

It is no objection to our conclusion, as applicable to the case at bar, if it can be shown that the bridge answers a county purpose, as distinguished from a local city purpose, that the bridge was to be constructed under a contract with the city, and that the city will have control of the same, and must bear the responsibilities connected with it. This will be that much better for the County. So far as it is said to be objectionable on the ground that the appropriation by the County is towards the payment of a debt of the city, the bridge being built under a contract with the city, that is met by the fact, if found to exist, that the appropriation is for a county purpose, and would be in effect a payment of its own obligation. And so far as it is said to be objectionable on the ground that the ownership and control of the bridge will be in the city, that is met by the admission, connected with our view as to the authority of the County to build the bridge itself if thereby serving a county purpose, that if "the County would have a right to build the bridge, it would likewise have a right to appropriate for a part of it." As to responsibility for proper care and repair of the bridge, we express no opinion. But if the County discharges a duty in the attainment of a county purpose in such manner as to be relieved from further responsibility in the matter, this furnishes no reason against the validity of its action. We are to understand that in making the appropriation the Commissioners acted, not as aiding the city in a work with which they had no concern, but as performing a primary duty of their own under the power vested in them to build bridges in the County. The reservation they made that the bridge would be a free one, was to guard against restrictions in its use which would not be within the scope of their authority, and was a proper consideration for joining in the work.

Under our conclusion it will be for the defendants to determine, upon existing facts of the situation, whether they will further resist the injunction.

The decree is reversed, with leave to them to answer, if they should deem it advisable.

INDIANA SUPREME COURT.

Mary J. LOGAN, *Appt.*,
v.
Lewis V. STOGDALE.

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

1. The condemnation of land for a private way cannot be authorized by the Legislature; hence the Act of March 9, 1889, which attempts to do so, is void.

2. The circuit court has jurisdiction of a proceeding to establish a way of necessity over the land of another, since the Act of March 9, 1889, which attempted to confer jurisdiction of such proceedings upon the board of county commissioners, is unconstitutional.

NOTE.—*Eminent domain; right of.*

It is for the Legislature to determine the necessity which exists for the use of the property proposed to be taken. See *note* to Moore v. Sanford (Mass.) 7 L. R. A. 151.

But when the question arises whether the use for which it is sought to be condemned is really a public one, it must be determined by the courts without any regard to a legislative declaration that the use is public. Kansas City v. Baird, 98 Mo. 215; Sadler v. Langham, 34 Ala. 311; Stockton & V. R. Co. v. Stockton, 41 Cal. 147; Consolidated Channel Co. v. Central Pac. R. Co. 51 Cal. 269; Young v. Harrison, 6 Ga. 130; Parham v. Decatur Co. Justices, 9 Ga. 341; Bankhead v. Brown, 25 Iowa, 540; Loughbridge v. Harris, 42 Ga. 501; New Cent. Coal Co. v. George's Creek Coal & I. Co. 37 Md. 537; Talbott v. Hudson, 16 Gray, 417; *Re* St. Paul & N. P. R. Co. 34 Minn. 227; Savannah v. Hancock, 8 West. Rep. 248, 91 Mo. 54; Dickey v. Tennison, 27 Mo. 373; Dayton G. & S. Min. Co. v. Seawell, 11 Nev. 394; St. Louis Co. Ct. v. Griswold, 58 Mo. 175; Scudder v. Trenton D. F. Co. 1 N. J. Eq. 694; Coster v. Tide Water Co. 18 N. J. Eq. 54; *Re* Deansville Cemetery Asso. 66 N. Y. 569; Harris v. Thompson, 9 Barb. 350; Concord R. Co. v. Greely, 17 N. H. 47; McQuillen v. Hatton, 42 Ohio St. 202; Pittsburgh v. Scott, 1 Pa. 309; Anderson v. Turbeville, 6 Coldw. 150; Tyler v. Beacher, 44 Vt. 648; Varner v. Martin, 21 W. Va. 534.

The question of the necessity for the exercise of the right of eminent domain, and in what cases it shall be exercised, is legislative, and not judicial; the questions whether the use to which it is sought to appropriate property is a public use, and whether the power is delegated to the corporation, are subjects of judicial determination. Chicago & E. I. R. Co. v. Wiltz, 4 West. Rep. 121, 116 Ill. 449.

Although the determination of the Legislature is not conclusive that a purpose for which it directs property to be taken is a public use, yet it is conclusive, if the use is public, that a necessity exists which requires the property to be taken. Moore v. Sanford (Mass.) 7 L. R. A. 151.

Private roads; way of necessity.

There is a way by necessity, where another cannot be got or made without reasonable labor and expense; and, in determining the question, the jury may consider the comparative value of the land and the probable cost of such way, and that the word "necessary" cannot be limited to absolute physical necessity. But yet the way must be necessary, and the facts of each case must determine whether it or any other easement thus claimed is necessary. It must be more than one of mere convenience, or one beneficial and convenient, and is only commensurate with the existence of the necessity upon which the implied grant of it is founded, and ceases when the necessity for it ceases. Marvin v. Brewster Iron Min. Co. 55 N. Y. 553; Screven v. Gregorie,

See also 25 L. R. A. 502; 40 L. R. A. 105; 47 L. R. A. 79.

3. A grantee of land across which a prior grantee from the same grantor has the right to a way by necessity takes it subject to such right, although it had been neither exercised nor claimed before his title was acquired.

(April 23, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Grant County sustaining a demurrer to the complaint in an action brought to establish a way of necessity over defendant's land. *Reversed.*

The facts fully appear in the opinion.

Messrs. **W. H. Carroll** and **G. Dean** for appellant.

Messrs. **H. Brownlee** and **H. J. Paulus** for appellee.

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

The appellant, in her complaint, describes a tract of land of which she is the owner, and alleges that the appellee is also the owner of a parcel of land which she particularly describes. In addition to the allegations referred to the complaint contains the following: That in the year 1878, Enos Key was the owner of both parcels of land; that in January of that year he sold to the plaintiff the land she owns; that he subsequently sold and conveyed to the appellee's grantor the land now owned by the appellee; that both of the parties to this action hold under Enos Key; that the land of the plaintiff is surrounded on all sides by the lands of divers persons, including the land of the appellant; that the plaintiff's land is completely shut off from any highway; that it is impossible to go to the plaintiff's land without passing over adjoining land; that the appellant refuses to permit the plaintiff to pass over his land to a highway, and for the purpose of preventing her from passing over his land has erected high and strong fences; that he threatens to sue her if she enters upon his land; that there are improvements on her land and her own home is there; that the best and shortest way to a highway is over the appellee's land and that the distance is sixty rods. The prayer is that the court shall establish for the plaintiff, as a way of necessity, a way to the highway across the land of the appellant. To this complaint a demurrer was sustained.

All that is presented in argument in defense of the ruling of the trial court by the appellee's counsel is that, under the Act of March 9, 1889, the action ought to have been brought in the court of the county commissioners, and that the circuit court has no jurisdiction of the subject. The appellant's counsel contend that the Act of March 9, 1889, is in violation of the Constitution and is therefore void.

The Act in question assumes to provide for the establishment of branch highways, and to give any freeholder who has no outlet to a highway the right to petition the board of county commissioners to establish a way. The Act provides that the owner of the land upon which it is proposed to establish a way may remonstrate on two grounds and no other; "*first*, that another convenient and less injurious route can be established over his said lands, or the lands of another; *second*, that the pro-

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8 Rich. L. 158; Alley v. Carleton, 29 Tex. 79; Ogden v. Jennings, 62 N. Y. 532; Holmes v. Seely, 19 Wend. 507; Nicholas v. Chamberlain, Cro. Jac. 121; Oakley v. Stanley, 5 Wend. 523; Tabor v. Bradley, 18 N. Y. 109; LeRoy v. Platt, 4 Paige, 77; French v. Carhart, 1 N. Y. 96; Voorhees v. Burchard, 55 N. Y. 98; Warren v. Blake, 54 Me. 276; Pierce v. Selleck, 18 Conn. 321.

Right of way by necessity arises from presumption of law that the parties did not intend that land to which the owner had no access should be retained or conveyed. Prowattain v. Philadelphia (Pa.) 2 Cent. Rep. 332.

This right of way by necessity may arise in favor of a parcel of land, when the same is surrounded by what has been the grantor's other land, or partly by this and partly by that of a stranger. Collins v. Prentice, 15 Conn. 39; Marshall v. Trumbull, 28 Conn. 183; Taylor v. Warnaky, 55 Cal. 350; Kuhlman v. Hecht, 77 Ill. 570; Trask v. Patterson, 29 Me. 499; Brice v. Randall, 7 Gill & J. 349; Bass v. Edwards, 126 Mass. 445; Kimball v. Cocheco R. Co. 27 N. H. 449; Lore v. Stiles, 25 N. J. Eq. 381; Wheeler v. Gilsey, 35 How. Pr. 145; New York L. Ins. & T. Co. v. Milnor, 1 Barb. Ch. 353; Tracy v. Atherton, 35 Vt. 52.

A right of way of necessity may be acquired over the land of another, although the road to which the way leads is not a county road, but a mere by-road open to the public. Cheney v. O'Brien, 69 Cal. 199.

The rule allowing a way of necessity preserves access, but does not give two modes of access and double right of way. Kings Co. F. Ins. Co. v. Stevens, 2 Cent. Rep. 430, 101 N. Y. 411.

Where a party acquires a new way by partition or otherwise the right of way by necessity ceases and becomes extinguished. Carey v. Rae, 58 Cal. 159; Abbott v. Stewartstown, 47 N. H. 230.

If it ceases to be a way of necessity, and becomes merely a way of convenience, it is extinguished. Seeley v. Bishop, 19 Conn. 128; Pierce v. Selleck, 18 Conn. 321; Gayetty v. Bethune, 14 Mass. 49; Viall v. Carpenter, 14 Gray, 126; Nichols v. Luce, 24 Pick. 102; Holmes v. Seely, 19 Wend. 507; Lawton v. Rivers, 2 McCord, L. 445; Screven v. Gregorie, 8 Rich. L. 158; Alley v. Carleton, 29 Tex. 78.

Petition for private road.

The power of locating a private road is entirely of a public nature, and a petitioner therefor having pursued the mode pointed out by the Code is entitled to the road as a matter of right. Douglas Co. v. Clark, 15 Or. 3.

The county has no authority to take a bond to indemnify it against expenses of its location and damages assessed thereon. *Ibid.*

A petition of a person asking for a "cartway leading from his dwelling and lands," stating that it "is the only practical way that petitioner can travel either to church, Sunday school or burying ground by wagon, buggy or cart," although informal, sufficiently alleges that he is "settled upon or cultivating land," and that the way is "necessary, reasonable and just." Warlick v. Lowman, 103 N. C. 122.

Where a person petitioning for a private way already has a private way, or by parol license an unobstructed way, across the land of another, his petition should be denied. Warwick v. Lowman, 104 N. C. 403.

A petitioner is not entitled to have a cartway simply upon the ground that no public road leads to his land, or because it will be more convenient for him to have it, but it must appear that it is necessary, reasonable and just, and that he resides on the land, and has no way to get to and from a public road without it. Burwell v. Sneed, 104 N. C. 118.

ceeding is wrongful, oppressive or malicious." Elliott's Supp. §§ 1539–1542.

It is evident from the provisions to which we have just referred, and from other provisions of the Act, that the Legislature intended to grant a freeholder who is shut off from a highway a right to secure a way across the land of another upon the payment of damages. It is not made essential that the way shall be one required by the public, for the whole scope and tenor of the Act indicate that it was intended to secure a right of way to private property owners. That this was the intention is evident from the introductory part of the first section wherein it is provided "that, whenever any freeholder of this State owning lands surrounded by the lands of others, and over which he must necessarily travel in order to reach his own lands, and there is no other outlet to the public road, shall petition the board of commissioners of the county in which the lands necessary to be traveled are situate for the location of a branch highway thereon, setting forth facts in his petition which shall be verified, such board, if it be satisfied that notice has been served upon the owner of such other lands, at least ten days before the meeting of the board at which such petition is to be presented, shall appoint three disinterested persons to view such highway."

The provision is an influential one, for it declares what the petition shall contain, and it is in harmony with other provisions of the Act, for all the influential provisions indicate and express an intention to authorize the seizure of property for private way. The provision as to what the petition shall show, the rigid and emphatic restriction of the questions that may be presented by the property owner whose land it is proposed to seize, and the provisions declaring what questions shall be tried, all combine to prove that the Act was intended to authorize the seizure of property for a private way, and to compel an unwilling property owner to yield his land for that purpose. It is impossible to construe the Act as one authorizing only the establishment of public roads, for it will bear no such construction. Nor is it possible to effect a separation of its provisions, for they are so blended that severance is impossible; and as the provisions are inseparable, the Act must be taken in its entirety. *Griffin* v. *State*, 119 Ind. 520; *State* v. *Indiana & O. O. G. & Min. Co.* 120 Ind. 575; *Baldwin* v. *Franks*, 120 U. S. 678 [30 L. ed. 766]; *Virginia Coupon Cases*, 114 U. S. 269 [29 L. ed. 185]; *Trade Mark Cases*, 100 U. S. 82 [25 L. ed. 550]; *United States* v. *Reese*, 92 U. S. 214 [23 L. ed. 563].

It is true that in the preamble and in some of the provisions in the body of the Act, there is an indirect assertion that the use for which authority is conferred to seize private property is a public one, but such an assertion, even if made in the clearest terms, cannot rescue the Act from condemnation, for it is not within the power of the Legislature to determine what is a public use within the meaning of the Constitution. Whether the use is a public one is a judicial question and not a legislative one. *Sadler* v. *Langham*, 34 Ala. 311; *Re Deansville Cemetery Asso.* 66 N. Y. 569; *Bankhead* v. *Brown*, 25 Iowa, 540; *Tyler* v. *Beacher*, 44 Vt. 648; *Re St. Paul & N. P. R. Co.* 34 Minn. 227; *Savannah* v. *Hancock*, 91 Mo. 54, 8 West. Rep. 248; *Concord R. Co.* v. *Greely*, 17 N. H. 47; *Rensselaer* v. *Leopold*, 106 Ind. 29, 3 West. Rep. 874.

A private use cannot be transformed into a public one by a mere legislative declaration.

As the Act assumes to authorize the seizure of the property of one citizen for the benefit of another, it cannot be upheld. Our own decisions declare that land cannot be seized for a private road, and they are well sustained by the decisions of other courts. *Wild* v. *Deig*, 43 Ind. 455; *Stewart* v. *Hartman*, 46 Ind. 331; *Sanxay* v. *Hunger*, 42 Ind. 44; *Blackman* v. *Halves*, 72 Ind. 515.

The doctrine of our cases is sanctioned by *Judge* Cooley, and many decisions asserting the same rule are cited by him. Cooley, Const. Lim. 5th ed. 657.

We are compelled to sustain the contention of the appellant, and adjudge the Act of March 9, 1889, to be void because it violates the provisions of the Constitution. As that Act is without force, the circuit court had jurisdiction of the subject, and the only question is whether the complaint states facts sufficient to constitute a cause of action.

In the case of *Anderson* v. *Buchanan*, 8 Ind. 132, the court quoted with approval from *Chancellor* Kent the following statement: "Thus, if a man sells land to another which is wholly surrounded by his own land, in this case the purchaser is entitled to a right of way over the other's ground to arrive at his own land." 3 Kent, Com. 420.

This is an apt illustration of the old and familiar doctrine of ways by necessity, and the doctrine has often been given effect by our decisions. *Steel* v. *Grigsby*, 79 Ind. 184; *Sanxay* v. *Hunger*, 42 Ind. 44; *Stewart* v. *Hartman*, 46 Ind. 331.

If the appellant's grantor had remained the owner of the land now owned by the appellee, it is clear that she would be entitled to a way, as of necessity, to the public road. *Kimball* v. *Cochecho R. Co.* 27 N. H. 448, 59 Am. Dec. 387.

A way by necessity exists by grant, and the grant is an implied one. *Nichols* v. *Luce*, 24 Pick. 102, 35 Am. Dec. 302.

The theory is that where land is sold that has no outlet, the vendor grants one over the parcel of which he retains the ownership. It results from this that a way of necessity cannot be successfully claimed over the land of a stranger, and if the appellant were asserting a right of way over a stranger's land she could not succeed. If the appellee occupies the position of a stranger, then the appellant must fail; but if he occupies the position as to her that the common grantor did before he parted with title, then she is entitled to the relief she prays. In our judgment, the appellee is in the position of his grantor in so far as the question before us is concerned, and must yield the appellant a right of way. As the law implied a grant at the time the common grantor conveyed to the appellant, and as that grant was prior to the conveyance to the appellee, the latter must carry into effect his predecessor's implied grant.

In *Taylor* v. *Warnaky*, 55 Cal. 350, both parties claimed, as do the parties before us,

through a common grantor, and it was held that the party whose land was surrounded was entitled to a way as of necessity across the land of the other. The decision in the case referred to is sustained by the doctrine, maintained by the ancient and the modern authorities, that the original grantor grants, as appurtenant to the parcel expressly conveyed, a way which will enable his grantee to obtain access to the corporeal property expressly conveyed to him. Both the corporeal property and the incorporeal right pass from the grantor at the same time, one as the inseparable incident of the other, and a subsequent grantee must necessarily take the land conveyed to him subject to the burden created by the implied grant.

Our ultimate conclusion is that the action was properly brought in the circuit court, and that such facts are stated in the complaint as require an answer.

Judgment reversed.

William MERRELL, *Appt.*,
v.
Rebecca A. SPRINGER.

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

The owner of a note which was, after maturity, surreptitiously taken, without his knowledge or consent, from his possession by its nominal payee and sold to a third party, may recover it from the purchaser although the latter paid value for it and had no notice of the defect in the title of his vendor.

(April 30, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Fayette County in favor of plaintiff, and from an order denying a motion for a new trial, in an action brought to recover possession of a certain promissory note. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. **R. Conner** and **H. L. Frost** for appellant.

Messrs. **G. G. Florea** and **J. H. Claypool** for appellee.

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

This was an action of replevin to recover the possession of a promissory note alleged to be the property of the appellee, and wrongfully detained from her by the appellant.

The only questions discussed by counsel in their respective briefs relate to the alleged error of the circuit court in overruling the appellant's motion for a new trial.

The evidence in the cause tends to prove that the appellee, in November, 1873, deposited with the maker of the note in controversy the sum of $25, and took a note therefor in the name of her son, Orin Springer, who was then about five years old. The note was taken in the name of her son for the reason that the husband of the appellee was much addicted to becoming intoxicated, and was in the habit of appropriating the appellee's property to his own use. To prevent him from obtaining possession of the money represented by this note it was taken in the name of the son, but was kept in the possession of the appellee. The note was renewed from time to time, covering other small deposits, until the 16th day of December, 1884, when the present note for $160 was executed. All the money represented by the note was the money of the appellee. In August, 1886, the son, without the knowledge or consent of the appellee, took the note from a bureau drawer in her possession, and sold it to the appellant.

The theory of the appellant was that the appellee, by making the note in controversy payable to her son, constituted him her trustee, and that as he assigned the note to the appellant, who had no notice of the secret trust between the appellee and her son, the appellant acquired a good title to the note. Acting upon that theory the appellant, at the proper time, prayed the court to give the jury the following instructions, viz.:

"3. If the plaintiff, Rebecca Springer, furnished all the consideration for the execution of the note in question, but had the same made payable to Orin Springer for the purpose and with the understanding that he should hold the legal title to the same in trust for her, and that he has never since the execution of said note transferred his title to the plaintiff; that the said Orin Springer, before the bringing of this suit, for a valuable consideration, by his indorsement in writing, assigned said note to the defendant, and that the defendant, at the time said note was transferred to him, had no knowledge that anyone except said Orin Springer had any interest in said note; and that he purchased the same in good faith and for a valuable consideration, relying upon the apparent title said Orin Springer had to said note,—then, in such case, you should find for the defendant.

"4. If said Rebecca Springer furnished all the consideration for the execution of the note in question, but had the same made payable to Orin Springer, and he has never since the execution of the same transferred his title to said note to the plaintiff, and the plaintiff took said note into her possession, and kept the same where said Orin had free and ready access to the same, and said Orin, without the knowledge or consent of said plaintiff, took said note into his possession, and the defendant in good faith and for a valuable consideration, and relying upon the apparent title thus conferred upon said Orin Springer, purchased said note of him without any knowledge of the claim of the plaintiff to said note; and the said Orin Springer, in pursuance of said purchase, on the 2d day of August, 1886, indorsed said note to the defendant,—then, in such case, you should find for the defendant."

The court refused to give these instructions, but instructed the jury as follows:

"8. If the jury believe that said Rebecca Springer furnished all the consideration for the note in question; that said note was made payable to her son, Orin Springer, by the direction of the said plaintiff, Rebecca Springer; that at the time of its execution it was placed in her hands, and that she never voluntarily parted

NOTE.—See Baldwin v. Ely, 50 U. S. 9 How. 580 (13 L. ed. 266), and note.

with the possession thereof, and that Orin Springer, the payee, got possession of said note surreptitiously, without the knowledge or consent of said Rebecca Springer, and while so holding the same he indorsed and transferred the same to the defendant Merrell, and the plaintiff, Rebecca Springer, before the commencement of this suit, demanded the possession of said note from the defendant Merrell, —in such case the plaintiff will be entitled to recover, although the defendant may have paid a valuable consideration therefor, and had no notice that said Orin Springer was not the owner of said note."

The note in controversy is not negotiable by the law-merchant, and was sold and assigned to the appellant after maturity. In such case the purchaser must inquire as to the title of his assignor, and as to the defenses against the note in the hands of the assignor. *Kastner* v. *Pibilinski*, 96 Ind. 229; *Sims* v. *Wilson*, 47 Ind. 226; *Robeson* v. *Roberts*, 20 Ind. 155; *Schafer* v. *Reilly*, 50 N. Y. 61; *Bush* v. *Lathrop*, 22 N. Y. 535.

It seems to be settled in this State that a purchaser of such a note can acquire no better title than that held by his vendor.

In *Summer* v. *Huston*, 48 Ind. 228, it was said by this court: "It is a familiar principle that no man can confer a greater interest in, or title to, personal property than he has himself, and this principle is as applicable to choses in action (paper governed by the law-merchant of course excepted) as to any other species of personalty. The principle that the purchaser of the legal title to real estate, without notice of an outstanding equity, takes it discharged of the equity, has no application in the case of the purchase of a chose in action. It is a general and well-settled principle that the assignee of a chose in action takes it subject to the same equity it was subject to in the hands of the assignor."

This was but a repetition of what was said in the case of *Robeson* v. *Roberts*, 20 Ind. 155. It was further said in this case that "an abuse of a trust can confer no rights on the party abusing it, nor on those who claim in privity with him."

To the same effect are *Sims* v. *Wilson*, 47 Ind. 226, and *Payne* v. *June*, 92 Ind. 252.

The doctrine that where one of two innocent parties must suffer, the party who put it in the power of the wrong-doer to perpetrate the wrong must suffer the loss, has no application to this case, for there is no evidence in the cause tending to contradict the evidence of the appellee that Orin Springer took the note from her bureau drawer without her knowledge or consent. See authorities above cited.

Under the rules as established by these cases we are constrained to hold that the court did not err in refusing to give the jury the instructions asked, and that the instruction given upon the subject now under consideration states the true rule.

This case is clearly distinguishable from the case of *Moore* v. *Moore*, 112 Ind. 149, 11 West. Rep. 229. In that case the party claiming title had indorsed and delivered the note then in dispute, with the intention of vesting in the assignee title, and it was correctly held that as the note had passed to an innocent purchaser for value, without notice of any fraud by which the assignment was procured, that the assignor was estopped from reclaiming the note from such innocent purchaser. That case rests upon the principle announced in *Parrish* v. *Thurston*, 87 Ind. 437, and *Curme* v. *Rauh*, 100 Ind. 247.

The appellant also discusses in his brief other questions appearing in the record relating to the admission and rejection of evidence. We have carefully examined these questions, as well as all others presented and discussed, but are unable to discover any error in the ruling of the circuit court.

Judgment affirmed.

Charles E. CATLIN, Receiver, etc., of Clapp & Davies, *Appt.*,
v.
WILCOX SILVER PLATE CO.

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

The right of a receiver appointed by a foreign tribunal to wind up an insolvent partnership situated within its jurisdiction, to take possession of money due to such partnership from domestic debtors, will not be recognized as against the claims of nonresident creditors of the insolvent partnership who have attached such money under the domestic laws after the appointment of the receiver but before he obtained actual possession of the money or an enforceable lien thereon, even although he has received a general assignment of the partnership property.

(April 29, 1890.)

APPEAL by intervenor from a judgment of the Circuit Court for La Porte County in favor of plaintiffs in an attachment suit brought to recover a debt due by the concern of which the intervenor was receiver out of money due such concern. *Affirmed.*

The facts are fully stated in the opinion.

Mr. **L. A. Cole,** for appellant:

Where two courts, of substantially concurrent jurisdiction, attempt to assert jurisdiction of the same matter, that court which takes the first step will retain the jurisdiction till the end, and the other cannot lawfully interfere. *Taylor* v. *Carryl*, 61 U. S. 20 How. 583 (15

NOTE.—*Foreign receivers.*

Receivers appointed in one jurisdiction are not entitled as of right to recognition in other jurisdictions. See *note* to Humphreys v. Hopkins (Cal.) 6 L. R. A. 793.

A receiver of partnership assets, appointed by a competent court of another State, may maintain an action in New Jersey to set aside a sale of the assets situate in New Jersey by one partner in fraud of the other, when there are no creditors of the firm and the only one to be benefited is the partner defrauded. Sobernheimer v. Wheeler (N. J.) Aug. 16, 1889.

The possession of a receiver appointed in one jurisdiction, of the personal property of a debtor taken by him under order of court, does not exempt it, when taken into another jurisdiction, from attachment by creditors therein, or give the receiver any right to hold the property against the claims of such attaching creditors. Humphreys v. Hopkins, 6 L. R. A. 792, 81 Cal. 551.

L. ed. 1028); *Freeman* v. *Howe*, 65 U. S. 24 How. 450 (16 L. ed. 749); *Buck* v. *Colbath*, 70 U. S. 3 Wall. 334 (18 L. ed. 257); *Heidritter* v. *Elizabeth Oil Cloth Co.* 112 U. S. 294 (28 L. ed. 729); *Senior* v. *Pierce*, 31 Fed. Rep. 625; *Melvin* v. *Robinson*, Id. 634; *Kohn* v. *Ryan*, Id. 636.

This principle is applicable in every respect to the case at bar. This debt was located in Illinois.

Story, Conf. L. 362 *a*, 363, 399, *note 3*, 400; *Connor* v. *Hanover Ins. Co.* 28 Fed. Rep. 549; *Guillander* v. *Howell*, 35 N. Y. 657, and cases cited; *Gale* v. *Carry*, 10 West. Rep. 838, 112 Ind. 39.

An open account is susceptible of assignment, so as to absolutely vest the title thereto in the assignee.

Patterson v. *Crawford*, 12 Ind. 241; *McFadden* v. *Wilson*, 96 Ind. 253.

The attaching creditor can only hold the garnishee for such interest as defendant had at the time the process was served.

2 Wade, Attachm. § 437; *Williams* v. *Pomeroy*, 27 Minn. 85; *Lewis* v. *Bush*, 30 Minn. 244; *Knisely* v. *Evans*, 34 Ohio St. 158; *Schuler* v. *Israel*, 27 Fed. Rep. 851; *Faulkner* v. *Hyman*, 2 New Eng. Rep. 181, 142 Mass. 53; *Butler* v. *Wendell*, 57 Mich. 62.

A court of chancery, having jurisdiction of the person, may for the benefit of creditors compel a debtor to execute such assignments or conveyances as will vest the title to such property in the assignee.

Mitchell v. *Bunch*, 2 Paige, 606; *Phelps* v. *McDonald*, 99 U. S. 298 (25 L. ed. 473); *Great Falls Mfg. Co.* v. *Worster*, 23 N. H. 462.

Messrs. **John H. Bradley, F. E. Osborne** and **W. B. Biddle**, for appellee:

The receiver acquired the property and effects of Clapp & Davies by operation of law by virtue of his appointment, or by an assignment *in invitum*, and, either way, he took no title or interest to or in any property beyond the limits of the State of his appointment.

Paine v. *Lester*, 44 Conn. 196; *Warner* v. *Jaffray*, 96 N. Y. 248; *Hibernia Nat. Bank* v. *Lacombe*, 84 N. Y. 367; *Rhawn* v. *Pearce*, 110 Ill. 350; *May* v. *First Nat. Bank* (Ill.) 7 West. Rep. 681; *Weider* v. *Maddox*, 66 Tex. 372.

The *situs* of this debt for the purpose of attachment and garnishment is in this State.

Smith's App. 104 Pa. 381; *Wyman* v. *Halstead*, 109 U. S. 654 (27 L. ed. 1068); *Owen* v. *Miller*, 10 Ohio St. 136.

Where creditors intervene the right of the receiver is always denied until such claims are satisfied.

Willitts v. *Waite*, 25 N. Y. 577; *Hurd* v. *Elizabeth*, 41 N. J. L. 1; *Lycoming F. Ins. Co.* v. *Wright*, 55 Vt. 526.

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

The question for decision arises upon the following facts:

Clapp & Davies, partners doing business in the City of Chicago, were indebted to certain judgment creditors residing in that city. They were also indebted to the Wilcox Silver Plate Company, and others, who were residents of the State of Connecticut. At the same time Bagley & Oberreich, partners, residing and doing business at La Porte, Indiana, were indebted in a considerable sum to Clapp & Davies. One of the judgment creditors instituted proceedings in chancery against the latter firm, by filing a creditor's bill in the Superior Court of Cook County. In aid of its jurisdiction in the proceeding thus instituted, that court appointed the appellant, Catlin, receiver, and by an order made on the 14th day of April, 1887, required Clapp & Davies to execute a general deed of assignment transferring all their partnership property and effects to the receiver. Subsequently, in the month of June, the Wilcox Silver Plate Company instituted a suit in attachment in the La Porte Circuit Court against Clapp & Davies, and summoned Bagley & Oberreich to answer as garnishees. The other Connecticut creditors became parties to this last proceeding under § 943, Rev. Stat. 1881. Thereupon Catlin, as receiver of the Superior Court of Cook County, intervened by leave of the La Porte Circuit Court, and asserted the right, in virtue of his appointment as receiver and the assignment made to him, to take and hold the debt due Clapp & Davies, from Bagley & Oberreich.

The controversy, as will appear, involves the right to the fund in the hands of the garnishee-defendants, and the question presented is, Are the rights of the nonresident attaching creditors paramount, in the courts of this State, to those of the receiver of the Superior Court of Cook County, whose appointment antedates the issuing of the writ of attachment? The solution of the question depends upon the extent of power which a court of general jurisdiction, sitting in one State, can exercise over property whose actual *situs* is within the jurisdiction of the courts of a foreign State.

A receiver is nothing more than an officer or creature of the court that appoints him. His acts are those of the court, whose jurisdiction may be aided, but in no wise enlarged or extended, by his appointment. His power is only co-extensive with that of the court which gives him his official character. While it has been held that a court may appoint a receiver and authorize him to take possession of property in a foreign jurisdiction, the doctrine is universal that the appointment confers no legal authority which the receiver can exert over the property without the aid of the courts in whose jurisdiction it is found. The appointment, of its own force, gives him the right to take possession of the property, but it confers upon him no power to compel the recognition of that right, outside the jurisdiction of the court making the appointment. High, Receivers, § 47, p. 241.

While there are authorities of great weight which seem to hold that a receiver appointed in one jurisdiction will not be permitted to maintain a suit in a foreign State, the generally prevailing doctrine, upon which all the decisions seem to be harmonious, is that, upon the principles of comity, the courts of the jurisdiction in which the property or fund is situate will recognize the rights of the receiver, so far as to aid him in reducing it to possession, unless to do so would in some way violate the local policy or interfere with the rights of resident creditors. *Metzner* v. *Bauer*, 98 Ind. 425, and cases cited; Beach, Receivers, §§ 16, 19, 682;

Merchants Nat. Bank v. *McLeod*, 38 Ohio St. 174.

But the recognition of well-established principles of comity and courtesy between courts of different jurisdiction is one thing, while the rights of resident or other attaching creditors, who are seeking to avail themselves of legal proceedings authorized by statutes of the State, for the appropriation of a fund belonging to a nonresident debtor, must be determined upon altogether different principles. As has in effect been said, courts are prepared to extend comity where there is no reason to the contrary; especially if there is no interest of their own citizens, or of the citizens of another State, who are asking the protection of their laws, injuriously affected by such recognition. *Paine* v. *Lester*, 44 Conn. 196; *Milne* v. *Moreton*, 6 Binn. 361.

The rule may be considered as established that a receiver may invoke the aid of a foreign court, in obtaining possession of property or funds within its jurisdiction, to which he is entitled; but aid will only be extended as against those who were parties, or in some way in privity with the proceedings in the court in which his appointment was made, or who are in possession of the property or fund to which the receiver has a right; and not against creditors of a nonresident debtor, who are seeking to subject the property or fund to the payment of their debts, by proceedings duly instituted for that purpose. Accordingly, in *Hurd* v. *Elizabeth*, 41 N. J. L. 1, the court said: "That the officer of a foreign court should not be permitted, as against the claims of creditors resident here, to remove from this State assets of the debtor, is a proposition that appears to be asserted by all the decisions."

The principle upon which the decisions rest is, that it is the policy of every government to retain within its control the property of a foreign debtor until all domestic claims have been satisfied, and hence the right of the receiver of a foreign court to sue, which is allowed only upon considerations of comity, will be denied when it comes in conflict with the interests of domestic creditors. "We decline," said the court in *Runk* v. *St. John*, 29 Barb. 585, "to extend our wonted courtesy so far as to work detriment to citizens of our own State, who have been induced to give credit to the foreign insolvent." *Bagby* v. *Atlantic, M. & O. R. Co.* 86 Pa. 291; *Lycoming F. Ins. Co.* v. *Wright*, 55 Vt. 526; *Thurston* v. *Rosenfield*, 42 Mo. 474, 97 Am. Dec. 351; *Willitts* v. *Waite*, 25 N. Y. 577.

It follows, hence, that the available legal authority of a receiver is co-extensive only with the jurisdiction of the court by which he was appointed when the right of precedence or priority of creditors is asserted in respect to property or funds of a nonresident debtor, which the receiver has not yet reduced to possession. *Hunt* v. *Columbian Ins. Co.* 55 Me. 290; *Warren* v. *Union Nat. Bank*, 7 Phila. 156; *Booth* v. *Clark*, 58 U. S. 17 How. 322 [15 L. ed. 164]; *State* v. *Jacksonville, P. & M. R. Co.* 15 Fla. 202; *Farmers & M. Ins. Co.* v. *Needles*, 52 Mo. 17; *Taylor* v. *Columbian Ins. Co.* 14 Allen, 353.

It is said, however, that as Clapp & Davies were residents of the State of Illinois at the time the receiver was appointed, the debt due them from Bagley & Oberreich was within the jurisdiction of the Superior Court of Cook County, upon the principle that the domicil draws to it the personal property and choses in action of the owner, wherever they may be situate. Hence, the contention is, that as the appointment of the appellant as receiver was followed by a general deed of assignment, valid in the State of Illinois, it must be regarded as valid here, and as devesting Clapp & Davies of all title or interest in the debt in controversy after the date of the assignment. It is, of course, well settled that personal property is transferable according to the law of the owner's domicil, and that a voluntary assignment or transfer made without compulsion or legal coercion is to be governed everywhere by that law, unless the contract by which the transfer was made is limited or restrained by some policy of positive enactment of the State in which the property is situate, or unless it affects citizens of the latter State injuriously. *Ames Iron Works* v. *Warren*, 76 Ind. 512; *Martin* v. *Potter*, 11 Gray, 37, 71 Am. Dec. 689; *Weider* v. *Maddox*, 66 Tex. 372, 59 Am. Rep. 617; *Warner* v. *Jaffray*, 96 N. Y. 248; *Green* v. *Van Buskirk*, 74 U. S. 7 Wall. 150 [19 L. ed. 113]; *Askew* v. *La Cygne Exch. Bank*, 83 Mo. 366; *Law* v. *Mills*, 18 Pa. 185; Burrill, Assignm. 301; Story, Conf. L. 383-390.

"The voluntary transfer of a chattel by the debtor, if not forbidden in other respects by the law at the place of the *situs*, is to be as much regarded there or elsewhere as it would be at the place of the domicil." *Lowry* v. *Hall*, 2 Watts & S. 131; *Smith's App.* 104 Pa. 381; *Chafee* v. *Fourth Nat. Bank*, 71 Me. 514, 36 Am. Rep. 345. See 15 Am. L. Rev. 251.

Such an assignment will not be upheld, however, if it contravenes the policy of the law of the place where the property is situate. *Guillander* v. *Howell*, 35 N. Y. 657; *Faulkner* v. *Hyman*, 142 Mass. 53, 2 New Eng. Rep. 181; *Moore* v. *Church*, 70 Iowa, 208; *Re Waite*, 99 N. Y. 433.

The principles above stated are applicable only to transfers or assignments of property which rest essentially on contract and are voluntary in the sense that they are the product of a will acting without legal compulsion. Property in a foreign State that has passed from an assignor to an assignee by a voluntary deed, and not by proceedings *in invitum*, by process of law is distinguished from like property in the hands of a receiver by operation of law, or by an assignment made under legal compulsion.

Assignments of the latter class are held inoperative upon property not situate within the territory over which the laws that make or compel the debtor to make them have dominion. *Rhawn* v. *Pearce*, 110 Ill. 350; *Smith's App.* and *Weider* v. *Maddox*, *supra*.

Involuntary assignments which are made under foreign Insolvent Laws, have no operation outside of the State under whose laws they were made, while a voluntary assignment is a personal common-law right, possessed by every owner of property, and may operate in one State as well as another. *Walters* v. *Whitlock*, 9 Fla. 86, 76 Am. Dec. 607.

Some conflict or contrariety of opinion may be found in the decisions in respect to what may or may not constitute a voluntary assign-

ment under the statutes of different States, but it is unnecessary to enter upon a discussion of the cases relating to voluntary assignments, as all the authorities agree that where an assignment is made under compulsion of law, or where property is taken *ab invitum*, the transfer will not be regarded as voluntary, nor will it be effectual beyond the jurisdiction in which it was made, when it conflicts with the interests of citizens in a foreign jurisdiction. As we have seen, a court cannot extend its jurisdiction by the appointment of a receiver, so it is equally powerless to do so by coercing an assignment of the property in controversy. An assignment is regarded merely as a matter of convenience in aid of the jurisdiction of the court, the established doctrine being that, as against nonresident creditors, the assignment confers no additional or higher right to the property than the receiver had by virtue of his appointment. *Iddings* v. *Bruen*, 4 Sandf. Ch. 252; High, Receivers, § 443.

While it is true, as has been remarked before, the domicil of the owner, in legal contemplation, draws to it his personal estate, wherever it may be, yet as this is so only by fiction of law, the rule is not of universal application. When, by the law and policy of the State where the property is actually located, it is subject to the process of attachment or garnishment at the suit of a domestic or other creditor, the fiction yields, and the actual *situs* of the property determines whether or not it should be subjected to the process of the court. *Warner* v. *Jaffray* and *Green* v. *Van Buskirk*, *supra*.

In cases of attachment and garnishment, like those for founding administration, the *situs* of a debt is the residence of the debtor. *Wyman* v. *Halstead*, 109 U. S. 654 [27 L. ed. 1068]; *Owen* v. *Miller*, 10 Ohio St. 136.

It is said, however, that the principles of comity which control in aid of the receiver of a foreign court, who is seeking to obtain possession of a fund, should only be suspended in their operation in favor of domestic creditors, and that inasmuch as the attaching creditors in the present case are all nonresidents of the State, the aid of the court should have been extended to the receiver and denied the creditors. While this position is not without support, it is not in our view maintainable. Although nonresidents, the attaching creditors are properly in our courts, pursuing a remedy which the Statute confers upon foreign as well as domestic creditors. Until the Legislature shall declare a different policy, the rights of a foreign creditor against the property of a debtor must be regarded by the courts as in all respects the same as those of resident creditors, so far as respects proceedings in attachment and garnishment. The rule which commends itself to our judgment is thus declared: "Once properly in the court and accepted as a suitor, neither the law, nor court administering the law, will admit any distinction between the citizen of its own State and that of another. Before the law and its tribunals, there can be no preference of one over the other." *Hibernia Nat. Bank* v. *Lacombe*, 84 N. Y. 367; *Rhawn* v. *Pearce*, *Warner* v. *Jaffray* and *Paine* v. *Lester*, *supra*.

This rule governs the more recent decisions.

The conclusions above stated lead to an affirmance of the judgment.

Judgment affirmed, with costs.

BERKEY & GAY FURNITURE CO., *Appt.*,
v.
Milo S. HASCALL.

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

In case one, who has sold furniture for a hotel and contracted with the proprietor to deliver it by or on a certain date, knowing the purpose for which it is to be used and that it is necessary for the operation of the hotel, fails to deliver it until long after the appointed time, thereby preventing the renting of the rooms to guests, he is liable for the loss sustained by reason of such failure; and such loss may be determined by finding the difference between the value, for the purpose for which they were intended, of the rooms furnished and unfurnished during the time they could not be used for such purpose.

(May 1, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Elkhart County allowing defendant's claim to a set-off and rendering judgment against it thereon, in an action to recover the contract price for certain furniture sold and delivered. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. **W. H. Vesey, C. W. Miller** and **J. M. Vanfleet** for appellant.

Messrs. **H. D. Wilson** and **W. J. Davis** for appellee.

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

This is an action by the appellant against the appellee to recover a balance of $374.62 for goods sold and delivered.

The answer is in three paragraphs, setting up a counterclaim:

1. It is alleged in the first paragraph that on August 26, 1881, the appellee had just completed his hotel with fifty rooms, and was in need of new furniture therefor, without which he could not carry on his business, as appellant well knew; that on said day, for the purpose of furnishing said hotel in all its parts with suitable furniture, the appellant agreed with him to furnish said furniture and every part thereof complete, and set it up in proper shape and condition in his hotel rooms ready for use by September 15, 1881; that said rooms were irregular and different in sizes, dimension and construction, and for the purpose of making said furniture suitable for said rooms, appellant measured said rooms, and a list of goods was agreed upon, and at the foot thereof appellant executed a memorandum in writing as follows:

We agree to put these goods all in good order (set up in hotel without charge except freight and cartage), castored, with bracket wood-wheels on all beds. All bureaus and washstands to have good wood-wheels on rubber castors. Goods to be ready the 15th of Sept. Any goods not according to order, or not satisfactory, may be returned free of charge.

Goshen, Aug. 26, 1881.

Berkey & Gay Furniture Co.
T. M. Moseley.

The paragraph then alleges that he was ready, able and willing to comply with his part of said contract, but that appellant, with full knowledge of all the facts, violated said agreement, in this, to wit: It failed to deliver any of said goods prior to September 30, 1881, whereby he lost the daily use of twenty-nine rooms, of the rental value of $2 per day for each room from September 15 to September 30; that appellant failed to deliver said goods prior to January 18, 1882, except as set forth in the complaint; that said furniture was purchased to be delivered in sets and suits for specific rooms and places, as set forth in said foregoing memorandum, but the articles so delivered were not in sets or suits, but in disjointed and unmatched pieces, and were not and could not be properly set up or used until all were delivered; by reason of which he lost the daily rental value and use of twenty of said rooms, worth to defendant $2 each per day from October 1, 1881, to January 18, 1882, inclusive; that because of such failure he was compelled to turn away and did turn away twenty persons each day, who desired to become guests at said hotel, whereby the income and profits of said hotel business were diminished $50 per day.

The second paragraph of the counterclaim alleges that on the 26th day of August, 1881, he had just completed his hotel at a cost of $40,000; that it contained forty rooms (besides dining-room, kitchen, etc.) suitable for the entertainment of guests; that it was then operated and run by him in the business of hotel-keeping, and was so operated for the next two years; that the rental value of said hotel, when furnished, was $5,500 per year; that on said 26th day of August, 1881, he was in great need of furniture to supply and furnish thirty of the aforesaid guest rooms in said hotel, which rooms were then unfurnished and empty, in which condition they were of no rental value to defendant, all of which appellant well knew; that to supply and furnish said rooms and hotel as aforesaid, appellant promised and agreed with him to deliver and set up in good order and condition the furniture mentioned in its complaint by the 15th day of September, 1881, according to written specifications and agreement (copied into first paragraph above); that appellant failed and refused to deliver said goods until January 18, 1882, during which time, from September 15, 1881, to January 18, 1882, he was deprived of the use and rental value of said hotel and the several rooms therein, which use and rental was of the value of $2,000.

3. The third paragraph of the counterclaim alleges all the matters contained in the other two paragraphs, showing a little more minutely the rooms for which the different articles of furniture were designed.

A reply in general denial was filed to the answer. The cause was submitted to a jury for trial, and the jury returned a special verdict in the words and figures following:

SPECIAL VERDICT.

1. We, the jury, find that the plaintiff contracted with the defendant, on the 26th day of August, 1881, to sell and deliver to defendant the several items of property mentioned in plaintiff's complaint at and for the price of each article as stated in plaintiff's complaint, and was to deliver the same and set the same up in defendant's hotel in Goshen, Indiana, and have the same ready for use in defendant's hotel, known as Hotel Hascall, by or on the 15th day of September, 1881. That plaintiff at the time of making such contract knew the purpose for which said furniture was to be used.

2. Plaintiff failed and neglected to deliver any of said furniture until the 30th day of September, 1881, and thereupon and thereafter until the 16th day of January, 1882, plaintiff delivered said furniture at the times, and in the specific articles, as severally set forth by the plaintiff in the complaint herein.

3. Defendant paid plaintiff the sums credited to defendant in plaintiff's complaint and returned to plaintiff the items of furniture, as stated in plaintiff's complaint, to the amount of $121.85, thus leaving unpaid of the purchase price of said furniture the sum of $374.62, March, 1882, as stated by the plaintiff.

4. We further find that defendant, at and just prior to the making of said contract, had reconstructed and built his hotel building in the City of Goshen, Indiana, at a cost of $40,000, and defendant was proprietor and manager thereof, and had within said hotel thirty (30) rooms that were unfurnished, and when so unfurnished were of no use or value to the defendant; that all said rooms remained vacant, and of no use or value to defendant, from the 15th day of September, 1881, to the 30th day of September, 1881, on account and by reason of the failure of plaintiff to comply with its agreement aforesaid; that twenty-three (23) of said rooms remained vacant, and of no use to defendant, from the 30th day of September, 1881, until the 19th day of October, 1881, because of the failure of plaintiff to comply with said contract; that seven (7) of said rooms remained vacant and of no use, from the 19th day of October, 1881, to the 5th day of November, 1881, because of the failure of plaintiff to comply with said contract; that from the 5th day of November, 1881, until December 15, 1881, six (6) rooms of said hotel remained vacant and of no use to defendant, because of the non-fulfillment of said contract by the plaintiff; that the use of each one of said rooms to the defendant was nothing when unfurnished.

5. We further find that the rental value and use of each of said rooms, when furnished with the furniture designated for same in said contract, would have been to the defendant 75 cents per day, during said time.

6. If, upon the foregoing facts, the law be with the plaintiff, then we find for the plaintiff, but if the law be with the defendant, then we find for the defendant.

John A. Smith, Foreman.

The appellant moved for judgment on the special verdict, which motion was overruled and an exception reserved. The appellee moved for judgment on the special verdict and the court sustained said motion, to which the appellant excepted. Final judgment was then entered in favor of appellee for $554.63, and costs.

Appellant filed a motion for new trial, which was overruled and exceptions reserved. The appellant assigns as error:

1. That the court erred in overruling appellant's motion for judgment in its favor upon the special verdict.

2. That the court erred in sustaining appellee's motion for judgment in his favor on the special verdict.

3. That the court erred in overruling appellant's motion for new trial.

It is contended that, under the facts found, the appellee is only entitled to compensatory or general damages, and not for the special damages set up as a counterclaim.

We think the facts found in the special verdict entitled the appellee to recover the special damages claimed.

In *Vickery* v. *McCormick*, 117 Ind. 594–597, the court says: "The general rule is, that a party who fails to comply with his contract to furnish goods is liable for the value of the goods in the open market at the time of the failure. But when similar goods cannot be purchased in the market, the measure of damages is the actual loss sustained by the purchaser in not receiving the goods according to the contract."

See *Rahm* v. *Deig*, 121 Ind. 283, and authorities there cited.

In *Hadley* v. *Baxendale*, 9 Exch. 341—Sedgwick, Leading Cases on the Measure of Damages, pp. 126–136—the court states what we deem to be the true rule governing the assessment of damages in such cases as this. In that case it is said: "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

The facts found by the jury show that the appellee, at and just prior to August 26, 1881, had reconstructed and built his hotel building in the City of Goshen, Indiana, at a cost of $40,000, and that appellee was proprietor and manager thereof, and had within said hotel thirty rooms that were unfurnished, and when so unfurnished were of no use or value to the appellee; that upon said day he contracted with the appellant to sell and deliver to him the several items of property mentioned in the appellant's complaint, which consisted of the necessary furniture to furnish said rooms at and for the price of each article as stated in the complaint, and agreed to deliver the same and set the same up in appellee's hotel, and have the same ready for use in said hotel by or on the 15th day of September, 1881; that the appellant, at the time of making of said contract, knew the purpose for which said furniture was to be used. The contract was to furnish the furniture for thirty rooms in a hotel and set it up in the rooms, and have it ready for use and occupancy by a day named. From these facts it necessarily follows as a conclusion that the party contracting to furnish the same knew that the rooms were valueless as hotel apartments when unfurnished; that the furniture was necessary to enable the purchaser to use and occupy the same, and operate his hotel, and that the appellee would be deprived of the use of such rooms for such purpose until it complied with its contract.

The facts found further show that the appellant commenced furnishing the furniture soon after the date when it was all to have been furnished and put up in the rooms, furnishing part at one time and part at another. The facts show the appellee had reconstructed and rebuilt a valuable hotel, and was operating it himself, and the damages naturally resulting from the breach of the contract, according to the facts found, were what the rooms would have been worth to appellee furnished according to the contract more than they were worth to him unfurnished, during the delay in complying with the contract. Appellee built the house for a particular purpose, and was having it furnished for such purpose; he was not bound to rent out the rooms for another purpose, even if he could have done so. If there had been a breach and a total failure of the appellant to have furnished the whole or any part of the furniture, and the appellee had been notified that he was not intending to furnish it, then the appellant would have been liable for the difference in value of the furniture between the price in the open market and the contract price, as well as the loss of the use of the rooms for the time necessary to have procured the furniture elsewhere; but in this case the appellant furnished the furniture and appellee accepted it, so that the damage was the loss sustained by reason of the delay.

We think the loss of the use of the rooms as they were to be furnished might fairly be considered to have been contemplated by the parties at the time of the making of the contract.

In *Richardson* v. *Chynoweth*, 26 Wis. 656, it was held that a defendant failing to deliver an article, knowing the purpose for which it was purchased, was liable for the profits the purchaser would have made. See 1 Sutherland, Damages, 7th ed. pp. 218–239; Field, Damages, § 250; *Terre Haute* v. *Hudnut*, 112 Ind. 542, 11 West. Rep. 333.

It is contended that the facts found do not state the damages correctly; that if the plaintiff is entitled to recover, the amount he is entitled to recover would be the difference between the rental value of the rooms unfurnished and furnished. This objection we do not think available for a reversal of the judgment. When special damages of this character are recoverable, it is the damage the party himself has sustained that he is entitled to recover.

If A purchase grain of B and at the time A has a previous contract to sell and deliver grain to C, and A purchases the grain of B with a view of filling his previous contract with C, and C is advised of that fact, and the contract is such as that, on failure to deliver, B becomes liable to A for the profit he would have made, the damage recoverable is the profit A would have made; and that amount might be determined by a finding of the facts showing the amount A was to pay B for the grain, and the amount he would have received from C for the same.

So in this case, the amount of damage that the appellee was entitled to recover was the

difference in value to the appellee in the rooms furnished and unfurnished, for the time they remained unfurnished by reason of appellant's failure to furnish the furniture; and that amount is determined by finding what the use of the rooms was worth to the appellee unfurnished, and what they were worth furnished, for the time he was deprived of the use of them for the purpose for which they were to be used. The jury has found as facts that the use of the rooms unfurnished was worth nothing to the appellee during that time, and furnished they would have been worth 75 cents per day; and the number of days each room was unfurnished from the date appellant contracted to set up the furniture in the rooms is also stated and found in the verdict, and the gross amount may be determined by a mere computation. The facts found in the special verdict entitle the appellee to a judgment for the amount of the damages found to have been sustained by him. *Fossion* v. *Landry*, not yet reported, this term.

The facts found cover all the issues in the case, and that is all that is required by a special verdict.

It is further contended that the court erred in not sustaining the motion for new trial, for the reason that the judgment rendered upon the verdict is in excess of the amount found due the appellee by the verdict; but this question is not presented by the record. If the judgment does not follow the verdict, or is not such a judgment as the party was entitled to have rendered upon the verdict, to present any question as to the amount or form of the judgment, it was necessary to make a motion to modify the judgment, and properly reserve exceptions in case the motion was overruled.

It follows, therefore, from the conclusion we have reached, that there is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

NEW YORK COURT OF APPEALS (2d Div.)

Oceana A. BANCROFT, *Appt.*,
v.
HOME BENEFIT ASSOCIATION of New York, *Respt.*

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

1. **A slight blow** on the throat while engaged in fencing, which causes a person to raise a little blood in consequence of which he is confined to his bed and attended by a physician for the greater part of three days, with no further hemorrhage from the day he was struck to the date of his death a year and a half thereafter, does not constitute "any wound, hurt or serious bodily injury" within the meaning of a question in an application for life insurance.
2. **The words "hurt" and "wound,"** in a question asked of an applicant for life insurance as to any "wound, hurt or serious bodily injury" received by him, mean an injury to the body causing an impairment of health or strength, or rendering the person more liable to contract disease, or less able to resist its effects.

(March 18, 1890.)

APPEAL by plaintiff from a judgment of General Term of the Superior Court of the City of New York, affirming a judgment of the Special Term dismissing the complaint in an action to recover the amount alleged to be due on certain mutual benefit certificates. *Reversed.*

The facts are fully stated in the opinion.

Mr. **William G. Wilson** for appellant.

Mr. **Francis Lawton,** for respondent:

Where there is a warranty of the truth of the answers contained in the application, the materiality of the questions is eliminated from the consideration of the court or jury.

Ætna L. Ins. Co. v. *France*, 91 U. S. 510 (23 L. ed. 401); *Jeffries* v. *Economical Mut. L. Ins. Co.* 89 U. S. 22 Wall. 47 (22 L. ed. 833); *Foot* v. *Ætna L. Ins. Co.* 61 N. Y. 571; *Edington* v. *Ætna L. Ins. Co.* 77 N. Y. 564; *Edington* v. *Ætna L. Ins. Co.* 1 Cent. Rep. 524, 100 N. Y. 536; *Burritt* v. *Saratoga Co. Mut. F. Ins. Co.* 5 Hill, 188; *Dwight* v. *Germania L. Ins. Co.* 4 Cent. Rep. 529, 103 N. Y. 346.

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

April 28, 1885, John S. Bancroft became a member of defendant's life department, and received two certificates, by each of which the defendant promised to pay, on proof of his death during the continuance of the certificate, $5.000 to the insured's wife, the plaintiff, from the benefit fund of the life department. Each certificate contains the following provisions:

"In consideration of the representations and agreements made in the application herefor, and which is a part of this contract, and of each of the statements made therein, which . . . every person accepting or acquiring any interest in this contract hereby adopts as his own, admits to be material and warrants to be full and true, and to be the only statements upon which this contract is made."

"I. If this certificate . . . has been or shall be obtained through misrepresentation, fraud or concealment, . . . then the same shall be absolutely void."

The application contained this question and answer: "3. *Q.* Have you received any wound, hurt or serious bodily injury? *A.* No."

The application contained the following declarations: "I do hereby declare that all the particulars and statements made by me in connection with this application are true to the best of my knowledge and belief, and I do hereby acknowledge, consent and agree that any untrue or fraudulent statement made by me, or to any medical examiner for said Association, or any concealment of facts by me, shall forfeit and cancel all rights to any benefit under the above-named contract, and expressly waive all provisions of law forbidding any physician

who has attended me from disclosing all information which he thereby acquired."

"I further declare and agree that my answers to the questions put by the medical examiner are correct and true, and that I am the person who signed the application on the opposite side, and was examined as stated."

September 19, 1885, the insured died, and this action was brought to recover the amounts insured by the certificates, and was defended at the trial on the sole ground that the answer to the question above quoted was untrue. The issue was tried before the court without a jury, which found as facts that February 21, 1884, the insured received a "wound" (5th finding), a "hurt" (6th finding), and a "serious bodily injury" (7th finding). The 8th finding of fact described with particularity the wound, hurt and serious bodily injury found in the 5th, 6th and 7th findings, and is as follows:

"*Eighth.* That prior to the making and delivery of the said application, and on or about the 21st day of February, 1884, the said John S. Bancroft, while engaged in fencing, did receive a blow from a foil on the throat in the neighborhood of or upon the Adam's apple; that in a few seconds thereafter he raised a little blood; that said blow produced an extravasation of the sub-mucus membrane just over the cricoid cartilage in the posterior part of the throat, almost opposite or behind, but a little below, the Adam's apple; that the force of said blow produced an abrasion, wound or hurt on the inside of the wind-pipe; that shortly thereafter the said John S. Bancroft was confined to his bed the whole or the greater part of three days, and during that time was attended by a physician, and was by him treated with the same treatment that he gave persons who have the complaint of spitting of blood; but I find that the treatment was not for the complaint of spitting of blood."

In the 9th finding the court found that the insured concealed from the defendant the injury described in the 5th, 6th, 7th and 8th findings, and as a conclusion of law decided that the plaintiff, by reason of the answer given, was not entitled to recover. The plaintiff excepted to the 5th, 6th, 7th and 9th findings of fact, and to this sentence contained in the 8th finding: "That the force of said blow produced an abrasion, wound or hurt on the inside of the wind-pipe," and now insists that they are without any evidence tending to sustain them, and are reviewable in this court as questions of law.

On the evening of February 21, 1884, the insured took at his own house a lesson in fencing with foils. His body was protected by a thickly padded buckskin jacket, fitting closely and high about his neck, and his face was shielded by a visor, which were specially designed for the protection of persons engaged in this exercise. At the end of the exercise he spat, as found, "a little blood," and immediately called his family physician, who, after an examination, expressed the opinion that his throat had been hit by the button of the foil, though no external mark or evidence of injury could be found. The insured was not conscious of having been hit and was quite confident that he had not been. The physician made a careful examination but found no evidence that the blood came from the throat or lungs. After the examination the patient was put to bed and treated in the manner and for the time described in the 8th finding of fact. No other hemorrhage occurred. March 2, 1884, his throat was examined by Dr. Jarvis, a specialist, who testified that by the use of a powerful light and mirrors he discovered the injury, which he described in the language used in the 8th finding. All the evidence descriptive of the injury and its effects was given by Doctors Wright, the attending physician, and Jarvis, the specialist, who were called by the defendant, and by the plaintiff, called in her own behalf. Dr. Wright testified that he had been the insured's family physician for ten or twelve years prior to May, 1885. After having described the injury and its effects, he testified: "I was his attending physician for some time after this (the accident) until he moved away from that part of the city in May, 1885. During the time that I attended him as a physician he was not at any time seriously ill with any complaint; he was not, to my knowledge, afflicted with any organic or chronic disease at that time; I do not believe that he was."

Q. After all you had seen of this patient at the time of the injury, immediately after the injury, and during the time you attended him as a physician, would you call that a serious injury?

A. The result seems to justify the supposition that it was not a serious injury, but a man bleeding from the throat or lungs is always regarded as possibly a serious case; physicians always give them the benefit of the doubt under such circumstances, as though it was certainly serious.

Q. On the final result of this, would you call it a serious injury?

A. I would not, for the patient got over it.

Dr. Jarvis testified:

Q. Did you regard this as a serious injury?

A. I cannot say that I took it in that light; it was simply to find out what the trouble was that I examined him.

Q. Was it your opinion he would lose the effects of it?

A. I thought it would disappear.

The plaintiff testified that her husband spat no blood between February 21, 1884, and the date of his death. There is no conflict on the evidence and there is none justifying the inference or finding that the injury was serious, or that it was a hurt or wound within the meaning of the contract.

September 14, 1866, the Connecticut Mutual Life Insurance Company insured the life of a Mrs. Wilkinson. The application, which was a part of the contract, and its statements warranties, contained this question and answer:

Q. Has the party ever met with any accidental or serious personal injury; if so, what was it?

A. No.

The insured died in 1869, and in the action on the policy the jury returned a special finding that in 1862 the insured fell from a tree, was injured in consequence thereof, was sick for some time, but that she recovered, and that the injury had no permanent influence on her health. The fact that the insured had fallen

and had been somewhat injured was not disclosed to the insurer. It was held that the injury was not within the meaning of the contract a serious one. *Wilkinson* v. *Connecticut Mut. L. Ins. Co.* 30 Iowa, 119.

At about the same time the Union Mutual Life Insurance Company of Maine insured the same life. This application, which was also a part of the contract, and its statements warranties, contained this question and answer:

Q. Has the party ever had any serious illness, local disease or personal injury; if so, of what nature and at what age?

A. No.

The accident which had happened to the insured was not disclosed to the insurer. On the trial of the issue joined, the jury returned a special finding that in 1862 the insured fell from a tree, was injured, but not seriously, and that its effects passed away without subsequently affecting her health. The fact that the insured had so fallen was not disclosed to the insurer. It was held that the injury described by the evidence and found by the jury was not a serious one, within the meaning of the contract, and that the plaintiff was entitled to recover. *Wilkinson* v. *Union Mut. L. Ins. Co.* 2 Dillon, 570; *Union Mut. L. Ins. Co.* v. *Wilkinson*, 80 U. S. 13 Wall. 222 [20 L. ed. 617].

In discussing the case, the meaning of the term "serious bodily injury" when used in life policies was discussed. The court said: "On the first branch of the case the court said to the jury that, if the effects of the fall were temporary, and had entirely passed away before the application was taken, and if it did not affect Mrs. Wilkinson's health or shorten her life, then the nondisclosure of the fall was no defense to the action. On the other hand, if the effects of the fall were not temporary, and remained when the application was taken, or if the fall affected the general health or was so serious that it might affect the health or shorten life, then the nondisclosure would defeat recovery, although the failure to mention the fall was not intentional or fraudulent.

"It is insisted by the counsel for the defendant that if the injury was considered serious at the time, it is one which must be mentioned in reply to the interrogatory, and that whether any further inquiry is expedient on the subject of its permanent influence on the health, is for the insurer to determine before making insurance. But there are grave and obvious difficulties in this construction. The accidents resulting in personal injuries, which at the moment are considered by the parties serious, are so very numerous that it would be almost impossible for a person engaged in active life to recall them at the age of forty or fifty years; and if the failure to mention all such injuries must invalidate the policy, very few would be sustained where thorough inquiry is made into the history of the party whose life is the subject of insurance. There is, besides, the question of what is to be considered a serious injury at the time. If the party gets over the injury completely, without leaving any ill consequences, in a few days it is clear that the serious aspect of the case was not a true one. Is it necessary to state the injury and explain the mistake to meet the requirements of the policy?

"On the other hand, when the question arises, as in this case, on a trial, the jury, and not the insurer, must decide whether the injury was serious or not. In deciding this, are they to reject the evidence of the ultimate effect of the injury on the party's health, longevity, strength and other similar considerations? This would be to leave out of view the essential purpose of the inquiry, and the very matters which would throw most light on the nature of the injury, with reference to its influence on the insurable character of the life proposed.

"Looking, then, to the purpose for which the information is sought by the question, and to the difficulty of answering when an injury was serious in any other manner than by reference to its permanent or temporary influence on the health, strength and longevity of the party, we are of the opinion that the court did not err in the criterion by which it directed the jury to decide the interrogatory propounded to them." See also *Wilkinson* v. *Connecticut Mut. L. Ins. Co.* 30 Iowa, 119.

The words "hurt" and "wound" as used in the application mean an injury to the body causing an impairment of health or strength or rendering the person more liable to contract disease or less able to resist its effects. No such consequences followed from the hurt sustained by the insured. A cut on the face, finger or on any part of the body from which blood flows, though healing in a few days and leaving no evil consequences, is a hurt or wound, but not within the meaning of the contract under consideration. There being no evidence tending to sustain the findings upon which the conclusion of law is based, *the judgment should be reversed, and a new trial granted, with costs to abide event.*

All concur.

KANSAS SUPREME COURT.

GERMAN INSURANCE CO. of Freeport, Ill., *Plff. in Err.*,
v.
Anderson GRAY.

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

***1. In an application for insurance,** where correct answers are given to a general agent of the company respecting incumbrances on the property of the applicant, and such agent fails to mention the incumbrances in the written application, but procures the signature of the applicant, accepts the premium and closes the contract, the company will not be relieved from liability on account of misrepresentations in the application, although it was stipulated therein

*Head notes by JOHNSTON, *J.*

NOTE.—*Fire insurance; insured not affected by wrongful acts of company's agent.*

Where an applicant for a policy answers questions truthfully, but the agent of the company inserts the answers incorrectly in the application, such agent's error cannot be imputed to the appli-

8 L. R. A.

See also 25 L. R. A. 198; 47 L. R. A. 201, 641.

that it should be considered a part of the policy and a warranty by the insured of the truth of the statements which it contained.

2. **A general agent** of an insurance company can modify the insurance contract, or waive a condition of a written policy by parol.

3. **A provision in an insurance policy respecting incumbrances** on the property insured may be waived by the insurance company or its general agent; and this, although the policy contains a printed stipulation that no agent of the company or any person other than the president or secretary shall have authority to waive any of the terms or conditions of the policy, and all agreements by the president or secretary must be signed by either of them.

4. **Where proofs of loss are taken by a duly authorized adjuster** of the company, who expresses satisfaction with the same, and states that he will forward them to the office of the company, and that the loss will soon be paid, the insured has a right to assume, until notified to the contrary, that no other or different proofs will be required; and the failure of the company to object to them within a reasonable time precludes it from thereafter objecting that they are insufficient.

(April 4, 1890.)

ERROR to the District Court for Sumner County to review a judgment in favor of plaintiff in an action to recover the amount alleged to be due upon a policy of fire insurance. *Affirmed.*

Statement by **Johnston, J.:**

This was an action for loss by fire upon a policy of insurance executed December 4, 1885, insuring, among other property, the following, for the amounts named: barn and shed, $200; hay in barn, $200; grain in barn and in stack on cultivated premises, $1,500; farming implements, $300. The fire occurred on May 28, 1886, and the property mentioned, which is alleged to be of the total value of $2,200, was wholly destroyed by the fire. The plaintiff alleged that the contract of insurance was in full force at the time of the fire, and that the property was destroyed without any fault of his, and that he had fully complied with all the requirements and agreements of the contract, but the Insurance Company refused, and still refuses, to pay the amount of the loss. He demanded judgment in the sum of $2,200, with interest from the time of the fire. The answer alleged that in the application for insurance by Gray he warranted that all the answers made by him to questions therein propounded were true; that, in response to a question in regard to what mortgages and incumbrances were upon the property, he failed to disclose a mortgage for $5,749.35, dated March 23, 1885, in favor of John S. Woods; and, further, that Gray, after the issuance of the policy, and without the consent of the Insurance Company indorsed on the policy, and in violation of the terms of the policy, incumbered and mortgaged the property insured un-

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cant. Bennett v. Agricultural Ins. Co. 8 Cent. Rep. 692, 106 N. Y. 243; Commercial U. Assur. Co. v. Elliott (Pa.) 12 Cent. Rep. 668.

The company cannot avoid payment because of misrepresentations as to value, location, incumbrances, etc., inserted by its agent, who had full knowledge of the facts, the assured being illiterate and placing reliance upon the agent, and having no reliable knowledge of the facts constituting such representations. Phenix Ins. Co. v. Golden, 121 Ind. 524.

And this is so although the application provided that the representations should be regarded as warranties. Stone v. Hawkeye Ins. Co. 68 Iowa, 737.

The act of an agent authorized to solicit and take applications for insurance in such a case is binding upon the company. Phœnix Ins. Co. v. Stark, 120 Ind. 444.

He must be deemed the agent of the company in all he does in preparing the application, and in any representation he may make as to the character or effect of the statements therein contained; and this rule is not changed by a stipulation in the policy subsequently issued, that the acts of such agent in making out the application shall be deemed the acts of the insured. Deitz v. Providence-Washington Ins. Co. 31 W. Va. 851.

The company is estopped from taking advantage of the falsity of an answer in an application, where, at the time of the issue of the policy, it personally or through its agent has knowledge of the facts which the question answered is intended to elicit. Dwelling-House Ins. Co. v. Brodie (Ark.) 4 L. R. A. 458.

Where he fills out the blanks in a policy signed by an applicant in blank, without the latter's instructions or authority, he does not thereby become the agent of the applicant; and misrepresentations of such agent will not avoid the policy, although it was afterwards signed by the applicant, who did not read it or know of such misrepresentations. Rogers v. Phenix Ins. Co. 121 Ind. 570.

Where an insurance agent has examined an applicant and received true answers, but omits certain answers, and the applicant signs the application under the agent's direction, the policy is not rendered null and void by such omissions, although it contains a provision that any false representation or omission in the material facts shall render the application void. Kansas Protective Union v. Gardner, 41 Kan. 397.

Plaintiff is not estopped by the fact that a copy of the application was attached to the policy, and he failed to notify the company that the statements were false. Donnelly v. Cedar Rapids Ins. Co. 70 Iowa, 693.

If the company had knowledge, when it issued the policy, that the statements made in the application as warranties were not true, it must be regarded as having waived said warranties; and it is bound by whatever knowledge its soliciting agent had when he took the application. Stone v. Hawkeye Ins. Co. 68 Iowa, 737; Mullin v. Vermont Mut. F. Ins. Co. 2 New Eng. Rep. 483, 58 Vt. 113.

The insurance agent is presumed to be familiar with the construction of the building insured, as well as its divisions, manner of use and description, and the company is bound by his knowledge. Pettit v. State Ins. Co. (Minn.) July 19, 1889.

Limitations in an insurance policy as to the powers of the agents are not conclusive; and if an act is within the scope of an agent's authority at the time it is done, it binds the corporation, without reference to restrictions in the policy. Niagara Ins. Co. v. Lee, 73 Tex. 641.

A restriction upon his powers in the policy, and not in the application, cannot be construed to refer to any act or knowledge of the agent that occurred before the delivery of the policy. Crouse v. Hartford F. Ins. Co. (Mich.) Jan. 24, 1890.

The assured is not bound by private instructions to the agent, not known to him. Commercial U. Assur. Co. v. State, 13 West. Rep. 47, 113 Ind. 331.

der the policy as follows: On May 15, 1886, he made and delivered a mortgage to A. Brennaman for $3,110, upon the real estate on which the insured buildings stood, and upon 2,000 bushels of wheat in the granary, and about 300 acres of growing wheat; and, further, on December 22, 1885, that he made and delivered to Sumner County Bank a mortgage of $700 on some farming implements and other articles covered by the policy. In his reply Gray admitted the existence and the making of the mortgages mentioned in the answer, but alleged that he gave a full statement of all the incumbrances on the property when the application for insurance was made, and also made known to the defendant that the mortgages would mature during the existence of the policy, and that he would be wholly unable to meet the indebtedness or remove the incumbrances, except by making and giving new mortgages, and renewing the incumbrances on the property; and he alleges that it was expressly stipulated and agreed between himself and the Insurance Company that he should be permitted to incumber his property, and that H. Steinbuschel & Bro., the duly authorized agents of the Company, expressly waived the condition written in the policy against incumbrances, and expressly agreed in behalf of the Company that he should have the right, notwithstanding the printed stipulations, to renew and extend the mortgages and incumbrances upon the property, or any part thereof.

Upon the trial the jury returned special findings of fact with their general verdict, as follows:

Q. Were there any chattel mortgages on the wheat covered by the insurance policy sued on in this action at the time said insurance policy was issued and delivered to Anderson Gray?

A. Yes.

(5) *Q.* Did the said plaintiff at any time after the issuance and delivery to the said Anderson Gray of the insurance policy sued on in this action, and before the time plaintiff claims that the property covered by said policy was destroyed by fire, give to any person any chattel mortgage upon any of the property covered by said policy?

A. Yes.

(7) *Q.* Were there any chattel mortgages upon any of the property covered by the insurance policy sued on in this action at the time said plaintiff claims the said property was destroyed by fire?

A. Yes.

(10) *Q.* What was the value of each item of property insured at the time plaintiff claims the same was destroyed by fire?

A. 2,000 bushels wheat, $1,500; six tons hay, $18; 2 two-horse Bain wagons, $80; 1 piano-box single buggy, $100; 1 ten-foot Hodge header, $100; 1 Buckeye mower, $40; 1 Bradley hay-rake, $15; 1 corn-planter, $45; 1 Wier double cultivator, $15; 1 press wheat-drill, $40; 2 one-horse wheat-drills, $30; 1 wheat fanning-mill, $30; barn, $800; harness, $55.

(11) *Q.* What interest did the plaintiff have in and to each separate item of said property at the time he claims said property was destroyed?

A. Wheat, owner; hay, owner; Bain two-

Liability of agents for loss arising from their negligence.

Local insurance agents who depart from their instructions are personally liable for losses arising from their negligent omission. Phœnix Ins. Co. v. Pratt, 36 Minn. 409.

Where a local agent, having received instruction from a state agent desiring him to relieve the company of a certain risk as soon as possible, answered by letter requesting as a personal accommodation that the policy might run until expiration, which would occur a few days later, such letter was sufficient evidence that he understood the instructions of his superior to be a direction to cancel, and a recognition of the authority of the latter to so order. *Ibid.*

An insurance company cannot recover more than nominal damages from its agent who has in good faith taken a risk somewhat different from what the company supposes, but not less valuable. State Ins. Co. v. Richmond, 71 Iowa, 519.

Where an insurance agent undertakes that property should be insured to a certain amount from a certain time, he is only liable for his failure to exercise diligence to procure the insurance by the time agreed upon. Arrott v. Walker, 10 Cent. Rep. 608, 118 Pa. 249.

Such agreement, considered as a contract of insurance against fire, on the part of the agent, is void, under Pa. Act 1870, p. 14. *Ibid.*

Acts of agent bind the company.

Insurance companies are responsible for the acts of their agents within the general scope of the business intrusted to their care. Union Mut. L. Ins. Co. v. Wilkinson, 80 U. S. 13 Wall. 222 (20 L. ed. 617).

The company cannot be allowed to hold out a party as its agent, and then disavow responsibility for his acts. Southern L. Ins. Co. v. McCain, 96 U. S. 84 (24 L. ed. 653).

After his appointment in a particular business parties dealing with him in that business have a right to rely upon the continuance of his authority, until in some way informed of its revocation. *Ibid.*

The silence of a company after receiving from an agent, whose authority had been terminated, a statement that a premium on a policy had been paid to him, is equivalent to the adoption of the act of the agent. *Ibid.*

No limitations of their authority will be binding on parties with whom they deal, which are not brought to the knowledge of those parties. Union Mut. L. Ins. Co. v. Wilkinson, *supra.*

An agent of a fire insurance company has authority to waive the conditions of a policy. Alexander v. Continental Ins. Co. 67 Wis. 422; Cleaver v. Traders Ins. Co. 8 West. Rep. 816, 65 Mich. 527.

So of a general agent authorized to represent it and transact its business at a particular place. Kruger v. Western F. & M. Ins. Co. 72 Cal. 91.

The acts of a general agent of an insurance company, through its sub-agent, bind the company. Lingenfelter v. Phœnix Ins. Co. 1 West. Rep. 695, 19 Mo. App. 252.

If the agent authorizes another, for him and in his name, to solicit applications and collect premiums, the company is bound. *Ibid.*

If the agent receives and accepts a proposition for a policy obtained through his sub-agent, the company is bound by the contract. Bodine v. Exchange F. Ins. Co. 51 N. Y. 123; 4 Wait, Act and Def. 32; Keim v. Home Mut. F. & M. Ins. Co. 42 Mo. 41.

The Iowa Act declares that any person who solicits insurance shall be held to be the agent of the

horse wagons, owner; 1 piano-box single buggy, owner; header, owner; 1 mower, owner; 1 hay-rake, owner; corn-planter, owner; double cultivator, owner; press wheat-drill, owner; 2 one-horse wheat-drills, owner; fanning-mill, owner; barn, owner; harness, owner.

(12) *Q.* What was the value of the plaintiff's interest in each item of said property at the time said plaintiff claims the same was destroyed by fire?

A. Same as No. 10.

(13) *Q.* Did the plaintiff read the written application for insurance which has been offered in evidence in the case before or at the time he signed the same?

A. No.

(14) *Q.* Could plaintiff at that time read writing and printing well enough to read such written application?

A. Yes.

(15) *Q.* Did plaintiff have an opportunity to read said written application before or at the time he signed the same?

A. Yes.

(16) *Q.* Did Anderson Gray, the plaintiff in this action, tell Mr. Steinbuschel, the agent of said defendant, at the time said written application for insurance was being written up, or before that time, of the existence of any mortgages upon any of the property covered by said insurance policy other than the one mentioned in said written application?

A. Yes. . . .

(18) *Q.* If you answer question 16 in the affirmative, then you may state if said agent of the defendant stated to plaintiff at that time that he would not mention such mortgages in said written application?

A. Yes. . . .

(20) *Q.* If all the mortgages that were upon the said property, or any part thereof, so covered by said insurance policy, were not mentioned in said written application, state fully why they were not so mentioned, and all the reasons therefor, so far as you find that they were known to plaintiff at that time?

A. Agent refused to put it in application, saying it was not necessary, because "I issue my own policies and adjust the losses."

(21) *Q.* Was the plaintiff at any time authorized by said defendant to mortgage or remortgage the said property covered by said insurance policy after the said insurance was issued and delivered to said plaintiff?

A. Yes.

(22) *Q.* If you answer question No. 21 in the affirmative, you will then please state at what time said authority was given, and by what officer or agent such authority was given, and whether such authority was given orally or in writing?

A. *First*, when application was made out; *second*, when policy was returned by Steinbuschel and brother, district agent.

Orally. "We, the jury impaneled and sworn in the above-entitled case, do upon our oaths find for the plaintiff, and assess the amount of his recovery at $2,018, with interest at 7 per cent from July 28, 1886."

A motion for a new trial was made and overruled, and the court thereupon entered judgment in accordance with the verdict for

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company and not of the insured; and for any mistake occurring in the transaction between him and the other agents the company is liable. St. Paul F. & M. Ins. Co. v. Shaver, 76 Iowa, 282.

That one of the trustees of a building insured agreed with the insurance agent that he should place insurance does not make such agent the agent of the trustee. Commercial U. Assur. Co. v. State, 13 West. Rep. 47, 113 Ind. 331.

Though the agent cannot delegate his agency, he may employ clerks and sub-agents, and their acts will bind his principal. Lingenfelter v. Phœnix Ins. Co. *supra*.

But an agent cannot waive the provisions of a policy in a matter outside the scope of his agency. Imperial F. Ins. Co. v. Dunham, 10 Cent. Rep. 577, 117 Pa. 460.

And a clause in an insurance policy accepted by the assured, prohibiting the waiver of its provisions by the local agent, is binding upon the assured. Hankins v. Rockford Ins. Co. 70 Wis. 1.

A local agent with authority to receive premiums and issue policies has no authority to waive the conditions of the policy, requiring the written or printed assent of the company to any change in circumstances or situation increasing the risk. Kyte v. Commercial U. Assur. Co. 3 New Eng. Rep. 884, 144 Mass. 43.

And although he has the fullest authority, conditions cannot be waived except in the manner provided. *Ibid.*

A provision in an insurance policy that no agent of the company shall be held to have waived any of its conditions unless such waiver is indorsed on the policy, is ineffectual to limit the legal capacity of the company to afterwards bind itself, contrary to the conditions of the policy, by an agent acting within the scope of his general authority. Lamberton v. Connecticut F. Ins. Co. 1 L. R. A. 222, 39 Minn. 129.

Breach of condition as to incumbrances.

A breach of warranty against incumbrances is not established by showing records of several unsatisfied judgments against a former owner. *Ibid.*

A judgment is not an incumbrance against insured property, under a condition in the policy that if the property shall become mortgaged or incumbered it shall be null and void. Phœnix Ins. Co. v. Pickel, 119 Ind. 155. But compare Hench v. Agricultural Ins. Co. 122 Pa. 128.

Where the insurance was for separate amounts, a misrepresentation concerning one piece will not bar a recovery for the loss of other pieces with which it is not connected in any way. *Ibid.*

The fact of additional incumbrances on the property insured is not a breach of a condition against incumbrances, where the total amount of all such incumbrances at no time exceeded the amount represented by the assured. Kister v. Lebanon Mut. Ins. Co. 5 L. R. A. 646, 128 Pa. 553.

But where it is stipulated in a policy that if either the real or personal property, or any part of it, be incumbered, it must be so represented in the application or the policy will be void, a misrepresentation as to one subject will invalidate the whole. Smith v. Agricultural Ins. Co. 118 N. Y. 518.

Where an applicant for insurance, on being asked if there is $1,000 incumbrance on the property, answers "Over $2,000," whereas there is $5,000, there is a material misrepresentation. *Ibid.*

Where an application for insurance requires the amount of a mortgage on the premises to be stated, an answer stating the principal sum due on the mortgage is sufficient. Hosford v. Germania F. Ins. Co. 127 U. S. 399 (32 L. ed. 196).

$2,125.95, with interest thereon from June 4, 1887, at the rate of 7 per cent per annum. The Insurance Company brings the case here, alleging error, and asking a reversal of the judgment.

Messrs. **G. W. Barnett, George & King** and **W. F. Rightmire** for plaintiff in error.

Messrs. **McDonald & Parker,** for defendant in error:

The agent who made the contract in this case was a general agent.

Continental Ins. Co. v. *Ruckman,* 127 Ill. 364.

The Company is liable for his acts and agreements and is infected with notice of all that was known to the agent.

Am. Cent. Ins. Co. v. *McLanathan,* 11 Kan. 549; *Sullivan* v. *Phenix Ins. Co.* 34 Kan. 174; *National Mut. F. Ins. Co.* v. *Barnes,* 41 Kan. 163.

The tendency of the modern decisions is to constantly broaden the powers of the agent and make them co-extensive with the business intrusted to his care.

Union Mut. Ins. Co. v. *Wilkinson,* 80 U. S. 13 Wall. 222 (20 L. ed. 617).

Even where a policy in terms provides that agents shall not waive forfeitures, alter or discharge contracts, or strike out or modify any of the provisions of the printed policy of insurance, the words of the policy are not conclusive, because it is within the power of the company to waive this provision.

Wood, Fire Ins. 2d ed. p. 886; *Eclectic L. Ins. Co.* v. *Fahrenkrug,* 68 Ill. 463; *American Ins. Co.* v. *Gallatin,* 48 Wis. 36; *Renier* v. *Dwelling-House Ins. Co.* 74 Wis. 89; *Young* v. *Hartford F. Ins. Co.* 45 Iowa, 377; *Morrison* v. *North America Ins. Co.* 69 Tex. 353; *Continential Ins. Co.* v. *Ruckman,* 127 Ill. 364; *McGurk* v. *Metropolitan L. Ins. Co.* 1 L. R. A. 563, 56 Conn. 528; *Lamberton* v. *Connecticut F. Ins. Co.* 1 L. R. A. 222, 39 Minn. 129; *Carroll* v. *Charter Oak Ins. Co.* 10 Abb. Pr. N. S. 166; *King* v. *Council Bluffs Ins. Co.* 72 Iowa, 310.

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

The greater part of the testimony taken in the case was with reference to the extent and value of the property destroyed, and as to whether or not the fire was the result of the action of the insured. But these questions, as well as all others upon which there was a conflict of evidence, have been determined by the jury in favor of the insured. The Insurance Company now seeks to escape liability upon the ground that Gray failed to disclose the existence of incumbrances upon the property when he made the application for insurance, and also because he had incumbered the property after the policy was issued without the consent of the Company indorsed thereon, and in violation of its provisions. The application for insurance was made on December 2, 1885, to Steinbuschel & Bro., of Wichita, who were agents of the Company for that portion of the State in which the property was situated. They wrote the answers to the questions propounded to Gray, and the application contained

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A mortgage executed within the term of a policy, and before its renewal, is not a breach of a condition in the renewal policy. Lebanon Mut. Ins. Co. v. Leathers (Pa.) 6 Cent. Rep. 901.

An undischarged mortgage which has been paid is not an incumbrance. Smith v. Niagara F. Ins. Co. 7 New Eng. Rep. 82, 1 L. R. A. 216, 60 Vt. 682.

Waiver of conditions, what constitutes.

The execution of a policy with full knowledge of existing facts, which by its conditions render it void, is a waiver of those conditions, because otherwise it would be a fraud. Wheeler v. Traders Ins. Co. (N. H.) 1 New Eng. Rep. 322; Liverpool & L. & G. Ins. Co. v. Ende, 65 Tex. 118.

And so as to knowledge of the agent, of incumbrances on the property insured. Breckinridge v. American Cent. Ins. Co. 4 West. Rep. 565, 87 Mo. 62; Phœnix Ins. Co. v. La Pointe, 5 West. Rep. 512, 118 Ill. 384.

If an insurer has knowledge of the assured's title, it is a waiver of the condition making an inaccurate statement of the title an avoidance of the policy. Wheeler v. Traders Ins. Co. (N. H.) 1 New Eng. Rep. 322; Lamb v. Council Bluffs Ins. Co. 70 Iowa, 238.

A principal is chargeable with all the knowledge possessed by the agent in the transaction of the business which he had in charge. Clark v. Hyatt, 118 N. Y. 563; Slattery v. Schwannecke, 118 N. Y. 543; Little Pittsburgh C. M. Co. v. Little Chief C. M. Co. 11 Colo. 223; Wheeler v. McGuire, 2 L. R. A. 808, 86 Ala. 398.

Where an authorized agent of the company delivers a policy acknowledging the payment of the premium, such acknowledgment concludes the company from assailing the legal existence of the policy. Home Ins. Co. v. Gilman, 10 West. Rep. 842, 112 Ind. 7.

The payment of the premium in cash may be waived by an agent authorized to deliver policies and receive payment, notwithstanding a stipulation in the policy to the contrary. *Ibid.*

Where a company authorized its agent to take insurance, collect the premium, deliver the policy, sign with his own name, and attach to the policy, printed provisions not contained in it,—it is bound by the agent's waiver of requirements in such printed slip. Niagara F. Ins. Co. v. Brown, 12 West. Rep. 815, 123 Ill. 356.

A provision that the use of general terms shall not be construed as a waiver of any condition in the policy may be waived by the company through its agent, and is not a limitation as to the manner of the exercise of his powers by the agent. Goldwater v. Liverpool & L. & G. Ins. Co. 12 Cent. Rep. 49, 109 N. Y. 618.

Waiver by agent's knowledge of incumbrances.

An insurance policy cannot be avoided for failure to state all the facts as to the ownership of the property in the policy, if these facts were fully made known to the agent of the company who issued the policy. Crescent Ins. Co. v. Camp, 71 Tex. 503.

The insurer is estopped from showing a breach of warranty by the insured, when the agent of the insurer who effected the insurance is fully apprised of the existence of incumbrances before making the insurance. Breckinridge v. Am. Cent. Ins. Co. 4 West. Rep. 565, 87 Mo. 62.

Where an answer to a question as to incumbrances is inserted in an application for insurance by the agent of a company, without the authority of the insured, who signs the application without knowledge of such answer, the company cannot avoid the policy for that reason. Dunbar v. Phœnix Ins. Co. 72 Wis. 492.

See also 15 L. R. A. 668.

the statement that the answers made were true. The application only mentions one mortgage, but Gray testifies that he stated his indebtedness and the incumbrances on his property to the agents fully and in detail, telling them that it would be necessary for him to mortgage and remortgage his property in the conduct of his business during the time for which the insurance was contracted. This is disputed; but the jury sustain Gray, and find that the Company was fully informed in respect to the existing incumbrances. The policy was not delivered by the agents at the time the application was made, but was sent by them to Gray at Conway Springs, Sumner County, near which place he resided. Soon after it had been so delivered, he discovered that it contained a provision that if the property should thereafter become mortgaged or incumbered, or, in case a change should take place in the title, the policy should be null and void. He immediately went to the agent, called his attention to the provision prohibiting the incumbering of his property, and insisted that it must be changed. After looking at the policy, Steinbuschel said that he would waive the condition relative to incumbrances, stating that he had authority for that purpose, and Gray, acting upon this waiver and agreement, mortgaged the property, as has already been stated. The incumbrances placed on the property, however, were mostly, if not entirely, the renewal and extension of debts and mortgages existing when the contract of insurance was made.

In regard to the misrepresentations in the application, we must assume that Gray gave correct answers to all questions asked. There was no concealment nor deception on his part. Steinbuschel, authorized by and acting for the Company, prepared the application, and purposely omitted a fuller statement concerning incumbrances. It was the fault of Steinbuschel or the Company which he represented, and not of the insured, that the application did not contain a complete statement. Steinbuschel having authority, his act must be treated as the act of the Company, and through him the Company had knowledge of all the incumbrances. With this knowledge, the Company accepted the risk, and the premium therefor, induced Gray to sign the application, which did not state the whole truth, and now, when the loss occurs, they cannot, under our decisions, insist on the breach of warranty or the untruth of the representations. *Sullivan* v. *Phenix Ins. Co.* 34 Kan. 170; *Continental Ins. Co.* v. *Pearce*, 39 Kan. 396; *National Mut. F. Ins. Co.* v. *Barnes*, 41 Kan. 161; *Kansas Protective Union* v. *Gardner*, 41 Kan. 401.

It is next contended that the giving of the subsequent mortgages by the insured avoided the policy; and in that connection it is urged that error was committed in admitting testimony of the verbal agreement modifying the terms of the policy, and waiving its conditions. We think the waiver must be upheld, and the point made by the Company overruled. The agents who made the agreement were more than mere local or soliciting agents. They fully represented the Company within a certain district; were authorized to solicit insurance, receive moneys and premiums, issue and renew

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An agreement by an insurance agent to note on the application the fact of an incumbrance on the property, upon which agreement the applicant relied, estops the company from setting up the incumbrance to defeat a recovery on the policy. Copeland v. Dwelling-House Ins. Co. (Mich.) Nov. 8, 1889.

But the company is not estopped from claiming the forfeiture where the local agent who issued the policy gave the insured to understand that such incumbrances would not invalidate the policy. Smith v. Continental Ins. Co. (Dak.) Oct. 10, 1889.

Where an insurance agent as a matter of fact was informed of the existence of mortgages on the property insured, and obtained a signature of the insured, who was ignorant in such matters, to an application which he had himself made out, the agent's knowledge of the existence of the mortgages was binding upon the company, and a waiver of the condition of the policy against such incumbrances. Renier v. Dwelling-House Ins. Co. 74 Wis. 89.

The knowledge of an agent, before the issue of an insurance policy, of the truth as to the ownership of the insured property and litigation concerning it, will prevent a defense on the ground of misrepresentations as to those matters in the application. Western Assur. Co. v. Stoddard, 88 Ala. 306.

A warranty, in an application, of undisputed ownership is not broken by the pendency of an action by a judgment creditor of a former owner, but not disputing insurer's ownership. Lang v. Hawkeye Ins. Co. 74 Iowa, 673.

Objections to statement of loss.

An objection made by the company to proofs of loss, that they are "deficient both in form and substance," is too general. Myers v. Council Bluffs Ins. Co. 72 Iowa, 176.

Overestimates of value in proofs of loss, not fraudulently made, will not avoid a policy providing that it shall be void upon an attempt to defraud the company before or after loss. Towne v. Springfield F. & M. Ins. Co. 5 New Eng. Rep. 484, 145 Mass. 582.

Nor will such overestimates render proofs of loss insufficient as a written statement of loss to render the company liable. *Ibid.*

The tender by insured of a particular account of his loss to the duly authorized agent of a foreign company is a compliance with the condition of the policy to render such account to the company. North British & M. Ins. Co. v. Crutchfield, 7 West. Rep. 85, 108 Ind. 518.

A statement in proofs of loss that the cause of the fire is to the assured unknown sufficiently states the origin of the fire. Jones v. Howard Ins. Co. 117 N. Y. 103.

Under the Wisconsin statutes, fixing the measure of the value of the insured property in cases of loss, the fact that the insured knowingly and intentionally stated the loss to be greater than it actually was is no defense in an action on the policy. Cayon v. Dwelling-House Ins. Co. 68 Wis. 510.

Where the loss was disputed by the company it was error to dismiss the complaint on the ground that the proofs of loss were insufficient. Karelsen v. Sun Fire Office, 45 Hun, 144.

It is sufficient to declare that "the said fire did not originate by any act, design or procurement on his [the insured's] part, or in consequence of any fraud or evil practice done or suffered by him." Howard Ins. Co. v. Hocking, 6 Cent. Rep. 918, 115 Pa. 415.

In a suit upon a policy of fire insurance, where the defense is that the plaintiff fraudulently misrepresented its loss, the alleged fraud must arise out of and inhere in representations as to the personal property contained in the proof of loss; and

policies; and the testimony is that they appointed sub-agents and adjusted losses. Only a short time previous to the making of the contract in question, they adjusted a loss under another insurance policy issued by the same Company to Gray, and paid him the amount of the loss. Gray had a right to assume, and we may fairly assume, that they were general agents of the Company.

In this State the courts have taken a liberal view with reference to the power of agents, and especially where they were representing foreign companies, which can only act through their agents, and where the agent is practically the principal in the making of contracts. *Am. Cent. Ins. Co.* v. *McLanathan*, 11 Kan. 549, and cases above cited.

Being general agents, empowered to make and renew contracts, they stood in this respect in the place of the Company, and certainly must be held to have the power to modify the same, or to waive any of the conditions in the contract which they had made. We are referred to *Burlington Ins. Co.* v. *Gibbons* (Kan.), 22 Pac. Rep. 1010, where the power of the agent to waive a condition was denied. In that case the agent had no authority from his company except as a soliciting agent, and it did not appear that he had any authority to issue policies, and he did not even countersign them when issued. In that case, however, it was said that "it has generally been held that where a person in procuring an insurance upon his property acts in good faith, and without any knowledge of any limitations upon the authority of the agent of the insurance company effecting the insurance, such person may assume that the agent is a general agent of the insurance company for that purpose; that he stands in the place of the company; and that the company will be bound by any terms or conditions or any waiver of terms or conditions which the agent may agree to while acting for the company in consummating the insurance."

If it was within the power of the Company, acting through its agents, to waive a condition or change the contract, it surely might do so by a parol contract, and might even waive the provisions stated in the policy with reference to the manner of altering or waiving its terms and conditions.

In *Westchester F. Ins. Co.* v. *Earle*, 33 Mich. 143, the court, in considering the question whether an agent of a company might change the conditions of a policy by parol, wherein it was provided that it could only be done upon the consent of the company written thereon, held that the written policy might be changed by parol, and stated that "a written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol than a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it." See also *Eclectic L. Ins. Co.* v. *Fahrenkrug*, 68 Ill. 463.

In the present case, as in some of the cases cited, it was stipulated in the policy that no agent of the Company, or any other person than the president and secretary, should have authority to alter or waive any of the terms or

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in such representations the plaintiff must have been guilty of designedly attempting to perpetrate a fraud upon the insurance company. Oshkosh Packing & P. Co. v. Mercantile Ins. Co. 31 Fed. Rep. 200.

Where the inventory containing the proofs of loss was made out by the wife of insured, negligence in failing to verify the same will be evidence of intended fraud. Mullin v. Vermont Mut. F. Ins. Co. 2 New Eng. Rep. 483, 58 Vt. 113.

A provision requiring proof of loss "in detail" is satisfied by setting out a copy of the description of the property insured by another policy referred to. Towne v. Springfield F. & M. Ins. Co. *supra*.

Neglect of the insured to furnish a detailed statement of the loss, under the Massachusetts standard fire policy, will not of itself defeat a claim. *Ibid.*

And nothing more is required than a statement of the aggregate value of the property destroyed, unless a more particular account is demanded at the time. Miller v. Hartford F. Ins. Co. 70 Iowa, 704.

A waiver of notice and statement of particulars of a loss cannot be shown by the acts of an insurance agent who took the application, or of an adjuster, without proof of their authority. Barre v. Council Bluffs Ins. Co. 76 Iowa, 609.

Provisions requiring statement and proof of loss. See *note* to Kenton Ins. Co. v. Wigginton (Ky.) 7 L. R. A. 81.

Waiver of notice and statement of loss.

A general agent of an insurance company—unless restricted in his power, and this is known to the plaintiff—can waive a statement of the loss, but only in the manner provided by the policy, although by the terms of the policy that was a condition precedent to recovery. Smith v. Niagara F. Ins. Co. 7 New Eng. Rep. 82, 1 L. R. A. 216, 60 Vt. 682; North British & M. Ins. Co. v. Crutchfield, 7 West. Rep. 89, 108 Ind. 518.

A local agent having authority only to receive proposals for insurance, fix rates of premium and issue policies, cannot waive the condition of a policy requiring a statement of loss. Smith v. Niagara F. Ins. Co. 7 New Eng. Rep. 82, 1 L. R. A. 216, 60 Vt. 682; Knudson v. Hekla F. Ins. Co. (Wis.) Dec. 3, 1889.

Where a fire insurance policy stipulates that the insured shall give notice of loss forthwith, immediate notice to a local agent is sufficient. Fisher v. Crescent Ins. Co. 33 Fed. Rep. 544.

Where the facts are not in dispute, it becomes a question of law for the court to determine whether, in the given case, the notice was reasonable. What constitutes reasonable diligence depends upon the circumstances of the case. Insurance Co. of North America v. Brim, 9 West. Rep. 830, 111 Ind. 281.

A failure to object to the notice after the right of action has expired will not revive the right. *Ibid.*; Barre v. Council Bluffs Ins. Co. 76 Iowa, 609.

But a mere written notice of loss, not in form required by the policy of fire insurance, is insufficient. German-American Ins. Co. v. Hocking, 6 Cent. Rep. 911, 115 Pa. 398.

Proofs of loss to be furnished.

A provision in a policy of insurance, that agents cannot waive "any condition," does not relate to stipulations about proofs of loss. Loeb v. American C. Ins. Co. (Mo.) Nov. 18, 1889.

A local insurance agent authorized simply to fix rates and countersign and deliver policies, subject to the approval of the company, has no authority to waive a provision made a part of the contract, requiring assured to give notice and proof of loss. Bowlin v. Hekla F. Ins. Co. 36 Minn. 433.

conditions of the policy, or make any indorsement thereon, and all agreements of the president or secretary must be signed by either of them. This provision, however, may be modified by the Company to the same extent as any other, and whatever the Company can do may be done by its general agents.

Renier v. *Dwelling-House Ins. Co.*, 74 Wis. 89, was a case somewhat similar to the one we are considering. In that case the policy provided that the application should form a part of the policy and a warranty by the assured. In the application for insurance it was stated that the property insured was not incumbered, but it appeared that the property was mortgaged, and that the insured informed the agent of the company of the existence of the mortgages, and he falsely wrote the answers therein, and the application was signed at the request of the agent. In the policy issued was a provision that "no act or omission of the company, or any act of its officers or agents, shall be deemed, construed or held to be a waiver of a full and strict compliance with the foregoing provisions of the terms and conditions of this policy, except it be a waiver or extension in express terms and in writing, signed by the president or secretary of the company." It was held that the action of the agent, with knowledge of the existence of the mortgage, was binding upon the company, and a waiver of the condition of the policy against incumbrances; and this, notwithstanding the limitation of authority of such agent expressed in the provision quoted on the face of the policy. Speaking of the restriction the court said: "We must hold, however, that such attempted restrictions upon the power of the company or its general officers or agents, acting within the scope of their general authority, to subsequently modify the contract and bind the company in a manner contrary to such previous conditions in the policy are ineffectual. Especially is this true in respect to a foreign insurance company whose officers are practically inaccessible to the assured."—citing *Gans* v. *St. Paul F. & M. Ins. Co.* 43 Wis. 108; *American L. Ins. Co.* v. *Gallatin*, 48 Wis. 36; *Shafer* v. *Phœnix Ins. Co.* 53 Wis. 361; *Lamberton* v. *Connecticut F. Ins. Co.* 1 L. R. A. 222, 39 Minn. 129; *Willcuts* v. *Northwestern Mut. F. Ins. Co.* 81 Ind. 308; *Steen* v. *Niagara F. Ins. Co.* 89 N. Y. 326; *Richmond* v. *Niagara F. Ins. Co.* 79 N. Y. 230; *Eastern R. Co.* v. *Relief F. Ins. Co.* 105 Mass. 570; *American L. Ins. Co.* v. *Green*, 57 Ga. 469; *Westchester F. Ins. Co.* v. *Earle*, 33 Mich. 143.

The court, proceeding further, says: "Of course, an insurance company, and especially a foreign insurance company, in making contracts of insurance, and adjusting, settling and paying losses, must act through its agents, if at all. To hold that, in such negotiations between such general agents and the assured, the latter is bound, but that in the same transaction the company, the agent's principal, cannot be bound by reason of having incapacitated itself and them, by previous stipulations, from agreeing to anything contrary to the conditions contained in the original contract, is, under most policies, in effect to hold that there is no mutuality in such contracts, and that the powers of such general agents are limited to the

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A requirement in an insurance policy, that sworn proofs of loss be furnished to the company, is not complied with by the making of a statement of the property lost and its value, to the adjuster at his request. Knudson v. Hekla F. Ins. Co. (Wis.) Dec. 3, 1889.

After the mortgagee of property damaged by fire has given the notice provided by the statute to the underwriter, he may furnish the preliminary proofs of loss. Nickerson v. Nickerson, 5 New Eng. Rep. 798, 80 Me. 100.

The provision of a policy that the assured shall, in his proofs of loss, state the interest and title, etc., means state the title at the time of the loss. Jones v. Howard Ins. Co. 117 N. Y. 103.

Reasonable time after he learned that something more was wanted in which to perfect his proofs of loss must be given. Miller v. Hartford F. Ins. Co. 70 Iowa, 704.

Whether proofs of loss were furnished within a reasonable time is a mixed question of law and fact. Am. F. Ins. Co. v. Hazen, 1 Cent. Rep. 631, 110 Pa. 530.

Where the company receives the proofs of loss without objection, after the time prescribed in the policy, it is a reasonable explanation of the delay. Am. Cent. Ins. Co. v. Haws (Pa.) 9 Cent. Rep. 413.

Provision for payment in sixty days after due notice and proof of loss refers to the proofs required within thirty days, and not to other proof required for establishment of claim. Clover v. Greenwich Ins. Co. 2 Cent. Rep. 873, 101 N. Y. 277.

Where the loss was total and immediate notice thereof was given, a further detailed proof of loss is not requisite to the right of recovery. Am. Cent. Ins. Co. v. Haws (Pa.) 9 Cent. Rep. 413.

Proofs of loss signed and sworn to by one member of a partnership are sufficient. Myers v. Council Bluffs Ins. Co. 72 Iowa, 176.

Where goods in two separate buildings are covered by one policy proof of loss should state the damage done in each building. Towne v. Springfield F. & M. Ins. Co. *supra*.

The failure to refer in the proofs of loss or otherwise to the lien of the lessor for rent on the building does not avoid the policy. Dresser v. United Firemen's Ins. Co. 45 Hun, 208.

An objection to the admission of proofs of loss in evidence, on the ground that they were not signed by the plaintiff, is untenable, where plaintiff's name was signed to the affidavit thereto, by another, in his presence and at his instance, and adopted by him. Breckinridge v. Am. Cent. Ins. Co. 4 West. Rep. 565, 87 Mo. 62.

Waiver of proofs of loss.

Proofs of loss may be waived by the underwriter; and waiver is a question for the jury. Nickerson v. Nickerson, 5 New Eng. Rep. 798, 80 Me. 100.

A provision in a policy requiring insured to give notice and proof of loss is waived if the insurer makes no objection to the absence of the proofs, but joins in arbitration proceedings required by the policy to be taken. Carroll v. Girard F. Ins. Co. 72 Cal. 297.

Objections to preliminary proofs of loss are waived by the failure of the company to disclose the same within a reasonable time. Firemen's Ins. Co. v. Floss, 9 Cent. Rep. 91, 67 Md. 403.

So retaining the proofs without objection is a waiver of objectionable defects. Cayon v. Dwelling-House Ins. Co. 68 Wis. 510; Bennett v. Agricultural Ins. Co. 8 Cent. Rep. 692, 106 N. Y. 243.

And stipulations as to proofs of loss are waived when other proofs are accepted without objection by an authorized agent. Indiana Ins. Co. v. Copehart, 5 West. Rep. 669, 108 Ind. 270; Smith v. Niagara F. Ins. Co. 1 L. R. A. 216, 7 New Eng. Rep. 82, 60 Vt. 682.

obtaining of premiums, and then defeating the enforcement of the policies upon which they were paid."

It is clear that the Company was not so bound but that it might modify any contract which it had made, or waive any of the conditions contained therein; and this may be done through its general agents. The knowledge of Steinbuschel & Bro. in this case was the knowledge of the Company, and their act was its act. When Gray applied for the insurance he informed the Company with reference to the incumbrances, as well as his necessity and purpose to continue them. Knowing these facts, the premium was accepted and the policy issued. Subsequent to the issuance of the policy, there was an express agreement that he might renew his mortgages as he had informed the Company it would be necessary to do, and the renewal of the incumbrances did not in any material degree affect the risk which the Company took. Accepting his statement, as the jury have done, we must assume that he acted in good faith with the Company and its agents, and that he was induced by the agreements and action of the Company to believe that he was warranted in renewing the mortgages. After receiving and retaining the premium, knowing the purpose and necessity of Gray to renew the incumbrances, and after a specific agreement waiving that condition of the policy, and authorizing him to renew the incumbrances, and after remaining silent and allowing him to proceed as though he was insured, until a loss occurs, the Company will not be heard to repudiate its contract or to deny its liability. We are aware that the authorities are not uniform upon the subject of waivers in policies like this one, but forfeitures are not favored in the law, and the view we have taken of the power of a general agent to waive the condition of a policy is more satisfactory to us, and is sufficiently supported. In addition to the authorities already cited, see the following: *Young* v. *Hartford F. Ins. Co.* 45 Iowa, 377; *King* v. *Council Bluffs Ins. Co.* 72 Iowa, 310; *Morrison* v. *North America Ins. Co.* 69 Tex. 353; *McGurk* v. *Metropolitan L. Ins. Co.* 1 L. R. A. 563, 56 Conn. 528; *American Ins. Co.* v. *Gallatin*, 48 Wis. 36; *Bartlett* v. *Fireman's F. Ins. Co.* 77 Iowa, 155; *Key* v. *Des Moines Ins. Co.* 77 Iowa, 174; *Sweetser* v. *Odd Fellows Mut. Aid Asso.* 117 Ind. 97; 2 Wood, Ins. §§ 422, 525.

It is further contended that a forfeiture occurred by reason of the failure of Gray to send proofs of loss to the Company. It is shown that immediately after the fire he notified Steinbuschel & Bro. of the loss, and they stated that they would at once inform the Company. Within a few days an adjuster of the Company, whose authority is not denied, came to Gray's place, and requested him to go before an officer and make proof of loss. The proofs were reduced to writing, signed and sworn to, and delivered to the adjuster; and there is testimony to the effect that he expressed satisfaction with them, and stated that he would forward them to the Company's office, and would return in a few days and settle the loss. This testimony was submitted to the jury under the following directions: "There is evidence tending to show that these statements were taken by said Winne as the agent of said Company, and sent to said Company, and it will be a question for the jury to determine whether such statements and proofs are such as are required by the policy; and, if not, whether the plaintiff was justified under the circumstances in believing, and did believe, that the proofs were satisfactory to the agent of the Company and to the Company, and that no further proofs would be required; and if the jury find from the evidence that the plaintiff was justified in believing, and did believe, that the proofs furnished to said Winne were satisfactory to him and to the Company; and further find that such proofs and statements were sent to the Company by said Winne, and that the Company made no objection thereto, and requested no further proofs to be made by the plaintiff within a reasonable time, and within the sixty days after the fire,—the jury would be justified in finding that defendant had waived the making of further proofs of loss. If, at the time such affidavits and statements were made at the request of said Winne, it was understood between said agent and said plaintiff that such statements and affidavits should not constitute the proofs required by the policy, and should not be considered as a waiver of such proofs, and that by taking such statements and affidavits said Winne should not and did not waive the making of the proofs in accordance with the provisions of the policy, then the jury would not be justified in finding that the taking of such statements and affidavits by said Winne, or that the acts and conduct of said Winne at the time of taking such statements and affidavits, con-

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Where the insurer bases his refusal to pay on other grounds, he thereby waives his right to object to their insufficiency. Bennett v. Agricultural Ins. Co. *supra*.

A refusal to pay a policy solely on the ground that the insured has no title to premises is a waiver of objections as to proofs of loss. German Ins. Co. v. Gueck (Ill.) 6 L. R. A. 835; Niagara Ins. Co. v. Lee, 73 Tex. 641.

Where the company denied its liability on the ground of a sale in violation of a condition in the policy, it waived proof of loss under the policy. Commercial U. Assur. Co. v. Scammon, 10 West. Rep. 337, 126 Ill. 364.

Directing the insured to make proofs of loss, without objection to a previous change of occupancy, which is known to the insurer at the time, is a waiver of objection on that ground. Jerdee v. Cottage Grove F. Ins. Co. (Wis.) Jan. 7, 1890.

Where the agent denies the validity of a contract of insurance, objections to proofs of loss furnished are waived. Commercial U. Assur. Co. v. State, 13 West. Rep. 47, 113 Ind. 331.

Proof of loss is waived by examination of premises by the insurer's agent, who refuses to pay the loss. Fisher v. Crescent Ins. Co. 33 Fed. Rep. 544.

Where the insurer adopts the acts of its agents, it cannot deny the authority of the agents to waive the proofs. Carroll v. Girard F. Ins. Co. 72 Cal. 297.

Such a waiver is not prevented by a provision in the submission to arbitration, in case of their election to make the submission. *Ibid.*

Where offer of proofs would be a vain act proof of loss is deemed waived. See *note* to Kenton Ins. Co. v. Wigginton (Ky.) 7 L. R. A. 81; German Ins. Co. v. Gueck (Ill.) 6 L. R. A. 835.

stituted a waiver of the proofs required by the policy."

The testimony was sufficient to sustain the finding of the jury. Neither the adjuster nor anyone representing the Company returned the proofs, or claimed that they were insufficient. The Company recognized the loss, took all the proofs it deemed essential to an adjustment, and, instead of claiming that they were insufficient, expressed satisfaction with them, and stated that the loss would soon be paid. Assuming the existence of the facts stated, we think the assured had a right to assume, until notified to the contrary, that no other or different proofs would be required. There are some criticisms in regard to the refusal of the court to give instructions, but what has already been said in the opinion disposes of the material objections that are made. The charge of the court fairly submitted the questions involved to the jury.

Finding no error, *the judgment of the District Court will be affirmed.*

All the Justices concur.

NEW YORK COURT OF APPEALS (2d Div.).

Thomas HALPIN, *Respt.*,
v.
INSURANCE COMPANY OF NORTH AMERICA, of Philadelphia, *Appt.*

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

Machinery and apparatus used in the business of manufacturing leather and morocco, including boiler, engine, etc., being the only property covered by a policy of insurance, do not constitute a mill, or the standing still thereof create a forfeiture under a policy which provides that "if a building covered by this policy shall become vacant or unoccupied, or if a mill or manufactory shall stand idle . . . all liability hereunder shall thereupon cease," where a further provision of the policy as to the failing of a building expressly declares that the policy shall cease as to property therein as well as to the building.

(March 21, 1890.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court,

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NOTE.—*Fire insurance; forfeiture in case of vacancy or non-occupancy.*

General agents of an insurance company in the matter of issuing policies may make a valid stipulation for the insertion of a clause in a policy relating to the occupancy of the buildings insured. Continental Ins. Co. v. Ruckman, 127 Ill. 364.

And the insured will be presumed to have had knowledge of a provision in his policy that the policy shall be void in case of the property becoming vacant, unoccupied or uninhabited. Burlington Ins. Co. v. Gibbons (Kan.) Jan. 11, 1890.

The condition against non-occupancy, in an insurance policy, must be construed and applied in reference to the subject matter of the contract and the ordinary incidents attending the use of the insured property. Halpin v. Phœnix Ins. Co. 118 N. Y. 165; Whitney v. Black River Ins. Co. 72 N. Y. 117.

The written agreement on a policy as to the use and occupation of the premises must be construed as an express promissory warranty, in the nature of a condition precedent, and a literal compliance is essential to the right of recovery. Dewees v. Manhattan Ins. Co. 34 N. J. L. 244; Carson v. Jersey City Ins. Co. 43 N. J. L. 300; May, Ins. § 156; Wood, F. Ins. § 165; Flanders, F. Ins. 226.

Such a condition does not render the policy absolutely void upon the happening of the event; and if the insurer waives the forfeiture, neither the insured nor a third person can treat the insurance as void. Germania F. Ins. Co. v. Klewer (Ill.) Oct. 31, 1889.

If the insurer does not exercise the power in case of breach of the condition, to declare the forfeiture while the assured is in default, and the premises are again occupied, its right to do so ceases, and its liability on the policy again attaches. Insurance Co. of N. A. v. Garland, 108 Ill. 220; Schmidt v. Peoria, M. & F. Ins. Co. 41 Ill. 295; Insurance Co. of N. A. v. McDowell, 50 Ill. 120; Westchester F. Ins. Co. v. Foster, 90 Ill. 121.

Clauses avoiding a policy on change of occupancy, or use for trade increasing hazard, are not violated by premises becoming vacant. Somerset Co. Mut. F. Ins. Co. v. Usaw, 2 Cent. Rep. 542, 112 Pa. 80; Cumberland Valley Mut. Protection Co. v. Douglas, 58 Pa. 419.

Terms "vacancy" and "non-occupancy" construed.

The terms "vacancy" and "non-occupancy" are used interchangeably in a policy which specially provides that "in case the premises shall be left unoccupied" (Paine v. Agricultural Ins. Co. 5 Thomp. & C. 619); or "shall remain unoccupied" (Keith v. Quincy Mut. F. Ins. Co. 10 Allen, 228); or shall become "vacant" (Cummins v. Agricultural Ins. Co. 5 Hun, 554, 67 N. Y. 260); or "unoccupied" (Wustum v. City F. Ins. Co. 15 Wis. 138); or shall "be vacated" (Ashworth v. Builders Mut. F. Ins. Co. 112 Mass. 422),—the insurance shall be forfeited.

The questions of vacancy and non-occupancy, and of increase of risk from these and other changes of circumstances, are questions of fact for the jury. Gamwell v. Merchants & F. Mut. F. Ins. Co. 12 Cush. 167; Luce v. Dorchester Mut. F. Ins. Co. 105 Mass. 297; Williams v. People's F. Ins. Co. 57 N. Y. 274; Cummins v. Agricultural Ins. Co. *supra*; Robinson v. Mercer Co. Mut. F. Ins. Co. 27 N. J. L. 134; Wood, Ins. § 439.

Dwelling-house.

A dwelling-house chiefly designed for the abode of mankind is occupied when human beings habitually reside in it and unoccupied when no one dwells in it. North American F. Ins. Co. v. Zaenger, 63 Ill. 464; American Ins. Co. v. Padfield, 78 Ill. 167; Phœnix Ins. Co. v. Tucker, 92 Ill. 64; Imperial F. Ins. Co. v. Kiernan, 83 Ky. 468; Stupetski v. Transatlantic F. Ins. Co. 43 Mich. 373; Cook v. Continental Ins. Co. 70 Mo. 610; Herrman v. Merchants Ins. Co. 81 N. Y. 184; Herrman v. Adriatic F. Ins. Co. 85 N. Y. 162; Alston v. Old North State Ins. Co. 80 N. C. 326; Fitzgerald v. Connecticut F. Ins. Co. 64 Wis. 463.

The phrase "left unoccupied" will not be construed as implying an abandonment or willful vacation of the premises, leaving them uncared for. Sonneborn v. Manufacturers Ins. Co. 44 N. J. L. 220.

Object of stipulation.

The object of the stipulation against vacancy and

8 L. R. A.

See also 11 L. R. A. 771; 23 L. R. A. 99; 26 L. R. A. 313; 33 L. R. A. 712; 48 L. R. A. 49.

Second Department, affirming a judgment of the Kings Circuit entered upon a verdict directed for plaintiff in an action brought to recover the amount alleged to be due upon a policy of fire insurance. *Affirmed.*

Statement by **Vann, J.:**

This is an action upon an insurance policy issued by the defendant on the 10th of February, 1883, whereby it insured the plaintiff, for the period of one year from that day, "against loss or damage by fire, to an amount not exceeding $2,000, on his boiler, steam-engine and connections, machines, machinery, shafting, belting, pulleys, hangers, tubs, tanks, tables, tools, vats and all machinery and apparatus used in the business of manufacturing leather and morocco, all contained in the frame building and extension situate on the south side of Wallabout Street, about 375 feet westerly from Lee Avenue, Brooklyn, L. I."

The defendant answered, alleging that after the delivery of the policy, and before the loss occurred, the plaintiff permitted "the said building in said policy mentioned to become vacant and unoccupied, and the said mill to remain idle, . . . until and at the time of the fire in" question. It appeared that the property insured was totally destroyed by fire on the 4th of January, 1884, and that for several months prior thereto the morocco factory had "stood idle," although the machinery was not removed from the building.

Mr. **Thomas E. Pearsall** for appellant.
Mr. **Nathaniel C. Moak,** with *Mr.* **John Oakey,** for respondent.

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

The policy in question is a long instrument, containing some provisions that apply exclusively to insurance upon buildings or real property, others that apply only to personal property, and others, still, that are applicable to property of both kinds. The form was evidently designed for use in insuring both kinds together, or either kind separately; but in the latter case, of course, certain provisions were not intended to be operative, as there would be nothing for them to act upon. The only provision specifically pleaded by the defendant in its answer, as a defense to this action, is the following, viz.: "If a building covered by this policy shall become vacant or unoccupied, or if a mill or manufactory shall stand idle, or be run nights or overtime, without notice to and the consent of the company, clearly stated hereon, all liability hereunder will thereupon cease; and if a building shall fall, except as the result of a fire, this policy, if covering thereon, or on property therein, shall thereupon immediately cease and determine."

It is contended by the defendant that "the machinery covered by the policy constituted a mill, and that its standing idle created a forfeiture." On the other hand, the plaintiff claims that a building is the sole subject of insurance contemplated by the first part of the clause above quoted, and that its true meaning is that if a building covered by the policy shall become vacant or unoccupied, or if, being a mill or manufactory, it shall stand idle, all liability shall at once cease. The plaintiff further claims that the property insured was not a mill or manufactory, and that it was not insured as a mill or manufactory, but simply as personal property.

We think that the plaintiff is right in his contention, because it would not be a natural or ordinary use of language to describe machinery used in milling as a mill, or in manufacturing as a manufactory. *Herrman* v. *Merchants Ins. Co.* 81 N. Y. 184.

The property insured was neither a mill nor

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non-occupancy is to guard against the increased risk arising from the absence of everybody whose duty or interest might afford protection from fire. Moore v. Phœnix F. Ins. Co. 3 New Eng. Rep. 57, 64 N. H. 140.

So a house from which the owner or tenant has removed with no definite intention of returning is unoccupied or vacant. Sleeper v. New Hampshire F. Ins. Co. 56 N. H. 401; Hartshorne v. Agricultural Ins. Co. 13 Cent. Rep. 132, 50 N. J. L. 427.

But a temporary absence, or the occasional and necessary absence of the family or servants, will not be so construed. Phœnix Ins. Co. v. Tucker, 92 Ill. 64; Laselle v. Hoboken F. Ins. Co. 43 N. J. L. 468; O'Brien v. Commercial F. Ins. Co. 6 Jones & S. 517; Franklin F. Ins. Co. v. Kepler, 95 Pa. 492.

A building is not vacant, unoccupied or not in use although unoccupied except by a clerk who entered and made repairs, occupied and slept therein. Stensgaard v. National F. Ins. Co. 36 Minn. 181; Imperial F. Ins. Co. v. Kiernan, 83 Ky. 468; Hartford F. Ins. Co. v. Smith, 3 Colo. 422.

But where the tenant with his family removes from the building, merely leaving some furniture therein, and resides elsewhere, the building is deemed unoccupied and vacant. Bennett v. Agricultural Ins. Co. 51 Conn. 504; Sexton v. Hawkeye Ins. Co. 69 Iowa, 99; Feshe v. Council Bluffs Ins. Co. 74 Iowa, 676; Ashworth v. Builders Mut. F. Ins. Co. 112 Mass. 422; Corrigan v. Connecticut F. Ins. Co. 122 Mass. 298; Cook v. Continental Ins. Co. 70 Mo. 610; Watertown F. Ins. Co. v. Cherry, 84 Va. 72.

Insurance on mill and machinery.

In a contract of insurance, made for a period of years upon a mill building and machinery, a description of the property as a "sawmill building" had not the effect to restrict the use to the purpose of a sawmill. Frost's D. L. & W. W. Works v. Millers & M. Mut. Ins. Co. 37 Minn. 300.

Where an engine driving planing-mill machinery twenty-two feet distant, and engine room and mill building were connected merely by a shaft transmitting power from the engine to the mill, and by a spout carrying shavings from mill to engine, while beneath these a roadway separated said buildings, insurance on such "mill building and addition and machinery therein" covers such engine-room and contents. Home Mut. Ins. Co. v. Roe, 71 Wis. 33.

Clauses avoiding policy for non-occupancy and vacancy of premises.

To constitute occupancy of a building used for manufacturing purposes, within a clause in an insurance policy against non-occupancy, there must be some practical use or employment of the property. Halpin v. Phenix Ins. Co. 118 N. Y. 165.

But a building used as a manufactory, which is closed and in the hands of an agent to rent, is unoccupied, within a provision in an insurance policy against non-occupancy, although occasionally visited by the agent and a watchman who resides next door. *Ibid.*

A cotton-mill building is not vacant and unoccupied within a policy, where a number of em-

a manufactory, as those words are commonly understood. While the word "mill" is used to describe "a machine for grinding," it is also defined as "a building, with its machinery, where grinding, or some process of manufacturing, is carried on." Webster Dict.

A manufactory is "a house or place where anything is manufactured." *Ibid.*

Neither term would be understood or used by the mass of mankind to describe simply "machinery and apparatus used in the business of manufacturing leather and morocco," which is the description in the written part of the policy that is claimed to mean a mill or manufactory as used in the printed part. If the defendant intended to attach the condition in question to machinery used in a mill, it should have said so. In the condition relating to the fall of a building it is provided that "this policy, if covering thereon, or on property therein, shall thereupon immediately cease." So the clause prohibiting the use of certain inflammable substances provides that if they are "stored, kept or used in any building on which, or on the contents of which, there is any insurance," the policy shall be void.

Thus it appears that in certain instances, by the use of language that no one could mistake, the insurer made its intent clear that a certain condition should apply both to real and personal property. If it intended that the condition under consideration should thus apply, why did it not say so? We think that this condition refers to a mill or manufactory in the sense only of a building used for milling or manufacturing, and that it has no application to the personal property covered by the policy.

Moreover, if there is a reasonable doubt as to the meaning or application of this clause, it should be construed most favorably to the insured, because the insurer prepared and executed the contract, and is responsible for the language used. *Kratzenstein* v. *Western Assur. Co.* 116 N. Y. 54, 59; *Dilleber* v. *Home L. Ins. Co.* 69 N. Y. 256, 263.

As was said by this court in a recent case: "The defendant is claiming a forfeiture. When a clause in a contract is capable of two constructions, one of which will support, and the other defeat, the principal obligation, the former will be preferred. Forfeitures are not favored, and the party claiming a forfeiture will not be permitted, upon equivocal or doubtful clauses or words contained in his own contract, to deprive the other party of the benefit of the right or indemnity for which he contracted." *Baley* v. *Homestead F. Ins. Co.* 80 N. Y. 21, 23.

The learned counsel for the defendant has referred us to a case, recently decided by this court, in which the plaintiff sought to recover for a loss upon the building that contained the personal property involved in this action, and destroyed by the same fire. *Halpin* v. *Phenix Ins. Co.* 118 N. Y. 165.

The policy in that case covered the building only, and provided that if said building should become vacant or unoccupied the insurance should cease. We gave effect to that condition, which was clear and unequivocal, by reversing the judgment that the plaintiff had recovered. In another case arising out of the same fire, and decided during the present term, the policy covered personal property only, described as contained in said building; but it provided that "if the above-mentioned premises," referring to the building, should become vacant or unoccupied, the policy should be void. *Halpin* v. *Ætna F. Ins. Co.* 30 N. Y. St. Rep. 259.

In that case, also, we were required by the clear and unmistakable terms of the contract, and the facts as disclosed by the evidence, to

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ployés are retained in the service of lessee, and are actually engaged about their usual work in the mill up to and on the day of the fire, and all the plant and some material and manufactured goods are there. American F. Ins. Co. v. Brighton Cotton Mfg. Co. 15 West. Rep. 180, 125 Ill. 131.

Where, during repairs of machinery by a manufacturing company, watchmen were on duty and employés were about the factory from its closing until it burned, it is not unoccupied. Brighton Mfg. Co. v. Reading F. Ins. Co. 33 Fed. Rep. 232; Brighton Mfg. Co. v. Fire Asso. of Phila. Id. 234; Lebanon Mut. Ins. Co. v. Leathers (Pa.) 6 Cent. Rep. 901.

Provisions against ceasing to operate mill or machinery.

Provision against ceasing to operate a tannery will not be violated, if at the time of the fire the use of the premises is the same as at the time of insurance. Lebanon Mut. F. Ins. Co. v. Erb, 2 Cent. Rep. 733, 112 Pa. 149.

The temporary suspension of the operation of a steam engine in a planing mill, materially decreasing the risk, the other business continuing, does not avoid a policy conditioned to be void on suspending operations without a special agreement indorsed on the policy. Allemannia F. Ins. Co. v. White (Pa.) 10 Cent. Rep. 65.

But a building insured as a trip-hammer shop, the business therein suspended for more than thirty days, the machinery and tools remaining there and the plaintiff's son going through the shop nearly every day to see if things were right, did not constitute occupancy. Moore v. Phœnix F. Ins. Co. 3 New Eng. Rep. 57, 64 N. H. 140.

A temporary cessation of the operation of a manufactory, occasioned by the prevalence of an epedemic, is not a ceasing of operation. Poss v. Western Assur. Co. 7 Lea, 704.

A mere temporary suspension of business to make repairs, or for want of materials, is not a cessation of operation. Lebanon Mut. Ins. Co. v. Leathers (Pa.) 6 Cent. Rep. 901.

A sawmill lying idle for several weeks for lack of water or want of logs does not thereby cease to be occupied. Whitney v. Black River Ins. Co. 72 N. Y. 117.

The stoppage of a mill, though for the purpose of necessary repairs, without the required notice, is within the provision of a policy that, if the mill shall be shut down or remain idle from any cause whatever, the policy shall be considered suspended until work resumed. Day v. Mill-Owners Mut. F. Ins. Co. 70 Iowa, 710.

A temporary suspension of the operation of a mill for forty-two days, occasioned solely by the want of logs to manufacture, while the logs were expected daily, does not make the policy void, under a provision that if the mill shall cease to be operated, unless shut down for repairs without notice to and consent of the company, it shall be void. City P. & S. Mill Co. v. Merchants M. & C. Mut. F. Ins. Co. (Mich.) Nov. 28, 1888.

reverse the judgment that had been rendered in favor of the plaintiff. But we are called upon in the case at bar to enforce a contract that differs materially from either of the others named, because it fails to attach any condition that was shown to have been violated, to the property covered by the policy.

The judgment in this case, therefore, should be affirmed.

All concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

John W. SMITH and Wife
v.
COUNTY COURT OF KANAWHA COUNTY, *Plff. in Err.*

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

***The plaintiff and a lady friend were driving a single horse,** in a spring wagon, along the road leading from the City of Charleston to the Town of Malden, in Kanawha County. At a point in said road where it was from twelve to eighteen feet wide, two calves yoked together came suddenly from the pawpaw bushes, and frightened the horse, which the plaintiff had owned for two years, and regarded as gentle; and he commenced backing, and continued so to do until he backed the wagon and its occupants and himself over the steep river bank, whereby the plaintiff was seriously and permanently injured. In a suit brought by said plaintiff against the County Court of Kanawha County to recover damages for the injuries sustained, it was proven by plaintiff that she could have managed the horse but for the narrowness of the road; that she had traveled the same road two or three times a week for the previous two years without accident,—and by another witness that the road was in good condition, smooth and cindered, and that he had traveled said road two hundred times a year for sixteen years, driving all kinds of horses and teams, and had never met with an accident; that the road at that point was wide enough for two teams to pass, and on one side of the road was a steep mountain which slipped into the road in wet times, and on the other side the river bank. *Held*, that under the circumstances of this case, the defendant was not liable for said injury.

*Head note by ENGLISH, *J.*

(March 25, 1890.)

ERROR to the Circuit Court for Kanawha County to review a judgment in favor of plaintiffs in an action to recover damages for personal injuries alleged to have resulted from a defect in a public highway. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. **Okey Johnson** and **S. C. Burdett,** with *Messrs.* **Sylvester Chapman** and **A. B. Littlepage,** for plaintiff in error:

The County is not required to make the traveled part of the highway the whole width of the road as laid out, and will not be liable for defects in that part not usually traveled upon which do not affect the safety of the other part.

NOTE.—*Negligence; liability for injuries produced by.*

One who violates a duty owed to others, or who commits a tortious or wrongfully negligent act, is liable not only for those injuries which are the direct and immediate consequences of his act, but for such consequential injuries as, according to common experience, are likely to and do in fact result from his act. McDonald v. Snelling, 14 Allen, 290; Metallic C. C. Co. v. Fitchburg R. Co. 109 Mass. 277; Derry v. Flitner, 118 Mass. 131; Wellington v. Downer Kerosene Oil Co. 104 Mass. 64; Smethurst v. Independent Congregational Church, 2 L. R. A. 695, 148 Mass. 261.

The resulting injury must be the natural and probable consequence of the original tortious or negligent act. See note to Louisville, N. A. & C. R. Co. v. Lucas (Ind.) 6 L. R. A. 194.

A carrier's act, from which an injury results, will be deemed the proximate cause, unless the consequences were so unnatural and unusual that they could not have been foreseen and provided against by the highest practicable care, although the precise accident which occurred might not have been anticipated. See Louisville, N. A. & C. R. Co. v. Lucas, 6 L. R. A. 193, 119 Ind. 583.

Negligence is the commission of a lawful act in a careless manner, or the omission to perform a legal duty, to the injury of another. Splittorf v. State, 10 Cent. Rep. 699, 108 N. Y. 205; Lehigh & W. Coal Co. v. Lear (Pa.) 8 Cent. Rep. 109.

The basis of liability in negligence is the violation of some legal duty to exercise care. Cusick v. Adams, 115 N. Y. 55.

The fact that an accident is unusual, unexpected or unheard of will not excuse the negligence which causes it. Doyle v. Chicago, St. P. & K. C. R. Co. 4 L. R. A. 420, 77 Iowa, 607.

The loss or injury attributed to the proximate cause.

There should be such affinity or connection in the relation of the cause and the effect, that the influence of the wrongful act should predominate over other supervening causes. Brown v. Wabash, St. L. & P. R. Co. 2 West. Rep. 559, 20 Mo. App. 222; Gilliland v. Chicago & A. R. Co. 2 West. Rep. 138, 19 Mo. App. 411.

When there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect and proximate to it. Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469 (24 L. ed. 256).

In all cases of loss it is to be attributed to the proximate cause, and not to the remote cause. This maxim governs in cases of insurance. Waters v. Merchants Louisville Ins. Co. 36 U. S. 11 Pet. 213 (9 L. ed. 691); West Mahanoy Twp. v. Watson, 8 Cent. Rep. 543, 116 Pa. 344.

If negligence is the proximate cause of the injury, it is of no consequence whether it be by omission or commission. Harriman v. Pittsburgh, C. & St. L. R. Co. 9 West. Rep. 446, 45 Ohio St. 11.

Negligence is not actionable unless it is the proximate cause of the injury complained of. Mathiason v. Mayer, 7 West. Rep. 739, 90 Mo. 585; Pittsburgh, C. & St. L. R. Co. v. Conn, 1 West. Rep. 904, 104 Ind. 64; Carter v. Chambers, 79 Ala. 223.

Negligence in standing on the step of a car platform while the train is in motion is not the proximate cause of injury from a lever or signal of a switch which scraped the cars as they passed. Bosse v. Northern Pac. R. Co. 5 Dak. 308.

The stoppage of a gas pipe is not the proximate cause of an accident, during an experiment made to increase the pressure. Taylor v. Baldwin, 78 Cal. 517.

Where one keeps a magazine of explosives in vio-

See also 12 L. R. A. 257, 482; 14 L. R. A. 743; 16 L. R. A. 106, 545; 17 L. R. A. 217, 310; 19 L. R. A. 365; 20 L. R. A. 582; 21 L. R. A. 316, 721; 35 L. R. A. 199.

Dickey v. *Maine Teleg. Co.* 46 Me. 483; *Phillips* v. *Ritchie Co. Ct.* 31 W. Va. 481.

If the road was dangerous, and the female plaintiff knew it was dangerous, but she was willing to risk it if anybody else was, then the evidence shows no right to recover, because she ought not to have driven over it, and it was negligence in her to do so.

Phillips v. *Ritchie Co. Ct.* 31 W. Va. 477; *Moore* v. *Huntington*, Id. 842; *Hubbard* v. *Concord*, 35 N. H. 52; *Raymond* v. *Lowell*, 6 Cush. 524.

If the road was safe and good to the width of eleven to fifteen feet, and safe to pass, if the horse did not become frightened, and the cause of the injury was, not the narrowness of the road, but "the calves coming down from the hillside out of some pawpaw bushes," which frightened the horse and caused him to back over the bank, then she is not entitled to recover, because the fright to the horse by the calves was the cause of the accident, a cause that could in no sense be attributed to any fault or neglect of the County.

Kingsbury v. *Dedham*, 13 Allen, 189; *Lund* v. *Tyngsboro*, 11 Cush. 563.

A county is not liable for every object which renders a public road unsafe and inconvenient for travelers to pass over it, but only for such as not only render the road unsafe and inconvenient, but also defective or out of repair, and the injury must be attributable to the defect or want of repair.

Cook v. *Charlestown*, 13 Allen, 190, *note*.

The duty of the County to the traveling public does not extend to the degree of keeping its road in such condition that no injury could possibly happen.

Wilson v. *Charlestown*, 8 Allen, 137.

Messrs. **Knight & Couch,** with *Mr.* **Sam D. Littlepage,** for defendant in error:

The complaint is good in that it alleges that that particular road, at that particular point where the injury occurred, was in a bad condition and out of repair in point of narrowness, and that that resulted in the injury complained of.

Stone v. *Hubbardston*, 100 Mass. 49.

The mere fact that a traveler is familiar with the road, and knows of the existence of a defect therein, will not impose upon him the duty to use more than ordinary care in avoiding it.

Shearm. & Redf. Neg. §§ 346, 376; *Lyman* v. *Hampshire Co.* 1 New Eng. Rep. 227, 140 Mass. 311; *Henry Co. Turnp. Co.* v. *Jackson*, 86 Ind. 111; *Bullock* v *New York*, 99 N. Y. 654; *Lyman* v. *Amherst*, 107 Mass. 339; *Humphreys* v. *Armstrong Co.* 56 Pa. 204; *Evans* v. *Utica*, 69 N. Y. 166; *Mahoney* v. *Metropolitan R. Co.* 104 Mass. 73; *Smith* v. *St. Joseph*, 45 Mo. 449; *Kavanaugh* v. *Janesville*, 24 Wis. 618; *Kenworthy* v. *Ironton*, 41 Wis. 647; *Murphy* v. *Indianapolis*, 83 Ind. 76; *Wilson* v. *Trafalgar & B. C. Gr. Road Co.* 83 Ind. 326; *Huntington* v. *Breen*, 77 Ind. 29.

Where two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway and the other some occurrence for which neither party is responsible, the municipality is liable, pro-

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lation of law, he is not liable solely because of such violation, unless the violation is in some degree the cause of the injury. Ladin & R. Powder Co. v. Tearney (Ill.) 7 L. R. A. 262.

Where a person willfully turned a stream from a hose upon horses hitched in front of his premises and they ran away and collided with a wagon, he was liable for the injury. Forney v. Geldmacher, 75 Mo. 113.

In determining the proximity of cause the true rule is that the injury must be the natural and probable consequence of the negligence. West Mahanoy Twp. v. Watson, 8 Cent. Rep. 543, 116 Pa. 344; Southside Pass. R. Co. v. Trich, 10 Cent. Rep. 367, 117 Pa. 390.

The ascertainment of the dividing line between proximate and remote cause, in actions for damages for injuries by negligent use of highways by railroad trains, is so perplexing that to a sound judgment must be left each particular case, upon the special facts belonging to it. Brown v. Wabash, St. L. & P. R. Co. 2 West. Rep. 560, 20 Mo. App. 222.

Slipping on an icy street and falling against a cellar door do not show a case of negligence in maintaining the door. Hunter v. Wanamaker (Pa.) 2 Cent. Rep. 70.

The mere act of shooting a dog, though itself a tort, is not the proximate cause of injury to one startled by the report who, owing to previous delicate health, became ill from the nervous shock. Renner v. Canfield, 36 Minn. 90.

The removal of a fence along a railroad is not the proximate cause of a subsequent injury to cattle. Louisville & N. R. Co. v. Guthrie, 10 Lea, 432.

Failure to signal the starting of a train is not the proximate cause of injury to one who knew it was going to start or that it was in motion. Barkley v. Missouri Pac. R. Co. 96 Mo. 367.

Where cattle stopped on a highway by a standing railroad train are injured by another train, the obstruction caused by the standing train is too remote a cause of injury to make the company liable. Brown v. Wabash, St. L. & P. R. Co. *supra*.

Damages resulting from fright or nervous shock to a person not actually struck, caused by the fall of a bundle of laths through the negligence of another person, are too remote to be recovered. Rock v. Denis (Super. Ct.) 4 Montreal L. Rep. 356.

Proximate and remote cause of injury. See *notes* to Louisville, N. A. & C. R. Co. v. Lucas (Ind.) 6 L. R. A. 194; Erickson v. St. Paul & D. R. Co. (Minn.) 5 L. R. A. 786.

Co-operating causes.

When two causes co-operate to produce damage the proximate cause is the originating and efficient cause which sets the other cause in motion. Lapleine v. Morgan's L. & T. R. & Steamship Co. 1 L. R. A. 378, and *note*, 40 La. Ann. 661.

If there be a concurrence of some other immediate agency, that event must have been the effect of the act complained of or within the range of probable occurrence. Gilliland v. Chicago & A. R. Co. 2 West. Rep. 138, 19 Mo. App. 411.

A railroad lawfully built on a public street, and carefully operated, is not liable for injury to a pedestrian, run over by a passing team, by reason of snow-drifts on the sidewalk. The injury in such case results by failure of the city to keep its sidewalks passable. McCandless v. Chicago & N. W. R. Co. 71 Wis. 41.

Where the united and contemporaneous negligence of two persons causes a collision between them on a street, neither can recover for injuries

vided the injury would not have been sustained but for such defect.

Shearm. & Redf. Neg. § 346, and authorities cited in *note; Ring* v. *Cohoes*, 77 N. Y. 83; *Ehrgott* v. *New York*, 96 N. Y. 264; *Hunt* v. *Pownal*, 9 Vt. 411; *Palmer* v. *Andover*, 2 Cush. 600; *Houfe* v. *Fulton*, 29 Wis. 296; *Hey* v. *Philadelphia*, 81 Pa. 44; *Brookville & C. Turnp. Co.* v. *Pumphrey*, 59 Ind. 78; *Hull* v. *Kansas City*, 54 Mo. 599; *Olson* v. *Chippewa Falls*, 71 Wis. 558; *Burrell Twp.* v. *Uncapher*, 10 Cent. Rep. 328, 117 Pa. 353, 2 Am. St. Rep. 664; *North Manheim Twp.* v. *Arnold*, 11 Cent. Rep. 846, 119 Pa. 380; *Flagg* v. *Hudson*, 2 New Eng. Rep. 652, 142 Mass. 280; *Rushville* v. *Adams*, 5 West. Rep. 682, 107 Ind. 475.

The law requires every road to be thirty feet wide.

Warth's Code, chap. 43, § 34.

The defendant was clearly guilty of negligence, not only by reason of the unlawful narrowness of the road at that point, but also by reason of the total absence of any protection to travelers by fence, railing, barriers or otherwise.

Olson v *Chippewa Falls*, 71 Wis. 558; *Houfe* v. *Fulton*, 29 Wis. 296, 9 Am. Rep. 568; *Baldwin* v. *Greenwood's Turnp. Co.* 40 Conn. 238, 16 Am. Rep. 33; *Page* v. *Bucksport*, 64 Me. 51, 18 Am. Rep. 239; *Hey* v. *Philadelphia*, 81 Pa. 44, 22 Am. Rep. 733; *Lower Macungie Twp.* v. *Merkhoffer*, 71 Pa. 276; *Hays* v. *Gallagher*, 72 Pa. 136; *McKee* v *Bidwell*, 74 Pa. 218; *Burrell Twp.* v. *Uncapher*, 10 Cent. Rep. 328, 117 Pa. 353; *Harris* v. *Clinton Twp.* 64 Mich. 447, 8 Am. St. Rep. 842; *Baltimore & H. Turnp. Co.* v. *Bateman*, 68 Md. 389, 6 Am. St. Rep. 449.

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

An action of trespass on the case was brought to the February Rules, 1888, in the Circuit Court of Kanawha County, by John W. Smith and Leonora Smith, his wife, against the County Court of Kanawha County. On the 23d day of March, 1888, on the plaintiff's motion, the case was remanded to rules, with leave to them to amend their declaration, and on the 3d day of January, 1889, the defendant appeared by counsel, and demurred to the plaintiffs' declaration, which demurrer, being argued by counsel, and considered by the court, was overruled, and thereupon the defendant pleaded not guilty, and issue was therein joined; and thereupon a trial was had before a jury, which resulted in a verdict in favor of the plaintiffs for $750. The defendant then moved the court to set aside said verdict of the jury as being contrary to the law and the evidence, and award it a new trial, which motion the court, after consideration, overruled, to which action and ruling of the court the defendant excepted, and the court entered up judgment upon said verdict; and the defendant tendered a bill of exceptions to certain actions and rulings of the court, which was made a part of the record in the case; and the defendant applied for and obtained a writ of error and *supersedeas* to said judgment.

The facts set forth in the bill of exceptions shows that the female plaintiff was driving a horse which she and her husband both regarded as gentle, returning home from Charleston in a spring wagon, accompanied by Miss Emma Jacob, along the road leading to her home in

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sustained thereby. Evans v. Adams Exp. Co. (Ind.) 7 L. R. A. 678, and *note*.

Intervening agency breaks causal connection.

If a new cause intervenes sufficient of itself to cause the misfortune, the former must be considered too remote. Seale v. Gulf, C. & S. F. R. Co. 65 Tex. 274.

The negligence of a responsible agent intervening between defendant's negligence and the injury suffered, *i. e.* the damage, breaks the causal connection. Mahogany v. Ward, 16 R. I. —, Feb. 23, 1889.

So where horses were frightened by the upsetting of a vehicle in a defective highway, and after running for some distance were killed by a train of cars, the town authorities were held not liable. West Mahanoy Twp. v. Watson, 3 Cent. Rep. 243, 112 Pa. 574.

Where a person traveling by night, driven by a drunken driver, is precipitated down an unfenced bank, the drunkenness of the driver, and not the defective condition of the road, is the proximate cause of the injury. Hershey v. Mill Creek Twp. Road Comrs. (Pa.) 8 Cent. Rep. 252.

One negligent person cannot escape liability for his negligence because the negligence of a third person concurred in producing the injury. Louisville, N. A. & C. R. Co. v. Lucas, 6 L. R. A. 193, and *note*, 119 Ind. 583; Pittsburgh, C. & St. L. R. Co. v. Spencer, 98 Ind. 186; Slater v. Mersereau, 64 N. Y. 138; Barrett v. Third Ave. R. Co. 45 N. Y. 628; Thomp. Neg. 1088.

A village is liable for personal injury caused by a fall from an unguarded sidewalk although the direct cause of the fall is the negligence of a third party pushing him off. Carterville v. Cook (Ill.) 4 L. R. A. 721, and *note*.

Negligently piling lumber, concurring with the negligence of a stranger, is the direct and proximate cause of injury from a fall of the lumber pile. Pastene v. Adams, 49 Cal. 87.

Driving at an unlawful rate in the street is the proximate cause of a collision with another vehicle, although the parties were prevented from quickly turning out by reason of the condition of the street railway. De Camp v. Sioux City, 74 Iowa, 392.

Where the wrong of one party places another in a dilemma, such wrong is to be deemed the proximate cause of the injury which ensues. Louisville, N. A. & C. R. Co. v. Falvey, 2 West. Rep. 687, 104 Ind. 430; Harris v. Clinton Twp. 7 West. Rep. 666, 64 Mich. 447; Cody v. N. Y. & N. E. R. Co. (Mass.) 7 L. R. A. 843.

Where one injured by the negligence of another does all that a prudent person could have done under the circumstances it will absolve him from the charge of contributory negligence. Louisville, N. A. & C. R. Co. v. Lucas, *supra*. See Carterville v. Cook (Ill.) 4 L. R. A. 721.

Effect produced by an intervening cause.

An intervening cause cannot affect the liability of a negligent party. Harriman v. Pittsburgh, C. & St. L. R. Co. 9 West. Rep. 446, 45 Ohio St. 11.

Where the intervening cause and its probable or reasonable consequences could reasonably have been anticipated by the original wrong-doer the causal connection between the original wrongful act and subsequent injury is not broken. Seale v. Gulf, C. & S. F. R. Co. 65 Tex. 274. See *note* to Erickson v. St. Paul & D. R. Co. (Minn.) 5 L. R. A. 787.

The fact that land of a third party intervened between the woodland of the plaintiff and the defendant's road would not alone be decisive, if the destruction of the plaintiff's property was the natural and direct effect of the first firing. O'Neill

the Town of Malden; that she had owned the horse for about two years, and had driven him from Malden to Charleston two or three times a week during that time, and had never known him to frighten; and that two calves came down from the hillside, out of the pawpaw bushes, and her horse became frightened, and commenced backing; that she tried to keep him in the road, but could not do so; that the horse backed until he backed across the road and over the river bank, a distance of about forty feet from the top of the river bank; that at the time her horse became frightened she was driving next to the mountain, on the side of the road furthest from the river; that she tried to keep the horse in the road, but he was so badly frightened she could not do so, although he was a gentle horse, easily managed, and had never become frightened before; that the road at that point was about from eleven to eighteen feet wide; that she received injuries from said accident of a serious and permanent character, and was under the treatment of a physician during the entire summer; that she was keeping a boarding-house in the Town of Malden, but had to give up the business on account of the injuries received, and since the accident had been unable to attend to her household affairs; that there was not room for two wagons to pass at the point where the accident occurred; that the road was in about the same condition it was during the two years she had been driving over it; that it looked dangerous; that said plaintiff had always considered it dangerous, but she was willing to risk it if anyone else was; that there was no other road by which she could return home; that she could have managed her horse had it not been for the narrowness of the road. This was, in substance, the testimony of the female plaintiff.

The testimony of J. W. Smith was, in substance, the same, fixing the width of the road, at the point where the accident occurred, at twelve feet, and stating that his wife is helpless now, unable to do any work; that she had to give up her boarding-house in Malden, and remain with him in Charleston, where his business is; that the road where the accident occurred, as far as it was made, was a good road, and the road was a favorite driving place between Charleston and Malden; that the slip from the mountain was not interfering with the road at the time of the accident, that he knew of.

J. E. Dana, a witness for the plaintiffs, proved that the road at that point was sixteen or eighteen feet wide; that the road was a favorite drive for pleasure; that he had driven along the road two hundred times a year for sixteen years, with all kinds of horses and teams, and had never met with an accident, and had never heard of one happening on said road; that the mountain on the upper side always slipped after a heavy rain, but the slips were always cleared away by parties in charge of the road; that the many slips had forced a curve in the road, throwing the road out close to the river bank; that the road was wide enough for two teams to pass; and that he, in driving, passed other teams at said point, and the road was as smooth as any road he had driven over in the County.

W. A. Bradford, a witness for plaintiffs, proved that he was well acquainted with the road at the point where the accident occurred; saw it next day after the accident; saw marks of the wagon wheel where it went over the bank; that the road was narrow at that point; that it was very difficult for two buggies to pass, but that they might, if they were careful; that he had known the road for forty years; that it had been narrow for five years; that it had been repaired, but not widened, and he

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v. New York, O. & W. R. Co. 115 N. Y. 584; Vandenburg v. Truax, 4 Denio. 464; Pollett v. Long, 56 N. Y. 200; Webb v. Rome, W. & O. R. Co. 49 N. Y. 420.

But where several buildings in succession take fire, each from another, and burn, the sparks which set the first one being carried past the last one burned, by a strong wind which changed its direction and subsided before the latter buildings took fire, while lack of fire apparatus or ladders prevented extinguishing the fire at the beginning, the burning of the last building is not the proximate result of the setting fire to the first one. Read v. Nichols 7 L. R. A. 130, 118 N. Y. 224.

The falling of a tier of berths in a ship's cabin is the proximate cause of injury to a passenger, who, being dragged from her place of peril by the steward, was dashed on the floor and against a door by the sudden lurch of the vessel. Smith v. British & N. A. R. M. S. Packet Co. 14 Jones & S. 86.

A person who hitched his horses by the lines only is liable for injury caused by their fright and running away. Wagner v. Goldsmith, 73 Ind. 517.

So where a horse, through fright at the fall of ice from a building, started and thereby threw the driver and injured him, the fall of ice is the direct cause of the injury. Smethurst v. Independent Congregational Church, 2 L. R. A. 695, 148 Mass. 261.

The blowing of a steam whistle is the proximate cause of injury to a traveler by a horse frightened by the whistle. Gibbs v. Chicago, M. & St. P. R. Co. 26 Minn. 427.

Where a stringer of a bridge breaks while a person is hauling a steam-boiler and a steam-engine over the bridge, and his horses are injured by the steam escaping from the boiler, the breaking of the bridge is the proximate cause of the escape of the steam and water, and the township is liable for the damage if it has been negligent in respect to the bridge. McKeller v. Monitor Twp. (Mich.) Dec. 28, 1889.

Where by negligence the horses of defendant ran away and collided with a carriage, the occupant of which was killed by being dashed down a depression in the road, there is a direct causal connection between the collision and the killing. Belk v. People, 15 West. Rep. 59, 125 Ill. 584.

The unlawful speed of a train is the proximate cause of a collision at a crossing when, if the train had been going only at lawful speed, the traveler at the crossing would have passed over in safety before it arrived. Winstanley v. Chicago, M. & St. P. R. Co. 72 Wis. 375.

Where the employés of a railroad company placed a torpedo where children were in the habit of passing, and one was injured by its explosion, such negligence was the proximate cause of the injury sustained. Harriman v. Pittsburgh, C. & St. L. R. Co. 9 West. Rep. 438, 45 Ohio St. 11.

An unnecessary act which would probably cause a chain to break, may be regarded as the proximate cause of the injury caused by its breaking. King v. Ohio & M. R. Co. 25 Fed. Rep. 799.

thought it was a very dangerous place, but that there was plenty of room for one vehicle to pass in safety, if the horse did not become frightened; that there was a great deal of pleasure driving on that road.

Dr. Thomas, another witness for the plaintiffs, stated that, a short time before the trial of the cause commenced, he examined the plaintiff Mrs. J. W. Smith, and took a measurement of her left arm; that it was three fourths of an inch less in circumference than the right arm,—caused, in his opinion, by an injury.

These, in substance, constitute the facts proven by the plaintiffs; and, under the rulings of this court, we must, in considering the motion for a new trial, reject all of the evidence of the exceptor which is in conflict with that of the plaintiffs, and give full force and effect to the evidence of the plaintiffs. See *Dower* v. *Church*, 21 W. Va. 23.

And the same rule must be applied in considering the propriety of the action of the court upon the motion to exclude the evidence of the plaintiffs. See *Wandling* v. *Straw*, 25 W. Va. 692; *Franklin* v. *Geho*, 30 W. Va. 27.

In determining the question as to whether the court erred in overruling the demurrer filed by the defendant in this case, it is only necessary to call attention to the fact that the demurrer was general; and counsel for the defendant do not insist that there was any defect in the second count. Neither is there any error apparent on the face of said second count, so far as we are able to discover; and, the second count being good, the demurrer, being general, was properly overruled. *Nutter* v. *Sydenstricker*, 11 W. Va. 536.

The serious question, however, which is presented by this case for our consideration and determination, is whether or not the court erred in refusing to exclude the evidence of the plaintiffs from the jury as being insufficient to maintain their suit, or in overruling the motion of the defendant to set aside the verdict of the jury as being contrary to the law and the evidence, and award it a new trial; and, as these rulings involve so nearly the same questions of law and fact, they may be considered together. What was it that caused the damage and injury to the female plaintiff on the day this accident is alleged to have occurred? Her own testimony shows that she had passed over this road two or three times a week for the preceding two years without injury. She was driving a horse that the evidence shows was gentle, and was driving him on the side of the road furthest from the river bank, and no doubt would have passed on as usual if the horse had not become frightened at the calves coming down from the hillside out of some pawpaw bushes, and commenced backing. That she tried to keep her horse in the road; but he was so badly frightened she could not do so, although he was gentle, easily managed and never had become frightened before. The witness Dana fixes the width of the road at that point at eighteen feet, and J. W. Smith at twelve feet. Dividing the difference between these witnesses would make the road fifteen feet. Then the plaintiff, driving at the edge of the road next the hill, was as far from the river bank as she would have been if the road had been thirty feet wide, and she had been driving in the middle of the same; and the horse would have to back the same distance to reach the river bank. In the absence of the calves, then, would the narrowness of the road have injured the plaintiff? This question is answered by the testimony of the witness Dana in detailing his experience for the previous sixteen years in passing over said road two hundred times a year, with all kinds of horses and teams, and without an accident, and also by the experience of the plaintiff herself, in passing over the same road for two years, two or three times a week, with this same horse; she encountered no calves on these many trips, and she met with no accident.

What, then, are we to conclude was the proximate cause of the accident? Was it the narrowness of the road? If such was the case, why had it not occurred many times before?

1 Shearm. & Redf. Neg., § 26, says: "The breach of duty upon which an action is brought must be not only the cause, but the proximate cause, of the damage to the plaintiff. We adhere to this old form of words because while it may not have originally meant what is now intended, it is not immovably identified with any other meaning, and is the form which has been so long in use that its rejection would make nearly all reported cases on the question involved unintelligible. The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred." And *note 3:* "If it cannot be said that the result would have inevitably occurred by reason of the defendant's negligence, it cannot be found that it did so occur, and plaintiff has not made out his case."

Applying this law to the facts of this case, can it be said the condition of the road was the proximate cause of the accident or injury complained of? If the use of this road, which had been for years in the same condition, without any accident resulting therefrom, had continued uninterrupted or unbroken by any new cause, such as the calves rushing from the bushes, would we be sanctioned in saying the injury would have resulted? Or can we say that, without the occurrence of that unlooked-for event, the horse would have backed the vehicle over the river bank? The experience of the plaintiff and others for years answers in the negative.

In the case of *Kingsbury* v. *Dedham*, 13 Allen 186, it was held that "an object in a highway with which a traveler does not come in contact or collision, and which is not shown to be an actual incumbrance or obstruction in the way of travel, is not to be deemed a defect for the sole reason that it is of a nature to cause a horse to take fright, in consequence of which he escapes from the control of his driver and causes damage." In this case the horse was frightened by a small pile of gravel in the road.

And in the case of *Cook* v. *Charlestown*, reported in a *note* (p. 190) of the same volume, a horse became frightened at another horse which had dropped dead, and was lying at the side of the street; and the frightened horse started and ran, and the carriage struck a tree and the curbstone at a distance of about 180 feet, throwing

the plaintiffs out, and injuring them. There was plenty of room for plaintiffs to pass without coming in contact with the dead horse. Under instructions authorizing them to do so, the jury found damages for the plaintiffs, and the defendant excepted; and the case was reversed upon a writ of error.

In the case of *Titus* v. *Northbridge*, 97 Mass. 265, the court holds "that when a horse, by reason of fright, disease or viciousness, becomes actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in a highway, or upon a place which is defective for want of a railing, by which the injury is occasioned, the town is not liable for the injury unless it appears that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable that merely shies or starts, or is momentarily not controlled by his driver."

In the case of *Horton* v. *Taunton*, reported in a *note* [p. 266] to *Titus* v. *Northbridge*, *supra*, the facts were somewhat similar to the case under consideration: "A laborer employed by the city had deposited a load of stones within the limits of the highway, and near to, but wholly out of, the traveled portion of it, by the side of a reservoir. . . . The plaintiffs were driving from west to east, and had come within a few feet of these stones when their horse took fright at them, and suddenly began to back, and continued backing until he reached a point beyond the end of the railing west of the brook, and within the thirty-one feet where the bank was unprotected by a railing; and there he backed himself and the wagon over the bank, and the injuries were sustained for which this action was brought. The accident occurred, and all the damage was done, within the limits of the highway. The plaintiffs remained in the wagon, and retained hold of the reins, and used the ordinary means to control the horse and prevent the backing, but without success. Neither the horse nor the wagon came in contact with the stones, . . . nor would the accident have occurred if the horse had not been frightened; and it was agreed that 'the accident would not, probably, have occurred had the railing extended further westward,' and . . . that the want of a railing at the point where the horse backed over the bank was a defect in the highway, and had existed for many months." There was a judgment for plaintiffs in the court below. Chapman, *J.*, delivering the opinion of the court, said: "This case was considered by the court in connection with *Titus* v. *Northbridge*, and the two cases must be governed by the same principle;" and, after briefly reviewing the facts, gave judgment for the defendants.

In the case of *Jackson* v. *Bellevieu*, 30 Wis. 251, the court held as follows: "It is not the duty of towns to provide roads which shall be safe for runaway or unmanageable horses, or such as have escaped from control of their drivers without the fault of the town; and where injuries are sustained under such circumstances, it appearing that otherwise they might not have been sustained, the loss must fall upon the owners. See also *Fogg* v. *Nahant*, 98 Mass. 578, where a carriage was upset by a horse getting his tail over the lines and becoming unmanageable.

The plaintiff, Mrs. Smith, stated that "she tried to keep her horse in the road, but he was so badly frightened she could not do so." She does not, however, state what she did in trying to keep her horse in the road. Jennie Jones, however, the witness for defendant, who swears that she was driving the calves, does tell what Mrs. Smith did, and her evidence cannot be regarded as conflicting with any evidence offered by the plaintiffs, for no other witness tells what Mrs. Smith did. She says: "I was driving two calves, and just as they came up to the horse the horse got scared at the calves, and commenced backing; and Mrs. Smith, who was driving, commenced pulling on the lines, and the horse kept on backing, and the wagon and all went over the bank."

Mrs. Smith was in a situation that would have a tendency to excite a lady. The horse was frightened and backing, and the wagon was near the edge of the bank, which the witnesses speak of as being dangerous; and she may not have preserved that coolness which would enable her to properly manage a horse, although she was accustomed to driving. And pulling on the lines, under all the circumstances, would have a direct tendency to contribute to the result. She, however, says that she could have managed her horse had it not been for the narrowness of the road. This is her opinion; but the horse kept backing, till not only the wagon and occupants, but he, went over the bank after them.

Upon this question, as to the width a county road is required to be maintained and kept in order, it is true our Statute requires that "every road shall be thirty feet wide, unless the county court order it to be of a different width." The order establishing this road does not appear as a part of the record, and it does not appear whether it was ordered to be of a different width or not.

Ang. & D. Highw. § 260, says: "It is not required that towns—at least in the country—should incur the expense of having the whole width of a highway of two or four rods passable safely with wheels on the sides, or even a double track for wheels over all public roads including causeways and bridges. But if the town suffers the traveled part to become widened, or a turnout to exist from the traveled part to a private way over adjoining land with the characteristic marks of a highway, it is bound to keep such places, within the limits of the laying out of the highway, in suitable repair for travel usually passing,"—referring to *Kelsey* v. *Glover*, 15 Vt. 708; *Green* v. *Danby*, 12 Vt. 338; *Cobb* v. *Standish*, 14 Me. 198, and others. He says further: "In many cases, as has been remarked, all the property of the town would be insufficient for that purpose. There may be ledges of rocks, ravines and watercourses in the road; and towns are not expected, in all cases, to bridge the whole width of the road, to fill up ravines or cut down ledges of rock. The most that could be required, in a road so difficult by nature, is that the sides should be in such a state as would admit of the passing of carriages when they meet without unusual delay or trouble. 'If a

road,' says Woodbury *J.*, in the case of *Hull* v. *Richmond*, 2 Woodb. & M. 337, 'was on a steep mountain side, or was carried up from the bed of a stream against a steep cliff of rocks, or through a narrow notch or gorge among the hills, a double track would seldom be expected, though places should be made, at no great distance, for persons to turn out entirely, and others where, by each turning out in part, each could safely pass,'" etc.

In the case of *Dickey* v. *Maine Teleg. Co.* 46 Me. 483, the court held that "the law does not require the town, in preparing a highway for travel, ordinarily, to make the traveled path the whole width of the road. Towns are not liable for obstructions on the portions of a highway not constituting the traveled path, and not so connected with it as to affect the traveled portion"

In this case, it is evident the road was a difficult one to keep in proper order. On the one side was the steep river bank, and on the other the hillside, which slipped and encroached upon the road in wet weather; but, notwithstanding these facts, the evidence is that the road was in passable condition, and was wide enough for two teams to pass. All that the road surveyor, under our Statute, is required to do, is that "he shall superintend the county roads and bridges, cause the same to be put in good order and repair, of the proper width, well drained, and to be cleared, and kept clear, of rocks, falling timber, landslides, carcasses of dead animals and other obstructions, and remove all dead timber standing within thirty feet thereof." Code 1887, chap. 43, § 7.

The only one of these requirements which it is claimed was not complied with is the one in regard to the width of the road; and the authorities to which we have referred seem clearly to indicate that this requirement is not always to be complied with, but depends upon the character of the country over which the road is laid out; and, for a road located as this one was, with a steep river bank on one side and a slipping hill-side on the other, we think the evidence shows it was in as good condition as could be expected.

Counsel for the defendant in error quote from 2 Shearm. & Redf. Neg., § 346, as follows: "The general rule is that where two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate,—the one being a culpable defect in the highway and the other some occurrence for which neither party is responsible,—the municipality is liable, provided the injury would not have been sustained but for such defect,"—and quote numerous decisions to sustain said proposition. We do not controvert this proposition; but, under the evidence adduced in this case, we hold that the proximate cause of the plaintiff's injury was the sudden appearance of the calves from the pawpaw bushes, which frightened the horse, and without which the injury to plaintiff would not have resulted; that the narrowness of the road must be regarded as the remote cause, although the plaintiff says "she could have managed the horse had it not been for the narrowness of the road."

There would, however, have been no necessity for managing the horse if the calves had not frightened him. Without that extraneous occurrence, we feel confident the plaintiff would have passed along the road as usual. There was no defect in the road that caused the action of the horse, no hole in the ground left by the supervisor, or pile of stone or lumber placed there by him, that caused the backing, as there was in many of the cases reported. The plaintiff gives it as her opinion that she could have managed the horse but for the narrowness; but can we say, from all the circumstances, the horse would not have backed over the bank if the road had been thirty feet wide? He showed no indication of ceasing to back, but kept on after the wheels went over, and until he went over himself; and I cannot say the result would not have been the same if the road had been thirty feet wide.

In the case of *Phillips* v. *Ritchie County Court*, 31 W. Va. 478, this court held that where the defect or obstruction in the road is merely a remote cause of the injury, and the want of care or negligence of the plaintiff is the direct or proximate cause of the injury, the plaintiff cannot recover.

In the case of *Fawcett* v. *Pittsburg, C. & St. L. R. Co.*, 24 W. Va. 755, this court held that "the cause of an injury, in contemplation of law, is that which immediately produces it as its natural consequence; and therefore, if a party be guilty of a default or act of negligence which would naturally produce an injury to another, but, before such injury actually results, a third person does some act which is the immediate cause of the injury, such third person is alone responsible for the injury." See also the case of *Washington* v. *Baltimore & O. R. Co.* 17 W. Va. 190.

In that case, *Judge* Green, delivering the opinion of the court, quotes from the case of *Louisiana Mut. Ins. Co.* v. *Tweed*, 74 U. S. 7 Wall. 52 [19 L. ed. 67], from the opinion of *Justice* Miller, as follows: "One of the most valuable *criteria* furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

In my view of the case, neither the instructions asked for by the plaintiff nor defendant were relevant, and they should have been rejected. Disregarding, then, the testimony offered by the defendant, and looking only to the testimony of the plaintiffs for the facts and circumstances of the case, and applying the law thereto, *the judgment of the Circuit Court must be reversed*, and the case remanded; and a new trial is awarded the appellant.

Snyder, *P.*, and **Brannon**, *J.*, concurred; **Lucas**, *J.*, concurred in the syllabus.

MINNESOTA SUPREME COURT.

Andreas M. MILLER, *Appt.*,
v.
Luther MENDENHALL, *Respt.*

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

*1. **The State holds the title to the soil in navigable waters** to low-water mark in trust for the people, and chiefly for the protection of the right of navigation.

2. **The riparian owner is entitled to fill in** and make improvements in the shallow waters in front of his land to the line of navigability, and such improvements in aid of navigation are recognized as a public as well as private benefit. These rights pertain to the use and occupancy of the soil below low-water mark, and are valuable property rights, and the exercise thereof, though subject to state regulation, can only be interfered with by the State for public purposes.

3. **The establishment of a dock** or harbor line in pursuance of legislative authority is to be considered as giving to the owners of the upland the privilege of filling in and building out to such line.

4. **Where the owners of upland, bordering upon the Bay of Superior,** in this State, after the establishment of the dock line, adopted a survey and plan of improvement for the use and occupation to such line of the submerged land abreast of the upland owned by them, in connection with the navigation of the lake,—*Held*, that they might not only possess, occupy and improve the same themselves, in connection with the dry land, but might concede to other parties the same rights within the dock line, and might, by the appropriate covenants and stipulations in the deeds to their grantees of the upland, and of sites used or to be used and improved under low-water mark, obligate each and all to respect and recognize the validity of such grants made in conformity with the general plan of improvement of the premises within the dock line, all such grantees thus becoming a party thereto; and in such case a court of equity will not interpose in favor of a grantee of the upland to set aside prior deeds to grantees of sites in the submerged land.

*Head notes by VANDERBURGH, J.

(April 3, 1890.)

APPEAL by plaintiff from an order of the District Court for St. Louis County sustaining a demurrer to the complaint in an action to have a conveyance of certain land covered by the waters of Duluth Harbor declared of no effect and to remove the alleged cloud thereby cast on plaintiff's title. *Affirmed.*

The facts fully appear in the opinion.

Messrs. **Mahon & Howard,** for appellant:

All lands in the State of Minnesota, lying below low-water mark on navigable bays and rivers, belong to the State.

Brisbine v. *St. Paul & S. C. R. Co.* 23 Minn. 114; *Union Depot, S. R. & Transfer Co.* v. *Brunswick*, 31 Minn. 297.

The establishment of a dock line, under au-

NOTE.—*Title to soil below ordinary high-water mark.*

All the soil below high-water mark, within the limits of the State, where the tide ebbs and flows, that is the subject of exclusive property and ownership, belongs to the State, subject only to such lawful grants of such soil as may have heretofore been made. Hess v. Muir, 5 Cent. Rep. 585, 65 Md. 601.

But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish. *Ibid.*; Smith v. Maryland, 59 U. S. 18 How. 71 (15 L. ed. 269); Martin v. Waddell, 41 U. S. 16 Pet. 367 (10 L. ed. 997); Den v. Jersey Co. 56 U. S. 15 How. 426 (14 L. ed. 757); Corfield v. Coryell, 4 Wash. C. C. 376; Fleet v. Hegeman, 14 Wend. 42; Arnold v. Mundy, 6 N. J. L. 1; Parker v. Cutler Milldam Co. 20 Me. 353; Peck v. Lockwood, 5 Day, 22; Weston v. Sampson, 8 Cush. 347; 1 Vattel, chap. 20, § 246.

The State succeeds to the ownership of channels, and lands under them, formed by gradual encroachment of the sea, in case of permanent acquisition by the sea; but when the water disappears, the proprietorship returns to the original owner, without reference to the lapse of time. Mulry v. Norton, 1 Cent. Rep. 748, 100 N. Y. 424.

The sovereign succeeds to the ownership of such islands only as are originally created in tideways outside the boundaries of individual ownership. *Ibid.*

Title to land under water, and to the shore below ordinary high-water mark, in navigable rivers and arms of the sea, was, by common law, vested in the sovereign. Barney v. Keokuk, 94 U. S. 324 (24 L. ed. 224); Smith v. Maryland, *supra*; Pollard v. Hagan, 44 U. S. 3 How. 212 (11 L. ed. 565); Goodtitle v. Kibbe, 50 U. S. 9 How. 471 (13 L. ed. 220); Teschemacher v. Thompson, 18 Cal. 11; People v. Davidson, 30 Cal. 379; State v. Sargent, 45 Conn. 358; Com. v. Alger, 7 Cush. 53; Weston v. Sampson, 8 Cush. 347; Com. v. Roxbury, 9 Gray, 451; Gough v. Bell, 22 N. J. L. 441; Bell v. Gough, 23 N. J. L. 624; Stevens v. Paterson & N. R. Co. 34 N. J. L. 532; Providence Steam Engine Co. v. Providence & S. Steamship Co. 12 R. I. 348; Galveston v. Menard, 23 Tex. 349; 2 Kent, Com. 427; 1 Bl. Com. 110, 264; Hale, De Jure Mar, chap. 4.

In England only tide-waters were regarded as navigable. This rule has been adopted in many of the States of this country; and in them the public title to beds and shores of navigable streams is confined to tide-waters. Barney v. Keokuk, *supra.*

Since the decision in The Genesee Chief, in 1851 (53 U. S. 12 How. 443, 13 L. ed. 1058), declaring all the great lakes and rivers of the country navigable that are really such, there is no longer any reason for thus restricting the title of the State except as a change might interfere with vested rights and established rules of property. *Ibid.*

In Iowa the true rule has been adopted, and it is held that the bed of the Mississippi River and its banks to high-water mark belong to the State, and that the title of a riparian proprietor extends only to that line. *Ibid.*; Renwick v. Davenport & N. W. R. R. Co. 49 Iowa, 664.

This rule applies to land bounded upon the river generally. Barney v. Keokuk, *supra.*

Public authorities have the right, in Iowa, to build wharves and levees on the bank of the Mississippi below high-water mark,—the title below that line being in the State,—and make other improvements thereon necessary to navigation or public passage by railways or otherwise, without

See also 8 L. R. A. 559; 13 L. R. A. 411, 590; 18 L. R. A. 668; 21 L. R. A. 62; 22 L. R. A. 736; 29 L. R. A. 539; 30 L. R. A. 497; 34 L. R. A. 184; 38 L. R. A. 606.

thority of the Legislature, cannot be regarded as in any way operating as a conveyance from the State to the riparian proprietor of any title, interest or estate in the space between the shore and the dock line as established. The title to the bank and that to the submerged land remain precisely as they were before the dock line was established.

Gould, Waters, § 138; *Wetmore* v. *Brooklyn Gas Light Co.* 42 N. Y. 384; *Atty-Gen.* v. *Hudson Tunnel R. Co.* 27 N. J. Eq. 176; *Boston & H. Steamboat Co.* v. *Munson*, 117 Mass. 34; *People* v. *Broadway Wharf Co.* 31 Cal. 33; *Dana* v. *Jackson Street Wharf Co.* 31 Cal. 118; *Kisling* v. *Johnson*, 13 Cal. 57; *Schurmeier* v. *St. Paul & P. R. Co.* 10 Minn. 82; *St. Paul & P. R. Co.* v. *Schurmeier*, 74 U. S. 7 Wall. 272, 287 (19 L. ed. 74, 78); *McManus* v. *Carmichael*, 3 Iowa, 1; *Champlain & St. L. R. Co.* v. *Valentine*, 19 Barb. 484.

This case falls within the ruling of this court in *Lake Superior Land Co.* v. *Emerson*, 38 Minn. 406, which holds that the riparian right belonging to the owner of the shore is a mere natural right. It exists *jure naturæ*. It is a right incident to the use of land. It follows the ownership and use of the bank and cannot be severed from the abutting land.

For these reasons a deed of conveyance by the owner of the shore, of the submerged land in front of his premises, is inoperative. It passes no estate or interest in land.

Lake Superior Land Co. v. *Emerson*, 38 Minn. 406; *Hanford* v. *St. Paul & D. R. Co.* (Minn.) June 10, 1889.

It is doubtful whether the covenant for title would bar the Improvement Company itself, should it attempt to assert, as against its grantee, the riparian right incident to other land owned by it.

Bliss v. *Kennedy*, 43 Ill. 67; *Brigham* v. *Smith*, 4 Gray, 297.

Covenants for title in a deed cannot operate against the assigns of the covenantor even when named, excepting in the one case of a lease.

Rawle, Covenants for Title, § 313.

Where the truth appears upon the deed or instrument, a party shall not be estopped from taking advantage of it even to the extent of showing that the grantor had nothing to grant.

Pelletreau v. *Jackson*, 11 Wend. 110, 118; *Wheelock* v. *Henshaw*, 19 Pick. 341; *Sinclair* v. *Jackson*, 8 Cow. 543; 2 Devlin, Deeds, § 1278.

To charge land with the burden of a covenant, there must be some privity of estate between the covenantee and the assignee of the lands so burdened or he will not be charged with the covenant.

Brewer v. *Marshall*, 18 N. J. Eq. 337; *National Union Bank* v. *Segur*, 39 N. J. L. 173, 184; *Van Rensselaer* v. *Smith*, 27 Barb. 104, 146; *Plymouth* v. *Carver*, 16 Pick. 183; *Norcross* v. *James*, 1 New Eng. Rep. 327, 140 Mass. 188; *Hurd* v. *Curtis*, 19 Pick. 459; *Bliss* v. *Kennedy*, 43 Ill. 67; *Corning* v. *Troy Iron & Nail Factory* 40 N. Y. 191.

The benefits of these covenants and agreements will not at law accrue or pass to the defendant. They do not run with the land attempted to be conveyed to him.

Am. *note* to *Spencer's Case*, 1 Smith, Lead.

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the assent of the adjacent proprietor, and without making him compensation. *Ibid.*

On the admission of a new State into the Union, the "shore" or tide lands therein not disposed of by the United States prior thereto become the property of the State. Case v. Loftus (Or.) 5 L. R. A. 684, 39 Fed. Rep. 730.

Upon admission the State of Illinois became entitled to and possessed of all the rights of dominion which belonged to the original States. Huse v. Glover, 119 U. S. 543 (30 L. ed. 487).

The abutting owner has a right of access from his land to the water, and may, subject to the power of the Legislature, erect and maintain a private wharf for his own convenience, so long as he does not materially interfere with the rights of the general public. Case v. Loftus, *supra*.

The water front on the bay of "Florida Promenade"—a public park in the City of Apalachicola, Florida,—was, at the time of the dedication, vested in the United States, but on the admission of Florida as a State, became vested in her. Ruge v. Apalachicola Oyster Canning & Fish Co. (Fla.) Aug. 21, 1889.

The title to the shores of tide waters in this State has since been devested by statute in favor of littoral owners. Geiger v. Filor, 8 Fla. 325; Alden v. Pinney, 12 Fla. 348.

The submerged lands of a bay, not disposed of by the State, are her property, and are not subject to disposition by the adjoining land owner. Ruge v. Apalachicola Oyster Canning & Fish Co. *supra*.

Under the New Jersey Riparian Laws, lands below the high-water mark of navigable waters belong to the State. Hoboken v. Pennsylvania R. Co. 124 U. S. 656 (31 L. ed. 543).

The Colonial patents to Long Island towns vested in them the title to the soil under the waters of the bays within the bounds of the patents. Roe v. Strong, 10 Cent. Rep. 33, 107 N. Y. 350; Brookhaven v. Strong, 60 N. Y. 56; People v. Schermerhorn, 19 Barb. 540.

Private individuals asserting title to a part of the shore within such bonds must establish the devestiture of the title of the town and its acquisition by them. Roe v. Strong, 10 Cent. Rep. 33, 107 N. Y. 350.

The State may either sell or convey its title to a riparian owner or his assigns, or, in case of their neglect to take from the State its grants on the terms offered them, to a stranger who, succeeding to its title, has no relation to the adjacent riparian owner, except that of common boundary. Hoboken v. Pennsylvania R. Co. *supra*.

Grantees from the State have exclusive possession of the premises against an adverse claim of a municipality to an easement over them by virtue of a dedication of the streets to high-water mark by a former proprietor of the premises to whose rights such grantees have succeeded. *Ibid.*; Com. v. Alger, 7 Cush. 53; Com. v. Roxbury, 9 Gray, 451; Arnold v. Mundy, 6 N. J. L. 1; Bell v. Gough, 23 N. J. L. 624; Atty-Gen. v. Delaware & B. B. R. Co. 27 N. J. Eq. 1, 631; Atty-Gen. v. Hudson Tunnel R. Co. Id. 176.

Littoral owner, right to soil to low-water mark.

The proprietor of land on navigable water has an exclusive right to the soil between high and low water mark, for the purpose of erecting wharves and stores thereon. Ladies Seamen's Friends Society v. Halstead, 58 Conn. 144.

Mud flats on a seashore, between high and low water mark, may be used for any purpose which does not interfere with navigation. *Ibid.*

The owner may build upon and inclose it. But while covered with the sea, the public have the right

Cas. 8th Am. ed. 174; *Martin* v. *Drinan*, 128 Mass. 515.

Mr. **Walter Ayers,** for respondent:

So far as anything but the pure legal title is concerned, lands under water in this State to the point of navigability are absolutely the property of the shore owner.

Tuck v *Olds*, 29 Fed. Rep. 738.

The owner of city lots bounded on navigable streams, like the owner of any other lands thus bounded, may limit his conveyance thereof within specific limits, if he shall so choose.

Watson v. *Peters*, 26 Mich. 508.

The ownership of the land under the water will become severed from the land upon the bank adjacent when such is the manifest intent.

Smith v. *Ford*, 48 Wis. 115; *Barker* v. *Bates*, 13 Pick. 255, 23 Am. Dec. 678.

The covenant entered into by plaintiff runs with his land, even under the strict legal doctrine.

Shaber v. *St. Paul Water Co.* 30 Minn. 179; *Kettle River R. Co.* v. *Eastern R. Co.* (Minn.) Oct. 4, 1889.

Where it distinctly appears in a conveyance, either by a recital, an admission, a covenant or otherwise, that the parties actually intend to convey and to receive reciprocally a certain estate, they are estopped from denying the operation of the deed according to its intent.

Bayley v. *McCoy*, 8 Or. 259; *Clark* v. *Baker*, 14 Cal. 627; 2 Herman, Estoppel, §§ 642, 648, 670.

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

This case involves the consideration of the riparian rights of the owners of lands abutting upon the Duluth Harbor or Bay of Superior, in the shoals or land covered by water between low-water mark and the deep or navigable waters, and within the dock or harbor line established by the authority of the Legislature. These waters are within the jurisdiction of the state and federal governments, and the State holds the title to low-water mark in its sovereign capacity, in trust for the people, for the purpose chiefly of protecting the rights of navigation. But, though the title is nominally in the State, the common right of the people is limited to what is of public use for the purposes of navigation and fishery; and the riparian owners are permitted to enjoy the remaining rights and privileges in the soil under water beyond their strict boundary lines, after conceding to the State all the public rights. Gould, Waters, § 168.

The right of access and communication with the navigable waters, which pertain peculiarly to the ownership of the upland, in order to be available and of practical use, necessarily includes the right to fill in and to build wharves and other structures in the shallow water in front of such land, and below low-water mark, and the exercise of such rights, though subject to state regulation, can only be interfered with for public purposes; and such improvements are encouraged, because they are in the general

to use it for purposes of navigation. Boston v. Lecraw, 58 U. S. 17 How. 426 (15 L. ed. 118).

The State also, to prevent encroachments in the harbors, may establish lines, and limit this power of the owner over his own property. *Ibid.*

The riparian owner of land only has the right, under North Carolina Entry Laws, to enter the water front up to deep water, for the purpose of erecting a wharf; and in such case, the title to the land passes. Gregory v. Forbes, 96 N. C. 77.

The State can grant land under navigable water for wharf purposes only; and county commissioners have no power to confer upon a party a right to build a wharf upon such land for the purpose of a public road. *Ibid.*

By N. Y. Laws 1875, chap. 249, the dock department of New York City was given authority not previously possessed to authorize the erection of sheds on East River piers, and previous licenses were legalized. People v. Baltimore & O. R. Co. 117 N. Y. 150.

Riparian owners of land on East River, in Brooklyn, have a superior right to build wharves and collect tolls, and may collect damages for a wrongful interference with their rights. Steers v. Brooklyn, 1 Cent. Rep. 798, 101 N. Y. 51.

A riparian proprietor whose land is bounded by a navigable river has the right of access to the navigable part of the river, and the right to make a landing, wharf or pier for his own use or for the use of the public. Yates v. Milwaukee, 77 U. S. 10 Wall. 497 (19 L. ed. 984); St. Paul & P. R. Co. v. Schurmeier, 74 U. S. 7 Wall. 272 (19 L. ed. 74).

He has the right to use the shore in front of his land for any purpose not inconsistent with the rights of the public. Parker v. West Coast Packing Co. 5 L. R. A. 61, 17 Or. 510; Boston v. Lecraw, *supra*.

He may maintain a dock along the shore and extending the necessary distance into the water; and when thus erected, the dock is an appurtenance of the real estate. Tuck v. Olds, 29 Fed. Rep. 738.

Right to construct piers, wharves, etc.

Piers or landing places, and even wharves, may be private or public, although the property may be in an individual owner. Dutton v. Strong, 66 U. S. 1 Black, 23 (17 L. ed. 29).

The owner may have the right to their exclusive enjoyment, and may construct them for his own exclusive use or benefit. *Ibid.*

His right is property of which the owner can be deprived only if necessary that it be taken for the public good, upon due compensation. Yates v. Milwaukee, 77 U. S. 10 Wall. 497 (19 L. ed. 984).

But if erected without other authority than his mere ownership, the structures are unlawful and he will be liable for damages caused thereby. Atlee v. Northwestern Union Packet Co. 88 U. S. 21 Wall. 389 (22 L. ed. 619).

Wharves and permanent piers constructed by the riparian proprietor on the shores of navigable rivers, bays and arms of the sea, or on the lakes, where they do not extend below low-water mark, are not a nuisance, unless they are an obstruction to navigation. Dutton v. Strong, *supra*.

Such structures differ materially from wharves or piers made to aid navigation, and regulated by city or town ordinances, or by statutes or other competent authority, and from piers built for railroad bridges across navigable streams, which are authorized by Acts of Congress or statutes of the States. Atlee v. Northwestern Union Packet Co. *supra*.

A railroad company under the power of eminent domain, granted by the State, cannot appropriate his pier to its own use without compensating him. Davenport & N. W. R. Co. v. Renwick, 102 U. S. 180 (26 L. ed. 51).

Right subject to control.

The State of California did not, by granting the use of the water front to the City of San Francisco, surrender control of the navigable waters of the

interest of navigation and commerce, and are a public as well as a private benefit.

In *Dutton* v. *Strong*, 66 U. S. 1 Black, 32 [17 L. ed. 32], it is said that, "wherever the water is too shoal to be navigable, there is the same necessity for such erections for lake navigation as in the bays and arms of the sea; and where that necessity exists it is difficult to see any reason for denying to the adjacent owner the right to supply it."

And in *Yates* v. *Milwaukee*, 77 U. S. 10 Wall. 497 [19 L. ed. 984], it is held broadly that these riparian privileges are to be treated as valuable property rights, which cannot be taken or interfered with for public use without compensation. *Union Depot, S. R. & Transfer Co.* v. *Brunswick*, 31 Minn. 301.

And, if a stranger makes a filling or an obstruction in the waters in front of his land, the owner of the adjacent upland may enjoin its continuance, or recover in trespass, if not in ejectment.

In the case before us the complaint shows that a corporation known as the "Duluth Improvement Company" was the owner of a large tract of land bordering upon the waters of Duluth Harbor, which communicates with Lake Superior, and is navigable for large boats and vessels. In front of this land, and for a considerable distance into the bay, the water is shallow, and not navigable; and, in pursuance of legislative authority, a dock or harbor line had been duly established by the City of Duluth, extending in front of, and at a distance of a thousand feet or more from, the low-water mark on the tract of land referred to. Thereafter the Improvement Company caused this land, together with the land in front thereof under water, out to the dock line, to be surveyed and platted into lots and blocks, piers, slips, avenues and streets, and caused a plat thereof to be duly made and recorded under the name of the "Bay Front Division of Duluth," and thereafter proceeded to convey divers lots and parcels of the platted land, as well land under water as the dry land, to divers persons, by reference to the recorded plat, and by conveyances of the form set out in the complaint, and containing special covenants and stipulations, as hereinafter mentioned. The complaint further proceeds as follows: "That on or about the 27th day of June, 1887, the said Duluth Improvement Company sold and conveyed to Luther Mendenhall, defendant herein, by deed duly executed, a copy whereof is hereto annexed and made a part of this complaint, the following described tract or parcel of land, the same being a part of the land hereinabove referred to, to wit: All that part of block twenty-seven (27) in the Bay Front Division of Duluth, first re-arrangement, according to the recorded plat thereof, that lies easterly of a

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bay and the right to erect proper wharves and use them. Payne v. English, 79 Cal. 540.

By the common law of Massachusetts, the grantee of land on navigable waters where the tide ebbs and flows is owner of the soil between high and low water mark. Boston v. Lecraw, 58 U. S. 17 How. 426 (15 L. ed. 118).

The Act of 1806, chap. 18, operates as a legislative grant of the interest in the soil below low water and confers the right to lot owners on Acushnet River to build wharves. Hamlin v. Pairpoint Mfg. Co. 2 New Eng. Rep. 143, 141 Mass. 51.

The private interest in submerged soil at the bottom of a river, which had been granted to a person by a State, is subject to the paramount right of the public to use the river for navigation, and of the United States, in the regulation of commerce and navigation. Hawkins Point Lighthouse Case, 39 Fed. Rep. 77.

A State Legislature may authorize the building of a bridge or other structure tending to obstruct the navigation of a navigable river which is altogether within its own boundary; and it is only when Congress, by virtue of the constitutional provision, acts as to such obstructions, that its will must be obeyed so far as may be necessary to insure free navigation. Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co. (Ky.) 2 L. R. A. 540, 2 Inters. Com. Rep. 515.

A license under the New Jersey Wharf Act confers no right on licensee, unless he owns the upland abutting on tide-water. New Jersey Z. & I. Co. v. Morris Canal & Bkg. Co. 13 Cent. Rep. 342, 44 N. J. Eq. 398.

The owner of the land abutting on the stream has a license to fill in and dock out to such extent as does not interfere with public rights. *Ibid.*

Under the California statutes, a title to a lot on the Bay of San Francisco was in subordination to the control, by the City of San Francisco, over the space immediately beyond the line of the water-front, and to the right of the State to regulate the construction of wharves and other improvements; and his erection of a wharf was an encroachment on the soil of the State. *Ibid.*; Weber v. State Harbor Comrs. 85 U. S. 18 Wall. 57 (21 L. ed. 798).

Public authorities have the right, in Iowa, to build wharves and levees on the bank of the Mississippi below high-water mark, and make other improvements thereon necessary to navigation or public passage by railways or otherwise, without the assent of the adjacent proprietor, and without making him compensation. Barney v. Keokuk, 94 U. S. 324 (24 L. ed. 224).

The compact between Virginia and Maryland of 1785 secured to their citizens "the privilege of making and carrying out wharves" on the shores of the Potomac only so far as they were "adjoining their lands." Potomac Steamboat Co. v. Upper Potomac Steamboat Co. 109 U. S. 672 (27 L. ed. 1070).

Subject to the exceptions established by paramount law, the City of New Orleans has the right of building levees and wharves on the banks of the Mississippi River, within its corporate limits, for the public utility. New Orleans, M. & T. R. Co. v. Ellerman, 105 U. S. 166 (26 L. ed. 1015).

Riparian rights, how conferred. See *notes* to Haines v. Hall (Or.) 3 L. R. A. 609; Fulmer v. Williams (Pa.) 1 L. R. A. 603; Brooks v. Cedar Brook & S. C. R. Imp. Co. (Me.) 7 L. R. A. 460.

Alienation of right.

The title to the upland bordering on a seashore, and the appurtenant rights in the shore and the mud flats between high and low water mark, are separable, and either may be conveyed without the other. Ladies Seamen's Friends Society v. Halstead, 58 Conn. 144.

A riparian owner conveying land may reserve to himself the right to build wharves out into the water from such land. Parker v. West Coast Packing Co. 5 L. R. A. 61, 17 Or. 510.

A conveyance of land on a river bank passes all the land between high-water mark and the ordinary stage; and a survey which merely goes to high-water mark is not correct. Hess v. Cheney, 83 Ala. 251.

line through said block, parallel with and at equal distances from the lines dividing said block from block twenty-six (26), and from block twenty-eight (28) in said division. That Said Duluth Improvement Company, on or about the 30th day of July, 1887, sold and conveyed to plaintiff, by deed duly executed, and identical in form with and containing the same covenants as the deed to Luther Mendenhall, hereinabove referred to, the following described tract or parcel of land, being a part of the land hereinabove referred to, to wit: All that part of block twenty-seven (27) in the Bay Front Division of Duluth, first re-arrangement, according to the recorded plat thereof, that lies westerly of a line through said block parallel with and at equal distance from the lines dividing said block from block twenty-six (26), and from block twenty-eight (28), in said division, saving and excepting so much of said tract as lies within one hundred (100) feet of the southerly boundary line thereof, which said property so excepted is hereby dedicated for the perpetual use of a slip or water-way for the use and benefit of the owners and occupants of property abutting thereon. Plaintiff further alleges that the greater part of said block 27, so as aforesaid conveyed to plaintiff by the Duluth Improvement Company, consisted of dry land and shore, and that the same extended to the low-water mark on said bay. That all of that part of said block 27, so as aforesaid conveyed to Luther Mendenhall by said Duluth Improvement Company, lies under the water of the bay, beyond the low-water mark of said bay, and in front of and between that part of said block 27 so as aforesaid conveyed to plaintiff, and said established dock or wharf line upon said Duluth Harbor. That the said Luther Mendenhall claims title to the part of said block 27 so as aforesaid conveyed to him by the Duluth Improvement Company under and by virtue of said deed of conveyance to him, and claims the right to cut off and exclude plaintiff from access to the navigable waters of said bay over and across his part of that block, and denies the right of the plaintiff to dock out or make improvements in front of his part of the block to the established dock line, and claims and asserts that all the riparian rights to which plaintiff would be entitled, as owner of the shore along said harbor, are absolutely cut off and limited by the conveyance so as aforesaid made to him, said Mendenhall, as also by the conveyance made to the plaintiff."

Following the descriptions in the deeds to these parties, and to other grantees of the platted lands above referred to, we find the following clauses, covenants and stipulations, viz.: "Together with all the hereditaments thereunto belonging, or in anywise appertaining, but subject, nevertheless, to the reservations, exceptions and conditions of this instrument. And the said party of the first part, for itself, its successors and assigns, does covenant with the said party of the second part, his heirs and assigns, that it has not made, done, executed or suffered any act or thing whatsoever, whereby the above-described premises, or any part thereof, now are, or at any time hereafter shall or may become, imperiled, charged or incumbered in any manner whatsoever; and the title to the above-granted premises, against all persons lawfully claiming the same from or under it, the said party of the first part will forever warrant and defend. It being the intention hereby to vest in the said party of the second part, his heirs and assigns, forever, the exclusive right to use, occupy and enjoy the space covered by the above-mentioned lots, as laid down upon the said recorded plat of said Bay Front Division of Duluth, first re-arrangement, and to estop the party of the first part, its successors and assigns, from having or claiming the use or occupancy of said space by virtue of riparian ownership or otherwise. This conveyance is and shall be construed as a contract between the parties hereto. The character and extent of the premises, and the rights and privileges thereunto appertaining, whether riparian or other rights, shall be determined solely by reference to the plat of said division, and no rights or privileges of any kind shall pass by this conveyance except such as said plat shows to be appurtenant to the premises herein conveyed. The said party of the second part thereby estops himself, his heirs and assigns, from asserting or claiming that the lots or blocks, if any are shown on said plat, between the premises herein conveyed and the established dock line along the northerly side of the Bay or Harbor of Duluth, are not land, and estops himself from claiming or asserting any rights or privileges under this grant in any part of the territory covered by said plat, except such as would solely by reference to said plat vest in him."

The case comes here upon appeal from an order sustaining a demurrer to the complaint. In connection with the general statement in respect to the rights of riparian owners already made, we are to consider the additional fact of the establishment of the dock or harbor line, and the effect of the restrictive covenants in the deeds to the respective parties. The court will take notice of the extensive commerce and great shipping interests which must be accommodated in the Duluth Harbor, and which will require corresponding facilities in the way of local improvements, which must be made in great measure by private enterprise; and in this case we may assume that the plan adopted by the Duluth Improvement Company, in the survey and plat of the submerged land in connection with the upland, was one which was suitable and proper for the improvement and occupation of the same in the interests of navigation, so as to subserve the public as well as private interests. The action of the State, through the Legislature, in establishing the dock lines, is to be construed in connection with the established doctrine of riparian rights of which we have spoken, and the practical use permitted and necessarily made by riparian owners of land under water in front of the dry or upland.

In *Aborn* v. *Smith*, 12 R. I. 373, it is said by the court that the owners of the upland are in such cases impliedly permitted to carry the upland forward to the harbor line, so that each owner will occupy the part abreast his own land.

In *Gerhard* v. *Seekonk River Bridge Comrs.*, 15 R. I. 334, 2 New Eng. Rep. 619, and in *Engs* v. *Peckham*, 11 R. I. 223, 224, it is held to be a permission and invitation by the State

to the riparian owner to fill out and incorporate the flats with his upland to the line. *Eldridge* v. *Cowell*, 4 Cal. 80.

In *Fitchburg R. Co.* v. *Boston & M. R. Co.*, 3 Cush. 71, it appeared that the Legislature had established a harbor line for Boston Harbor, but prohibiting the extension of the existing wharves to the line without legislative permission. Afterwards the Legislature passed an Act authorizing the owners of certain wharves to extend them out to the line. This Act was held to be a grant, and not a mere revocable license (page 87); and in *Hamlin* v. *Pairpoint Mfg. Co.*, 141 Mass. 57, 2 New Eng. Rep. 143, a legislative authority to extend wharves to the channel of a river was held equivalent to a grant of a possessory title, if not an absolute interest in the soil. In *Norfolk* v. *Cooke*, 27 Gratt. 438, the court treats the right to use and occupy the land within such lines with wharves, etc., as a qualified proprietary interest in the soil, sufficient to support an action for the possession. *Guy* v. *Hermance*, 5 Cal. 74; *Power* v. *Tazewell*, 25 Gratt. 786.

But the title of the State is not extinguished by such legislative action merely. In this country the generally accepted doctrine is that the *jus privatum* passes to the owner of the adjacent lands, and in this State extends to low-water mark, with the accompanying riparian rights, while the *jus publicum* belongs to the State, which holds the title to the soil under the water as trustee. "The sovereign is trustee for the public, and the use of navigable waters is inalienable." 3 Kent, Com. 427. See *Com.* v. *Alger*, 7 Cush. 89, 93.

The State is authorized to regulate the exercise of riparian rights in the interests of the public, and may also make concessions to private owners of possessory rights in the soil of navigable waters, the effect of which will be to give them private and exclusive rights equivalent to a grant. Gould, Waters, §§ 138–140.

While the public right of navigation and fishery may not be extinguished until the waters are excluded, yet after the submerged land is filled or occupied the riparian owner will have the exclusive right of possession, and the entire beneficial interest; and whether his dominion would be absolute, and his title indefeasible as against the State, is not necessary to inquire. *Union Depot, S. R. & Transfer Co.* v. *Brunswick, supra.*

The action of the Legislature in establishing a harbor line is to be construed as a regulation of the exercise of the riparian right. It settles the line of navigability, above which the State will not interfere; and is an implied concession of the right to build, possess and occupy to the established line, which amounts practically to a qualified possessory title. 141 Mass. 57, *supra.*

The importance and substantial character of these rights are recognized by the courts, and there is a growing tendency in different directions to give effect to contracts and grants in respect to riparian occupancy and improvements. *Norfolk* v. *Cooke*, 27 Gratt. 436; *Parker* v. *West Coast Packing Co.* 17 Or. 515, 5 L. R. A. 61.

It is true the right of access and communication with the navigable waters belongs exclusively to the riparian owner, except with his permission. But if in the case of a railway corporation he may, for a consideration, concede the right to occupy with its road-bed the land under the shore, and obstruct such communication by a valid contract, which we presume will not be questioned, why may he not contract with natural persons to grant to them the right of possession and occupancy of building sites within the dock line for wharves or elevators, for use in connection with navigation, or such other purposes (the State not objecting), as the grantees may be advised, with right of way, if need be, over his land, or, as in this case, impliedly over streets laid over the same as designated in the plat and dedicated to the public use? In many instances, however, such right of entry or easement of passage may be found entirely unnecessary, the occupant having other means of reaching the *locus in quo.* If the riparian owner may make such improvements, and afterwards grant and convey his possessory title, or contract to do so, the courts ought not to stand upon so narrow a distinction as that he may not bind himself by contract that another may have and enjoy the same possessory rights in a particular site or lot which he has in it; for his right is not a mere revocable license, though held in subordination to the public interest, and subject to some restraint for the general good as other property may be, though differently situated. *Com.* v. *Alger, supra,* 95.

There can be no doubt, we think, that a lease of such property would be operative between the parties, and a subsequent purchaser of the upland, with notice and expressly subject thereto, would also be bound to respect the lessee's rights.

In reference to a lease of a mill-site in the bed of the Mississippi River (at a place not navigable), this court says in *St. Anthony Falls Water Power Co.* v. *Morrison*, 12 Minn. 254 (Gil. 162): "It is not for a private individual, under a pretense of vindicating the abstract rights of the public, to set up the intrusion, in a private and civil action, for the purpose of repudiating his own solemn contract obligations."

In this case the respondent does not find it necessary to question the correctness of the decision in the case of *Lake Superior Land Co.* v. *Emerson*, 38 Minn. 406, because there the grantor simply undertook to convey a strict legal title, which until the land was reclaimed could not be the subject of transfer, and we are not called on to distinguish that case. But this case is rested upon the contract of the parties, incorporated in the several deeds, in which it will be seen the grantor covenants that "the grantees and their assigns shall have the exclusive right to use, occupy and enjoy the space covered by the lots as described in the deed, and as identified by the plat, and covenants to estop the company and its assigns from having or claiming the use and occupancy of such space by virtue of riparian ownership or otherwise." Here there is an express waiver and concession of the grantor's riparian rights in the premises, and consent to the use and occupancy thereof, so as to cut off its access and communication with deep water, except in accordance with the general plan of improve-

ment indicated by the plat. And this is also made a part of plaintiff's contract, and undoubtedly entered into and affected the consideration of the deed to him. He thereby made himself a party to the general plan and arrangement for the improvement and disposition of the property, in which there was nothing unlawful. He took with notice of defendant's deed. We see no reason why he should be relieved from the legitimate operation of these covenants, or why a court of equity should interpose to cancel or declare null and void the defendant's deed, in order to give the plaintiff rights he has expressly agreed to waive.

Order affirmed.

KENTUCKY COURT OF APPEALS.

James C. MURRAY, *Appt.*,
v.
James A. MURRAY *et al.*, Exrs., etc., of Henry H. Murray, Deceased.

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

1. **A conveyance on the eve of marriage,** to be regarded in equity as a fraud upon the legal rights of the intended wife, and consequently not binding upon her, must be made without her consent or knowledge.
2. **The fact that a conveyance,** made by a man with the consent of his intended wife, reserved a life estate in himself, is not a matter of which she can complain.
3. **A prima facie case of fraud on a wife's marital rights** in her husband's estate exists where, without her knowledge, he gives, either before or after marriage, all or the greater portion of his property to his children by a former marriage.

(March 8, 1890.)

APPEAL by complainant from a judgment of the Circuit Court for Franklin County settling her rights in her deceased husband's estate in an action brought for the settlement of such estate, and to set aside certain conveyances made by him upon the alleged ground that they were in fraud of her marital rights. *Reversed.*

The facts are sufficiently stated in the opinion.

Messrs. **John W. Rodman** and **George C. Drane,** for appellant:

Voluntary conveyances, or gifts by the husband to his children or others of all or the bulk of his estate pending a marriage treaty or during the marriage without the knowledge or concurrence of the wife, will be presumed to be fraudulent and the *onus* is upon the grantees or donees, in a controversy with the widow, to show that no fraud was intended or practiced against her.

Fennessey v. *Fennessey*, 84 Ky. 519.

When such a gift is made with, and for, the purpose of defrauding the wife, it will be set aside to the extent it may affect her rights as widow.

Manikee v. *Beard*, 85 Ky. 20. See 2 Bishop, Married Women, § 351; *Davis* v. *Davis*, 5 Mo. 189; *Stone* v. *Stone*, 18 Mo. 389; *Tucker* v. *Tucker*, 29 Mo. 350; *Hays* v. *Henry*, 1 Md. Ch. 337; *Smith* v. *Smith*, 6 N. J. Eq. 521; *Dunnock* v. *Dunnock*, 3 Md. Ch. 140; *Thayer* v. *Thayer*, 14 Vt. 122; *Dearmond* v. *Dearmond*, 10 Ind. 194.

Messrs. **William Lindsay** and **John B. Lindsley** for appellees.

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

In May, 1882, the appellant, Jane C. Murray, then Jane C. Jillson, first met Henry H. Murray. He was then a widower for the second time. During the summer of that year they became engaged to marry, the Christmas following being the time fixed for the consummation of the agreement. It was, however, postponed from time to time, at his instance, and upon one excuse or the other, until February 17, 1884, when they were married. He had three children living, to wit, William H. Murray by his first wife, and James A. and John W. Murray by his second wife. When he and the appellant became engaged, he was a gentleman of considerable fortune, being worth in lands and personalty probably not far from $70,000. This was then known to her. They lived together until December, 1886, when he died. In April, 1887, the appellant brought this action, seeking a settlement of his estate, and the cancellation, as to herself, of certain conveyances and gifts by him to his three sons, upon the ground that they were in fraud of her marital rights. Subsequent to their engagement to marry, and on August 17, 1882, he conveyed to his sons James A. and John W. Murray four houses and lots worth $4,000 or $5,000. It is conceded, however, in argument by appellant's counsel, that the consideration recited in the conveyance, to wit, that this property had come by the mother of the grantees, is true. The testimony so shows, and no recovery is now asked on account of it. It is therefore out of the case, and needs no further mention.

Subsequent, also, to their engagement, he, by a deed dated August 1, 1882, and acknowledged on October 30, and recorded November 28, following, conveyed to his sons James and John, in consideration of love and affection, the homestead where they were living, and another house and lot, the two pieces of property being worth from $15,000 to $25,000. The appellant admits, however, both in pleading and her evidence, that he informed her, before the making of this conveyance, of his intention to execute it, and she made no objection to it. She says, however, that she supposed it was to be an absolute one, by way of advancement to the two sons, and that it was not unreasonable in view of his financial condition as stated to her by him. She also says he then promised to do right by her, and provide well for her. She now claims, however, that the deed was in the nature of a testamentary disposition of the property, and in fraud of her coming marital rights, because it provided: "But there is reserved in said party of the first part [H. H. Murray] a right for life, at his option, to occupy,

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See also 27 L. R. A. 799; 34 L. R. A. 49.

use, lease and enjoy the profits of each and all of said property for and during his natural life."

A conveyance upon the eve of marriage, to be regarded in equity as a fraud upon the marital rights of the intended wife, and consequently not binding upon her, must be made without her consent or knowledge. *Leach* v. *Duvall*, 8 Bush, 201.

Here she knew of it, and the fact that it conveyed a less estate than she supposed cannot serve as a ground of complaint for her. It was an advantage to her. She, together with her husband, enjoyed during his life the use of at least the homestead, if not all of the property covered by the deed. The conveyances named appear to have embraced all the real estate owned by H. H. Murray.

April 3, 1884, he, in consideration of love and affection, assigned to his son James A. Murray a judgment against the Blantons, secured by mortgage lien, and amounting to about $7,000. The son says that his father had told him some four or five years before that he was to have this debt; and in this statement he is supported by the evidence of the draughtsman of the assignment of the debt, who says that the father said, when he executed it, that he had heretofore given it to the son. The gift was, however, not perfected until April 3, 1884. At the same time, the father, for the same consideration, assigned to the same son a mortgage debt on one Herrman for about $4,000; also a certificate for thirty shares of bank stock, worth $4,500. In November, 1885, he gave to James A., for John Murray, United States bonds of the value of $13,750. Also, at about the same time, he gave to his son William railroad bonds, payable to bearer, worth $4,800. Thus we see that shortly after his marriage he gave to his three sons about $34,000. With the last of these gifts his fortune was substantially gone. The wife had no knowledge of those made after their marriage. At his death he was worth but about $12,500, consisting altogether of personalty. A few days after his marriage he made a will by which he bequeathed all his estate, without naming his wife. It is contended for her that these gifts were merely colorable, and intended to be effective only in case his wife outlived him. In support of this, it is shown that the bank stock was never transferred upon the bank books until after his death; that the checks for the dividends thereon, and for the interest on the United States and railroad bonds, were issued payable to him until his death; and there is some evidence tending to show that he took some control of the property which was purchased in payment of the Blanton debt. The transfers, however, vested the donees with either the legal or equitable title; and there is rebutting testimony showing that they controlled the property from the date of the gifts, and received the money upon the checks issued in payment of the bank dividends, and the interest upon the bonds.

The question remains, however, whether the gifts of the personalty are, under the circumstances, to be regarded as having been made in fraud of the appellant's marital rights. The sons testify—and they are doubtless honest in the belief—that they were bona fide, and made without any intention to defraud the appellant as to her inchoate rights in the estate of her husband. It is difficult, however, in the face of this record, to believe that there was not a purpose upon the part of the husband to lessen the wife's interest in his estate, in the event she survived him, by giving it to his sons. We do not mean to intimate that a husband cannot make any advances to his children, and must preserve his estate intact to meet the inchoate claims of his wife. If the advancements or gifts be reasonable, when considered with reference to the amount of property owned by the husband, and his purpose be to provide for the children, and not to defraud the wife, then she cannot complain, although they in fact diminish the property to which her inchoate rights have attached by the marriage. It is a question of intention upon the part of the grantor. If the property given away constitute all, or the principal part, of the husband's estate, and be such an advancement as is unreasonable, when compared with his entire property, then, while it should not be conclusively presumed to have been made in fraud of the wife's marital rights, yet prima facie it should be so regarded, and the *onus* of showing otherwise be cast upon the donee. Each case must depend upon its own circumstances. If not done to prevent the wife from enjoying a reasonable portion of the husband's estate, or to deprive her of such an interest in it as she might reasonably expect upon her marriage, then the advancement should be upheld as to her. The court must look to the condition of the parties, and all the attending circumstances, in judging of the transaction. It should take into consideration the amount of the husband's estate, the value of the advancements, the time within which they are made, and all other *indicia* which will serve to determine the intention accompanying the transaction.

If, however, a gift or voluntary conveyance of all or the greater portion of his property be made to his children by a former marriage without the knowledge of the intended wife, or it be advanced to them after marriage without the wife's knowledge, a prima facie case of fraud arises; and it rests upon the beneficiaries to explain away such presumption. If the husband have an ample estate, he may, of course, give to the children of a former marriage a reasonable portion of it, and the wife cannot complain. If this were not the rule, then the hands of the husband would be completely and unreasonably tied, and he could make no advancement to his children by a former marriage, however large his estate, and however needful to them; but he would be compelled to hold it all, except from purchasers for value, to meet the inchoate claims of the wife.

Justice Story says that reasonable provision may be made for the children of a former marriage if done under such circumstances as evidence good faith. 1 Story, Eq. Jur. § 273.

In this instance, however, the husband, by successive gifts, advanced to his children, without the knowledge of his wife, nearly all his large estate. They were not her children, and the transfers deprived her of that reasonable expectation as to the enjoyment of a portion of his property which she had a right to form at their marriage. A prima facie case arises in her favor. It is attempted to overturn it with

the claim that the greater portion of the husband's property came by the second wife; but, while it appears that she derived some property from her mother, yet the amount of it is not even approximately shown, and is a matter of conjecture. The husband, within a comparatively short time after his marriage to the appellant, and without her knowledge, gave to his children by his former marriages between $30,000 and $40,000. What he so gave, together with his estate remaining at his death, amounts to about $46,000. Allowing for reasonable advancements to the children, the wife was, in our opinion, entitled to $10,000 as her distributable portion of the estate. This, it seems to us, is the equity of the case. The gifts made to the children subsequent to her marriage must, under the circumstances, be regarded as having been made in fraud of her marital rights; and the amount of them, together with the estate of the husband, remaining at his death, less what would have been reasonable advances to the children must be estimated in determining her rights. The chancellor will allow, as of the date of his decree, the sum above named. Any equities which may exist between the other parties to this action remain open for further settlement, not being now presented for determination.

The judgment below, and which allowed the appellant as her distributable portion but one third of the estate in her husband's possession, at the time of his death, *is reversed*, and the cause is remanded for further proceedings consistent with this opinion.

PENNSYLVANIA SUPREME COURT.

EDWIN SHULTZ
v.
Frederick WALL, *Appt.*

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

1. The responsibility of an innkeeper for goods and moneys of his guest extends to moneys stolen from the guest, unless they were stolen by a servant or companion of the guest.

2. The intoxication of a guest at an inn is no excuse for his negligence which contributes to the loss of his property by theft.

3. On evidence that the vest of a guest in a hotel was taken in the night while the door of his room was locked and bolted, and found in the morning in the dining-room carefully folded and laid between two blankets, but his money which he left in it missing, and that an outer door of the hotel bore marks of violence while his door did not, and other evidence showing that plaintiff had been drinking, to some extent at least, the night before, the question of his negligence should be left to the jury, considering the general uncertainty and mystery of the robbery.

4. Whether a guest at a hotel should be

NOTE.—*Innkeeper, responsibility of.*

The relation of guest does not depend on the time the traveler remains, or on the contract to pay. Jalie v. Cardinal, 35 Wis. 118.

The relation of innkeeper and guest is not necessarily and conclusively changed by an agreement as to price or any definite length of sojourn. Ross v. Mellin, 36 Minn. 421.

Innkeepers are responsible for the well and safe keeping and custody of the goods and chattels of their guests, and even the absence of negligence will not exempt them from liability. Shaw v. Berry, 31 Me. 478.

The particular responsibility of an innkeeper does not extend to goods lost or stolen from a room occupied by a guest for a purpose of business distinct from his accommodation as guest, such as the exhibition of samples of merchandise. Fisher v. Kelsey, 121 U. S. 383 (30 L. ed. 930).

He is not responsible under the Missouri statute, unless the guest shall have given written notice of having such merchandise for sale or sample, after entering the inn, or unless such loss shall be caused by fire intentionally produced by the innkeeper or his servants, or by their theft. Express knowledge of the innkeeper is not equivalent to written notice. *Ibid.*

They are liable for the loss of goods of a boarder only where they have been guilty of culpable negligence. Manning v. Wells, 9 Hump. 746.

Liability of innkeeper as insurer.

At common law, innholders, like common carriers, are regarded as insurers of the property committed to their care and are liable for any loss if not caused by the act of God, or by a public enemy, or by the neglect or fault of the guest. Mason v. Thompson, 9 Pick. 280; Berkshire Woollen Co. v. Proctor, 7 Cush. 417; Mateer v. Brown, 1 Cal. 221 231; 2 Kent, Com. 594; Story, Bailm. 3465.

But he is not an insurer of the goods of a traveler who is not a guest. Lusk v. Belote, 22 Minn. 468.

Either case or assumpsit lies for the loss of baggage through negligence of the innkeeper. Dickinson v. Winchester, 4 Cush. 114.

To make an innkeeper liable in trover, there must be an actual conversion of goods intrusted to him by the guest. Hallenbake v. Fish, 8 Wend. 547, 24 Am. Dec. 88; Wilkins v. Earle, 44 N. Y. 188; Sager v. Blain, Id. 449; Needles v. Howard, 1 E. D. Smith, 60.

Many cases hold that an innkeeper is liable as an insurer for the goods of his guest, and for losses by theft or fire which occur without the negligence of the innkeeper, and is only excused by the act of God, of the public enemy or of the guest. 2 Parsons, Cont. 146; 2 Story, Cont. § 909; Saunders, Negl. 212; Hulett v. Swift, 33 N. Y. 571; Shaw v. Berry, 31 Me. 478; Norcross v. Norcross, 53 Me. 163; Sasseen v. Clark, 37 Ga. 242; Burrows v. Trieber, 21 Md. 320; Hallenbake v. Fish, 8 Wend. 547; Morgan v. Ravey, 6 Hurlst. & N. 265; Day v. Bather, 2 Hurlst. & C. 14; Sibley v. Aldrich, 33 N. H. 553; Holder v. Soulby, 8 C. B. N. S. 254; Gile v. Libby, 36 Barb. 70; Cashill v. Wright, 6 El. & Bl. 891; Oppenheim v. White Lion Hotel Co. L. R. 5 C. P. 515; Fuller v. Coats, 18 Ohio St. 343; Jalie v. Cardinal, 35 Wis. 118.

In other cases, however, the liability has been restricted, particularly in losses by fire, to cases where there is negligence or default on the part of the innkeeper. Addison, Torts, § 684; 2 Kent, Com. 593; Cutler v. Bonney, 30 Mich. 259; Howth v. Franklin, 20 Tex. 798; Woodworth v. Morse, 18 La. Ann. 156; Kisten v. Hildebrand, 9 B. Mon. 72; Metcalf v. Hess, 14 Ill. 129; Johnson v. Richardson, 17 Ill. 302; McDaniels v. Robinson, 26 Vt. 316; Read v. Amidon, 41

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See also 16 L. R. A. 188.

treated as having notice of the existence of a safe is a question for the jury, where he has frequently stopped there and there is evidence that on some visit his attention had been called to the safe by the landlord.

5. Whether carrying a certain amount of money to his room instead of placing it in the hotel safe is negligence on the part of the guest, is a question for the jury.

(April 21, 1890.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Chester County in favor of plaintiff in an action to recover from a hotel keeper the value of certain money which had been stolen from plaintiff while a guest in the hotel. *Reversed.*

Wall was the keeper of a hotel in Phœnixville. Shultz was the driver of a beer wagon and came to the hotel of Wall on the evening of July 2, 1888, with his wagon and team, put his team in the hotel stable, and remained as a guest of the hotel during the night of July 2, the day and night of the third, and a part of the fourth. Shultz was assigned to a chamber on the door of which was a lock with key upon the inside, and also an inside sliding bolt. A notice was printed at the head of each sheet of the hotel register, which read as follows: "Money, jewelry and other valuables must be placed in the safe. Otherwise the proprietor will not be responsible for loss." Wall claimed to have called Shultz's attention to this notice.

On the night of July 3, Shultz procured a night key to enable him to enter the hotel after it should be closed for the night. He testified that between eleven o'clock and midnight he entered the house by means of the night key and went to his room and retired, and that upon rising in the morning he discovered that his vest was missing and that he had been robbed of some $180 in cash.

Upon the door by which Shultz had entered

Vt. 15; Laird v. Eichold, 10 Ind. 212; Dessauer v. Baker, 1 Wilson (Ind.) 429.

The liability is in some cases held to extend only to necessary articles. Treiber v. Burrows, 27 Md. 130; Maltby v. Chapman, 25 Md. 310; Sasseen v. Clark, 37 Ga. 242; Myers v. Cottrill, 5 Biss. 465; Simon v. Miller, 7 La. Ann. 360.

But in others it is held that his liability is not limited to articles and money necessary for traveling. Pinkerton v. Woodward, 33 Cal. 557; Sneider v. Geiss, 1 Yeates, 34.

An innkeeper is, however, liable for all losses which could have been prevented by ordinary care (Newson ads. Axon, 1 McCord, L. 509); but the loser must have been a guest at the time of the loss. Towson v. Havre-de-Grace Bank, 6 Har. & J. 47.

To render the innkeeper liable the goods must have been brought within the inn. Kent, Com. 593; Albin v. Presby, 8 N. H. 408; Calye's Case, 8 Coke, 32; Sanders v. Spencer, 3 Dyer, 266 *b*; Farnworth v. Packwood, 1 Stark. 249; Burgess v. Clements, 4 Maule & S. 306; Richmond v. Smith, 8 Barn. & C. 9; Jones v. Tyler, 1 Ad. & El. 522; Bennet v. Mellor, 5 T. R. 273; Packard v. Northcraft, 2 Met. (Ky.) 439; Norcross v. Norcross, 53 Me. 163.

The proprietor of a hotel is liable for the loss of baggage of guests through the negligence of a carrier to whom it has been delivered for transportation to the hotel, and whose apparent duty is, by authority of such proprietor, to transport guests and baggage to such hotel; and any private arrangement between the proprietor and carrier unknown to the guest is immaterial. Coskery v. Nagle (Ga.) 6 L. R. A. 483, and *note*.

Liability as bailee.

An innkeeper is liable for money deposited by a guest in the hotel safe, and stolen from it (Wilkins v. Earle, 44 N. Y. 172); and for money deposited with the barkeeper on the credit of the inn. Houser v. Tully, 62 Pa. 92.

The admission of a servant of an inn that he had stolen the jewelry of a guest is not evidence against the innkeeper. Elcox v. Hill, 98 U. S. 218 (25 L. ed. 103).

He is liable for the loss of baggage of a guest left in his custody. Adams v. Clem, 41 Ga. 65; Giles v. Fauntleroy, 13 Md. 126.

He is liable for goods lost during the temporary absence of the guest although the absence extends over several days. Grinnell v. Cook, 3 Hill, 490; McDonald v. Edgerton, 5 Barb. 560; Day v. Bather, 2 Hurlst. & C. 14; Bather v. Day, 32 L. J. N. S. (Exch.) 171; 1 Comyn, Dig. 421; Gelley v. Clerk, Cro. Jac. 188.

Proof of loss of goods, while in charge of the innkeeper, is sufficient prima facie to charge him with liability. Hill v. Owen, 5 Blackf. 323, 35 Am. Dec. 124; Laird v. Eichold, 10 Ind. 212.

Innkeeper may defend on ground of contributory negligence of guest. Elcox v. Hill, *supra*; Houser v. Tully, 62 Pa. 92; Hawley v. Smith, 25 Wend. 642; Chamberlain v. Masterson, 26 Ala. 371; Hadley v. Upshaw, 27 Tex. 547; Kelsey v. Berry, 42 Ill. 469.

Where a guest, on leaving a hotel without the intention of returning as a guest, but without paying his bill, leaves his valise in the charge of the hotel clerk, and returns within forty-eight hours, the innkeeper is liable as a bailee for want of ordinary care; and the loss of the valise raises a presumption of negligence against him. Murray v. Marshall, 9 Colo. 482.

Innkeepers are not bound to receive and keep property of a person who is neither a traveler nor a guest. Grinnell v. Cook, 3 Hill, 485.

A visit by one not requiring present accommodations, but for the purpose of simply depositing money for safe keeping, does not constitute the visitor a guest. Hence, a gambler depositing his money without registering his name is not a guest. Arcade Hotel Co. v. Wiatt, 2 West. Rep. 368, 44 Ohio St. 32.

In Illinois a hotel keeper is exempt from liability for money, jewels and the like, lost by his guest, where a safe for the keeping of such articles is provided, and notice given as required by the statute, and the guest fails to take the benefit of the protection thus furnished him. Elcox v. Hill, 98 U. S. 218 (25 L. ed. 103).

To this rule the statute makes one exception. If the loss occurs "by the hand or through the negligence of the landlord, or by a clerk or servant employed by him in such hotel or inn," the liability remains; but not if the loss was occasioned by the negligence of the guest himself. *Ibid.*; 2 Story, Cont. § 909.

For a guest at a hotel to retain the sum of about $500 in a belt upon his person while sleeping in a room by himself is not negligence as a matter of law, even though the bolt on the door could be opened from the outside by means of a wire. Smith v. Wilson, 36 Minn. 334.

See *note* to Coskery v. Nagle (Ga.) 6 L. R. A. 483, for a full discussion of this subject. See also Pullman Palace Car Co. v. Lowe (Neb.) 6 L. R. A. 809.

with his night key there was both a lock and a dead latch. He was himself the last person to enter that door upon that night, and the next morning the lock was found to have been broken off.

Shultz testified that he both locked and bolted his bed-room door before retiring, but that the next morning he found it standing partially open. If a thief entered that room it was admitted that he entered through that door, which bore no evidence whatever of the lock or bolt having been forced. The vest was found down stairs carefully folded and laid between two lap blankets on the hat-rack in the dining-room, with the pocket-book and everything intact, but the money gone. Matches of a kind not used in the hotel were found scattered at various points.

Wall's hostler, Rahn, testified that at about 11 o'clock of the night of the robbery some men called at his room seeking Shultz, and Mrs. Wall testified that between 11 and 12 o'clock she heard voices on the porch, one of which she recognized as Shultz's.

The court charged the jury, *inter alia*, as follows:

["As I understand the law of this Commonwealth relating to the liability of an innkeeper, I instruct you that he is answerable for all losses happening to the goods of travelers becoming his guests, except such losses as are caused by the act of God or the public enemy, or by improper conduct of the guest himself, or his servant, or the companion whom he brings with him. Wherever the loss does not occur by reason of any of these excepted causes, then the innkeeper in this Commonwealth, in judgment of this court, is answerable for that loss."] (Fifth assignment of error.)

["Mr. Shultz had no servant and he had no companion, and we say to you that we see no testimony in the case which would warrant the jury in concluding that Mr. Shultz by his conduct contributed to the theft, if that theft was committed. You will therefore see that under our view of the law, if a theft was committed in this house, Mr. Wall is answerable for the amount of the loss. You will also see that under the views of the court you have nothing to consider except the question whether or not there was a theft in this house. If there was, then you will ascertain the measure of damages which Mr. Shultz sustained, and the measure of damages will be the amount of that loss."] (Sixth assignment of error.)

Defendant requested the court to charge, *inter alia:*

(2) If the jury find that there was a sufficient lock and bolt on the door of the room occupied by the plaintiff, if properly used, to insure the safety of his property, and if they believe, from the evidence, that the plaintiff did not make use of safety thus supplied him, it is for the jury to find from all the facts whether, under the circumstances of the case, the plaintiff has not discharged the defendant, and, if they so find, the verdict should be for the defendant. *Answer.* In answer to this point, gentlemen, we say that we see no evidence in the case which would justify the jury in concluding that the plaintiff had not made use of the proper means of safety which were furnished him, and therefore disaffirm the point. (Second assignment of error.)

(3) The fact of the guest having the means of securing himself, and choosing not to use them, is one which, with other circumstances of the case, is for the jury to consider; and if they should find from that fact and other circumstances in the case, that the plaintiff did not exercise the ordinary care of a prudent man under the circumstances, and was thus guilty of contributory negligence, their verdict should be for the defendant. *Answer.* The principles of law, set out in that point, are correct. We say to you that there is no evidence in the case, in the estimation of the court, which would warrant you in applying them to the law as here set out, and we therefore disaffirm the point for the reason given. (Third assignment of error.)

There was a verdict for plaintiff for $186.82 and, a rule for a new trial having been discharged, defendant appealed.

Messrs. **I. N. Wynn, Archibald M. Holding** and **Robert E. Monaghan,** for appellant:

Although the loss in itself raises a presumption of negligence on the part of the innkeeper, or of those for whom he is responsible, it is not irrebuttable, but may be overcome by satisfactory proof that the loss did not occur through the negligence of him, or those for whom he is responsible.

Jones, Bailm. 3d London ed. pp. 94–96; Story, Bailm. 7th ed. §§ 470–472; *Merritt* v. *Claghorn*, 23 Vt. 177.

If the innkeeper was free from negligence he is not responsible for the loss.

Dawson v. *Chamney*, 5 Q. B. 164; *Howe Mach. Co.* v. *Pease*, 49 Vt. 477; Registrum Brevium, 105; Fitzh. N. B. 94; *Calye's Case*, 8 Coke, 32; Jones, Bailm. 3d London ed. 94 *a, note; McDaniels* v. *Robinson*, 26 Vt. 317; *Johnson* v. *Richardson*, 17 Ill. 302; *Kisten* v. *Hildebrande*, 9 B. Mon. 72; *Metcalf* v. *Hess*, 14 Ill. 129; *Laird* v. *Eichold*, 10 Ind. 212; *Hill* v. *Owen*, 5 Blackf. 323; *Dessauer* v. *Baker*, 1 Wilson (Ind.) 429; *Cutler* v. *Bonney*, 30 Mich. 259; *Howth* v. *Franklin*, 20 Tex. 798; *Weisenger* v. *Taylor*, 1 Bush, 275; *Vance* v. *Throckmorton*, 5 Bush, 41; *Norcross* v. *Norcross*, 53 Me. 163; *Read* v. *Amidon*, 42 Vt. 15; *Sasseen* v. *Clark*, 37 Ga. 242; *Metcalf* v. *Hess*, 14 Ill. 129.

There was evidence of contributory negligence for the consideration of the jury.

Herbert v. *Markwell*, 45 L. T. N. S. 649; Weekly Notes (Eng.) 1882, p. 112; *Oppenheim* v. *White Lion Hotel Co.* L. R. 6 C. P. 515, 517; *Bohler* v. *Owens*, 60 Ga. 185; *Walsh* v. *Porterfield*, 87 Pa. 378; Story, Bailm. 472.

The plaintiff was guilty of negligence in not availing himself of the place of safety provided by the defendant for the safe keeping of his money, and he cannot maintain this action.

Purvis v. *Coleman*, 21 N. Y. 112; *Chamberlain* v. *West*, 37 Minn. 54; *Jones* v. *Jackson*, 29 L. T. N. S. 399.

Mr. **H. H. Gilkyson,** for appellee:

The liability of the innkeeper, in cases of loss or theft, does not depend upon the measure of care with which he keeps the goods of a guest, nor the means which he has employed to protect them. His liability is analogous to

that of a common carrier, who is held absolutely responsible for all loss of goods while in his control, and under his custody, unless the loss be occasioned by an act of God or the public enemy.

Calye's Case, 8 Coke, 32, 1 Smith, Lead. Cas. *194, 7th Am. ed. 241; *Sibley* v. *Aldrich*, 33 N. H. 553; *Hulett* v. *Swift*, 33 N. Y. 571; *Packard* v. *Northcraft*, 2 Met. (Ky.) 439; *Shaw* v. *Berry*, 31 Me. 478; *Sasseen* v. *Clark*, 37 Ga. 242; *Mason* v. *Thompson*, 9 Pick. 280.

The goods are under the protection of the inn, so as to make the innkeeper liable for a breach of duty, unless the negligence of the guest occasions the loss in such a way that the loss could not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances.

1 Addison, Torts, p. 615; *Houser* v. *Tully*, 62 Pa. 92; *Walsh* v. *Porterfield*, 87 Pa. 376; *Rommel* v. *Schambacher* (Pa.) 9 Cent. Rep. 742, 20 W. N. C. 262.

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

As long ago as *Chancellor* Kent's day it was said: "The responsibility of an innkeeper for the goods of his guest . . . . has been a point of much discussion in the books." 2 Kent, Com. 592.

The common-law rule, as established in *Calye's Case*, 8 Coke, 32, was that the innkeeper was bound absolutely to keep safe the goods of his guest deposited within the inn, and Kent, after considering the cases, lays it down that "an innkeeper, like a common carrier, is an insurer of the goods of his guest." 2 Kent, Com. 594.

The subject is also learnedly discussed in the *note* to *Calye's Case*, 1 Smith, Lead. Cas. *197, and the *notes* to *Coggs* v. *Bernard*, 1 Smith, Lead. Cas. *307, where the learned American annotators sum up the rule in the following form: "An innkeeper is answerable for all losses happening to the goods of travelers becoming his guests, except such losses as are caused by the Act of God, or the public enemies, or by the conduct of the guest himself, or his servant, or the companion whom he brings with him."

The learned counsel for the appellant has presented us a strong array of authorities to show that the true foundation of the rule as administered in the later cases both in England and many of our sister States is the negligence of the innkeeper, and the only difference between the innkeeper and ordinary bailees is that a loss is prima facie proof of the innkeeper's negligence, and throws upon him the burden of disproving it. If the question were open it might be interesting to examine how far the desire to fix the exact limits of the liability, by resting it on something more definite than public policy, has led to modification of the severity of the common-law rule. Conceding negligence to be the foundation, we must logically concede the desired result, that if the innkeeper shows by satisfactory proof that he took due care, he is absolved from liability. For my own part I apprehend that the liability, like that of a common carrier, rested on the surrender of the owner's possession and control of his goods, and public policy which, for the protection of the owner under such circumstances, precluded every excuse for not restoring the goods to the owner, except such as were the result of *vis major*, the act of God or the public enemies, which would be notorious, and could not be fraudulently pretended.

But the rule, whatever its foundation, is no longer open to question in this State.

In *Houser* v. *Tully*, 62 Pa. 92, the common-law liability was laid down by Williams, *J.*, in the following emphatic terms: "His responsibility extends to all his servants and domestics, and to all the goods and moneys of his guest which are placed within the inn; and he is bound in every event to pay for them if stolen unless they were stolen by a servant or companion of the guest." The learned counsel for appellant has distinguished this case very carefully and accurately upon the facts, and claims that the enunciation of the general rule, above quoted, was not really necessary to the decision of the case actually before the court and that it is therefore only dictum. If the case stood alone there would be good ground for the claim, and we might be required now to re-examine the foundation and merits of the rule announced. But in *Walsh* v. *Porterfield*, 87 Pa. 376, the former case was distinctly affirmed in all the breadth of the opinion. The judge below had charged the jury that "at common law an innkeeper was liable, at all events, for the goods and baggage of his guests, ... and the law is the same to-day . . . . It was, in fact, insuring, as it were, the safety of the property of guests, and it was immaterial (if a loss occurred or property was stolen whilst the guest was in the hotel) by whom it was stolen, unless it was by the guest's own servant or a fellow guest of the party who was robbed, or the negligence of the guest; and however vigilant the landlord might have been, he was responsible to the party losing the property. That was the common-law liability. He was practically an insurer of the safety of the property whilst the guests remained in his house."

It was assigned for error that this charge was too broad, and eminent counsel argued there, as here, that the real foundation of the rule is the negligence of the landlord or his servants; but this court in affirming the judgment said: "We adhere to the statement of the law as laid down by our late brother Williams, in *Houser* v. *Tully*, as to the extent and character of the liability of innkeepers for the goods of their guests. An innkeeper is bound to pay for goods stolen in his house from a guest, unless stolen by the servant or companion of the guest. . . . The learned judge below, in his charge to the jury, evidently adopted this case as his chart, and there is no error in his instructions upon the law."

After this deliberate affirmance of the common-law rule in a case where it was applied and the correctness of the instruction distinctly assigned for error, we must regard the rule as settled.

The learned judge therefore was right in the general instruction he gave the jury as to the foundation of the plaintiff's case. In the press of the trial, however, the defense unfortunately did not receive the same consideration. Neither the question of contributory neg-

ligence nor the effect of the Statute of 1855 was presented to the jury as it should have been.

Volenti non fit injuria, and conduct of the plaintiff contributing to the loss, whether voluntary or negligent, is always a defense. This principle, though not very clearly enunciated, was applied to the liability of an innkeeper even in *Calye's Case*, where the first resolution was that if the horse was put to pasture at the guest's request and stolen, the innkeeper was not liable, and the eighth (8 Coke, 32), that if the innkeeper requires his guest to put his goods in such a chamber under lock, and the guest leave them in an outer court and they are stolen, the innkeeper shall not be liable. And however it might have been in the days of good Queen Bess, when *Calye's Case* was decided, and when the length of his wine bill might have been deemed sufficient consideration for the duty of an innkeeper to take care of his guest drunk or sober, it is now held in our own case of *Walsh* v. *Porterfield* that intoxication is no excuse for the negligence of a guest which contributes to his loss.

The evidence in the present case leaves the circumstances of the robbery in some degree of mystery. According to the plaintiff's story, he locked and bolted his chamber door on going to bed, and found it open on waking in the morning. The back outer door of the hotel bore marks of violence with a hammer or other tool, the catch of the dead latch was broken off, and matches of a kind not used in the hotel were found scattered at various points. All this pointed to a burglary by outside parties. Yet the evidence is that the plaintiff's bedroom door bore no marks of violence anywhere, the key was in the lock, and the transom window was but a foot high and swung in the middle leaving only a space of six inches through which no person could possibly climb. How then did the thief get in? There is no theory which does not encounter some difficulties, and the first question that arises in the mind is whether the plaintiff may not be mistaken in supposing he locked and bolted his door. The testimony is, that though a sober man he was not a total abstainer, and had been drinking that evening. Did he get more than he thought and is his recollection thereby beclouded? Or did he lock and bolt the door as he thinks, and did the beer get him up again in a confused condition of mind, and was his open door the result of this? The other circumstances only add to the difficulty of a satisfactory explanation. The evidence in general, as already said, points to a robbery by outside parties. But the vest carefully folded and laid between the two lap blankets on the hat-rack in the dining-room is hard to reconcile with such a theory. Again, the evidence of Mrs. Wall as to the voices on the porch, and of Rahn as to the men asking for plaintiff, suggest the possibility of other parties in company with plaintiff and the loss of the money before he entered his room. As already said, there is no view of the evidence that does not meet with some difficulty, and such difficulty is always for the jury to solve.

Jurors are to exercise the same common sense and judgment in the jury box that they do as men in the affairs of life, only with a strict regard, under the direction of the court, to the nature, relevancy and weight of evidence upon both sides. They cannot base verdicts on surmise or conjecture without evidence, but they are not bound to believe an incredible story because no witness contradicts it. It is for them to survey the whole case and say whether the party having the burden of proof has met it by a satisfactory preponderance of evidence. The learned judge below was of opinion that there was not sufficient evidence of plaintiff's negligence to be considered by the jury, and therefore, though stating the law correctly as to such negligence, he limited the jury to the consideration of the single question, whether or not there was a theft. In this view we are unable to concur. The difficulties in the way of the plaintiff's theory and the general uncertainty of the entire occurrence should have sent the whole case to the jury with an affirmance of defendant's second and third points.

The evidence in regard to the safe and the notice to guests is not as full and satisfactory as it might be, but it was sufficient to go to the jury. The provisions of the Act of the 7th of May, 1855 (Pub. Laws, 479), in regard to the place where notices must be posted, are intended to secure knowledge brought home to the guest. They may be said to be mandatory in the sense that as they amount to constructive notice; they must be strictly complied with if constructive notice is relied on. But if notice in fact is proved, then the provisions for constructive notice become immaterial. Defendant testified positively to having called the plaintiff's attention to the notice at the head of the hotel register, though it was probably not on this particular visit. The defendant denied it. This question should have gone to the jury for them to determine, under all the circumstances, the lapse of time since plaintiff saw the notice, if they find that he did have his attention called to it, the frequency of his visits and his consequent familiarity with the customs of the house, etc., whether he should be treated as having notice of the existence of a safe, and if so, whether his omission to avail himself of that protection, and his carrying such an amount of money to his bedroom, was negligence for which he must himself bear the loss.

Judgment reversed, and venire de novo *awarded.*

KENTUCKY COURT OF APPEALS.

Laura GOSS *et al.*, *Appts.*,
v.
Minnie R. FROMAN *et al.*

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

1. **Proof of the conduct of husband and wife** toward each other, and of their expressions of hatred and fear of each other, and of their statements, during the time they lived together apparently as husband and wife, as to non-access, may be admitted to show non-access, on the question as to the legitimacy of a child.

2. **The presumption that a child born in wedlock is legitimate,** where the husband and wife had opportunities of access, is not conclusive, but may be overcome by clear proof of the contrary, which may consist of proof that the husband was incompetent to have sexual intercourse with his wife or she with him.

3. **Proof of the wife's adultery** is competent on the question of the legitimacy of a child, to corroborate proof that the husband was not capable of performing the sexual act or that he had abstained from performing it with his wife.

4. **A mother is a competent witness** to prove the legitimacy of her child begotten during wedlock if such legitimacy is attacked; and in case she becomes a witness she will not be permitted to withhold on cross-examination any part of the truth, even although it will disclose acts of adultery.

5. **A woman who, during her abandonment of her husband, admits any man** or men to her periodically or whenever it is convenient or opportunity is afforded, is living in adultery within the meaning of the Kentucky statutes which forfeit her dower or distributable share in her husband's property, when she voluntarily leaves him and lives in adultery.

(November 26, 1889.)

APPEAL by cross-defendants from a judgment of the Louisville Law and Equity Court in favor of cross-petitioners in a suit brought by the executor of Solomon Froman, deceased, to obtain a settlement of his accounts, etc., the cross-petition setting up the birth of an heir after the making of the will, and praying a distribution of the estate to such heir subject to the dower rights of his mother. *Reversed.*

The facts are fully stated in the opinion.

Mr. **Burton Vance** for Laura Goss, appellant.

Messrs. **Brown, Humphrey & Davie, C. B. Seymour** and **W. H. McGee** for other devisees and heirs, appellants.

Messrs. **Thomas H. Hines** and **J. M. Wilkins,** with *Messrs.* **Abbott & Rutledge,** for Elizabeth Wilson, appellant:

The prima facie evidence of legitimacy may always be lawfully rebutted by satisfactory evidence that access did not take place between husband and wife, as by the law of nature is necessary in order for the man, in fact, to be father of the child.

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

Bastards are persons begotten and born out of lawful wedlock. Miller v. Anderson, 1 West. Rep. 810, 43 Ohio St. 473; 1 Bl. Com. 454; 2 Kent, Com. 208.

If a woman pregnant at her marriage is delivered after marriage the child is legitimate. Miller v. Anderson, *supra.*

The law presumes a child to have been born in lawful wedlock, and this presumption must prevail until overcome by clear and convincing proof adduced by those alleging illegitimacy. Orthwein v. Thomas, 4 L. R. A. 434, 127 Ill. 554.

Children of a married woman, born during coverture, are presumed to be legitimate. *Re* Romero's Estate, 75 Cal. 379.

The fact that a woman gave birth to a fully developed child so soon after marriage as to render it certain that it was begotten before marriage raises a legal presumption that it was begotten by him who became her husband. McCulloch v. McCulloch, 69 Tex. 682.

The presumption of legitimacy is a presumption *juris et de jure.* Miller v. Anderson, 1 West. Rep. 811, 43 Ohio St. 473.

The burden of proving illegitimacy lies entirely with the person seeking to establish it. Overlock v. Hall, 81 Me. 348; Plowes v. Bossey, 8 Jur. N. S. 352, 31 L. J. N. S. Ch. 681.

But in a later decision in England it has been held that it is not a presumption *juris et de jure,* but may be rebutted by evidence which must be clear and conclusive and not resting merely on a balance of probabilities. So where a child was born 276 days after the last opportunity of the husband's access, and there was evidence in the wife's conduct tending to show that she regarded the child as the offspring of her paramour, the question of its legitimacy was properly submitted to the jury. Bosville v. Atty-Gen. L. R. 12 Prob. Div. 177; Morris v. Davies, 5 Clark & F. 163.

A legal presumption relieves him in whose favor it exists from the necessity of any proof, but may be destroyed by rebutting evidence. Otherwise as to presumptions *juris et de jure,* against which no proof can be admitted. Dugas v. Estiletts, 5 La. Ann. 559; Davenport v. Mason, 15 Mass. 85; Baalam v. State, 17 Ala. 451.

Presumption in favor of the legitimacy of children will not be made where the question is to be determined as one of fact and not of law. Blackburn v. Crawford, 70 U. S. 3 Wall. 175 (18 L. ed. 186).

The presumption of legitimacy may be rebutted.

The presumption of legitimacy may be rebutted both by positive and by presumptive evidence. Wright v. Hicks, 12 Ga. 155, 15 Ga. 160.

In Louisiana this legal presumption can be overcome only in the mode and within the time prescribed by law. Dejol v. Johnson, 12 La. Ann. 853.

Elsewhere it can be overcome only by clear and convincing proof of non-intercourse between the husband and wife. Egbert v. Greenwalt, 44 Mich. 250; Van Aernam v. Van Aernam, 1 Barb. Ch. 378; Patterson v. Gaines, 47 U. S. 6 How. 550 (12 L. ed. 553); Sullivan v. Kelly, 3 Allen, 148; Hemmenway v. Towner, 1 Allen, 209; Fletteshan v. Julian, 1 Y. B. 7 Hen. IV. 9, pl. 13; Stegall v. Stegall, 2 Brock. 256; Cannon v. Cannon, 7 Humph. 410.

The presumption of legitimacy of a child born during the period of marriage is not rebutted by circumstances which create only doubt and suspicion, but is wholly removed by showing, first, that the husband was incompetent; second, that he was entirely absent, so as to have had no access to the mother; third, or entirely absent at the period during which the child must, in the course of nature, have been begotten; fourth, and present only

8 L. R. A.

See also 12 L. R. A. 359; 25 L. R. A. 477; 41 L. R. A. 760.

Nicholas, Adulterine Bastardy, p. 182; *Banbury Peerage Case*, 1 Sim. & Stu. 153; *Hawes* v. *Draeger*, L. R. 23 Ch. Div. 178; *Morris* v. *Davies*, 3 Car. & P. 215, 427; *Shuler* v. *Bull*, 15 S. C. 428; *Wilson* v. *Babb*, 18 S. C. 69; *State* v. *Shumpert*, 1 S. C. 85; *State* v. *Pettaway*, 3 Hawks (N. C.) 625; *Com.* v. *Wentz*, 1 Ashmead, 271.

The presumption of sexual intercourse between husband and wife may be rebutted by evidence of the feelings and conduct of the parties.

Wright v. *Hicks*, 12 Ga. 161; *Wright* v. *Hicks*, 15 Ga. 169; *Cannon* v. *Cannon*, 7 Humph. 410; *Strode* v. *Magowan*, 2 Bush, 621; *Remmington* v. *Lewis*, 8 B. Mon. 611.

Mrs. Froman was permitted to testify that she had never been unfaithful to her husband, and had never had intercourse, since her marriage, with anyone but him. This was error under the Civil Code, § 606, which provides: "Neither a husband nor his wife shall testify, even after the cessation of their marriage, concerning any communication between them during marriage."

See also *Boykin* v. *Boykin*, 70 N. C. 262; *Patchett* v. *Holgate*, 3 Eng. L. & Eq. 100; *Rex* v. *Sourton*, 5 Ad. & El. 180; *Hamp* v. *Robinson*, 16 L. T. N. S. 29; *Aylesford Peerage Case*, L. R. 11 App. Cas. 1.

Messrs. **Helm & Bruce** for appellees.

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

Minnie R. Froman is the widow of Solomon Froman, deceased. He died testate on the 3d day of June, 1884. Soloman White Froman, son of Minnie R. Froman, was begotten during the wedlock of Soloman Froman and Minnie R. Froman, and was born on the 3d day of January, 1885, about seven months after the death of the putative father, Soloman Froman. Soloman Froman's will made no provision for this after-born child, nor any provision for Minnie R. Froman, the widow. Soloman White Froman claimed the entire estate, under the statute, as an after-born pretermitted child. The widow renounced the provisions of the will, and claimed her dowable and distributable share of the estate. Issue was joined as to the legitimacy of Soloman White Froman, and as to the forfeiture of the widow's dowable and distributable interest by reason of her abandoning her husband, Soloman Froman, and living in adultery. These issues were decided against the devisees under the will, and they have appealed to this court.

It is to be regretted that questions like these should ever arise in the courts of this Commonwealth. Kentucky's matrons are famed for their high sense of virtue and exemplary conduct; and it is to be regretted that the conduct of Mrs. Minnie R. Froman was so radical a departure from this fair fame as to impel us to declare her son, Soloman White Froman, illegitimate. The proof is that Mrs. Froman left the house of her husband, Soloman Froman, on the morning of the 4th of April, 1884, and went direct to Bowling Green, to the house of a Mrs. Wilson, where she remained at least a week, and then returned to Louisville, and took boarding with a certain woman, and

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under circumstances which afford clear and satisfactory proof that there was no sexual intercourse. Hargrave v. Hargrave, 9 Beav. 552; Com. v. Stricker, 1 Browne (Pa.) Append. XLVII.

Proof of impotency of husband.

It is presumed that a mature male has normal powers of virility, and the burden of proving the contrary is on the party asserting it. Gardner v. State, 81 Ga. 144.

The presumption of legitimacy arising from the sleeping together of husband and wife can be rebutted only by clear and satisfactory evidence that some physical incapacity existed. Legge v. Edmonds, 25 L. J. N. S. Ch. 125.

The evidence must prove beyond all reasonable doubt that the husband could not have been the father. Phillips v. Allen, 2 Allen, 453.

The impotency of the putative father, if true and proven, would be conclusive, and evidence thereof is competent. State v. Broadway, 69 N. C. 411.

Proof of non-access.

Access between man and wife is always presumed until otherwise plainly proved, and nothing is allowed to impugn the legitimacy of a child, short of proofs of facts showing it to be impossible that the husband could have been its father. Gaines v. Hennen, 65 U. S. 24 How. 553 (16 L. ed. 770).

But if a husband went beyond seas two years before the birth of her child, the conclusion is irresistible that it is illegitimate. Rex v. Maidstone, 12 East, 550.

So illegitimacy may be shown by proof of abandonment by the husband, and his continued absence from the State, for a period of four years before the birth of the child. Pittsford v. Chittenden, 2 New Eng. Rep. 191, 58 Vt. 49.

Non-access of the husband need not be proved during the whole period of the wife's pregnancy, if the circumstances show a natural impossibility that he could be the father, as where he had access only a fortnight before the birth. Rex v. Luffe, 8 East, 193.

Where a husband after a long absence did not rejoin his wife until eight months before the birth of a full grown child he could not have been the father. Heathcote's Divorce Bill, 1 Macq. H. L. Cas. 535.

Opportunity of access becomes important to consider, where the wife was notoriously living in adultery. Reg. v. Mansfield, 1 Q. B. 444, 5 Jur. 505.

Where the child was born three months after the marriage, the wife was asked on cross-examination, "When did you first become acquainted with your husband?" and on her answering "Twelve months" the subject was dismissed. Anon. v. Anon. 22 Beav. 481; State v. Romaine, 58 Iowa, 48.

Where husband and wife, although living separate and apart, had been in such a situation that access might have been had, the presumption in favor of legitimacy can be rebutted only by strong evidence; and if the access is proved, no inquiry as to paternity can be made. Morris v. Davies, 5 Clark & F. 163, 1 Jur. 911.

Parties themselves not competent witnesses on the subject of access.

A woman cannot give evidence of the non-access of her husband to bastardize her issue, though the husband be deceased (Rex v. Kea, 11 East, 132; Goodright v. Moss, Cowp. 591); but the mother is a competent witness to prove the illegitimacy of her children. Rex v. Bramley, 6 T. R. 330; Standen v. Standen, 6 T. R. 331 *note (b.)*, Peake, N. P. 3; Rex v. Reading, Lee, Cas. t. Hardw. 79; Rex v. Luffe, 8 East, 193; Tioga Co. v. South Creek Twp. 75 Pa. 433.

The evidence of the husband is not admissible to

there remained as boarder until the death of her husband; never visiting or seeing her husband after she left his house on the 4th of April preceding, although she left him sick of a fatal disease, of which he died on the 3d of June. Mrs. Froman claims that her husband, Soloman Froman, on the morning of the 3d of April,—the day before she left his house,—sent for her to come to his room; that she went, and he then had sexual intercourse with her, getting her with child. If this story is to be believed, the appellee, Soloman White Froman, having been thereafter born within the usual time of gestation, is the child of Soloman Froman. But is the story to be believed? Does not the proof disclose a state of case that utterly repels the truth of this story? Does not the proof show a state of case that repels any presumption of sexual intercourse whatever? We think it does. Let us see. We find that Soloman Froman on the 11th day of November, 1883, was affected with Bright's disease, and dropsy of the bowels, scrotum and thighs. Dr. Griffith attended on him almost daily, and treated him for these diseases, until the 7th day of January, 1884, at which time he turned the case over to Dr. Holloway, and he attended on Froman almost daily, and treated him for these diseases, until his death. Froman continued to grow worse from the time Dr. Griffith commenced attending on him until he died. That his condition may clearly appear, we quote from Dr. Holloway's testimony, which is as follows: "He had œdema of the lungs, or asthmatic breathing, and frequent paroxysms of asthma, excessive bronchiæ. He had general dropsy. This dropsy was more generally displayed by the accumulation in his abdomen; by enlargement of the skin; by the dropsy of the skin of the abdomen, and the loins, back and thighs; of the skin of the thighs and legs, and by the general excessive accumulation of the fluid in the scrotum, and in the skin of the penis,—so much so that the penis proper could not be seen upon an examination, only the orifice. He had frequent attacks of vomiting and obstinate constipation, with loss of appetite. He was mentally dull, unless when aroused by some special cause of excitement. He had what is called 'hebetude.' With or without anodynes, he aroused at my visits in a sleepy way in his bed or chair, and had to be questioned before he would give any answer about his case. When aroused by any special cause of excitement, he was more talkative, but con-

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prove access, or any collateral fact tending to show that he had opportunities of access. Wright v. Holdgate, 3 Car. & K. 158.

The rule precluding the husband or wife from proving non-access for the purpose of bastardizing the issue applies where, on the day following the marriage, the husband abandoned the wife, and the child was born shortly afterward at the house of her employer, whom she sought to charge with the paternity. Tioga Co. v. South Creek Twp. *supra*; Parker v. Way, 15 N. H. 45; Davis v. Houston, 2 Yeates, 269; Page v. Dennison, 1 Grant, Cas. 377; Dennison v. Page, 29 Pa. 420; State v. Wilson, 10 Ired. L. 131; State v. Herman, 13 Ired. L. 502; 1 Phil. Ev. 87, *note*.

Evidence of intercourse with other men.

Evidence of intercourse with other men must be limited to a period such as to admit of the inference that the child derived its paternity from that intercourse. Bowen v. Reed, 103 Mass. 46. Compare Paull v. Padelford, 16 Gray, 263.

Evidence that another man had connection with the wife at about the proper time for begetting the child is not competent unless coupled with evidence that the husband had no connection with her at that time. State v. Bennett, 75 N. C. 305.

Evidence of acts of intercourse with other men twelve months before the birth is inadmissible. Sabins v. Jones, 119 Mass. 167.

The legal presumption is rebutted by the facts, that the wife led the life of a prostitute, was seen as such in company with other men, that though her husband lived in the same town, he always avoided her, and that the child was born in jail three years after their separation. Sibbet v. Ainsley, 3 L. T. N. S. 583.

So illegitimacy is established by evidence of the mother living in adultery at the time when the child was begotten. Barony of Saye and Sele, 1 H. L. Cas. 507.

Illegitimacy may be established by proof of other facts.

Illegitimacy may be established by any competent evidence, and proof thereof is not restricted to evidence of impotency on the part of the husband, or of impossibility of access, or of intercourse between the wife and a man other than her husband. Wilson v. Babb, 18 S. C. 59.

Hearsay evidence may be sufficient. Goerman's App. (Pa.) 1 Cent. Rep. 228.

Depositions are admissible on the trial of an issue of bastardy, as in other civil actions. State v. Hickerson, 72 N. C. 421.

The fact of paternity may be established by a fair preponderance of evidence as in other civil cases. People v. Cantine, 1 Brown, N. P. (Mich.) 140; Young v. Makepeace, 103 Mass. 50.

Evidence not admissible on question of paternity.

Declarations of parties made after cohabitation has ceased are not evidence to bastardize the issue. *Re* Taylor, 9 Paige, 611.

They are not admissible where no evidence is offered of non-access at the time of conception. Dennison v. Page, 29 Pa. 420.

Neither the mother's declarations nor her husband's, she having since deceased, are admissible on the question of paternity (Cope v. Cope, 5 Car. & P. 604, 1 Moody & R. 269); but a baptismal register describing the child as the illegitimate son of his mother is admissible. *Ibid.*

The father's declarations are insufficient to bastardize the issue of his marriage (Bowles v. Bingham, 2 Munf. 442, 3 Munf. 599); it requires the proof to show it was impossible that the husband could be the child's father. Vernon v. Vernon, 6 La. Ann. 243.

But where non-access has been established by evidence *aliunde*, the declaration of the mother is admissible to prove the paternity of the child. Legge v. Edmonds, 25 L. J. N. S. Ch. 125.

Admissions of the wife cannot be received to establish non-access at the period of conception, to bastardize her issue. Cross v. Cross, 3 Paige, 139.

Evidence of the likeness of a child to its supposed father is not admissible upon the question of paternity. United States v. Collins, 1 Cranch, C. C. 592; Hanawalt v. State, 64 Wis. 84. But consult State v. Bowles, 7 Jones, L. 579.

Nor is evidence of the color of the child's eyes admissible. People v. Carney, 29 Hun, 47.

fined himself to the subject that excited him; and then, when that passed away, he would relapse into his condition of hebetude. His urine was very scant, and when boiled with nitric acid it had the appearance of soiled boiled white of an egg. His case was plainly one of Bright's disease in its advanced stages." "This was his condition when I saw him in January, 1884. The dropsical condition of the penis and scrotum got steadily worse from the first time I saw him; only the orifice of the skin where the penis was could be seen. He could not have had sexual intercourse from the time I saw him in January, 1884. In his physical condition it was not possible for him to have emitted semen into a woman. It was not possible for him to have had connection with a woman at any time during my attendance upon him. The usual period of gestation is from 273 days to 280 days." In his second deposition, he says: "I am satisfied that he was not physically capable of performing the sexual act. I do not think it was possible for him to enter a woman so as to bring the semen in the track in such a manner that the spermatozoa could find their way to the ova. I visited him from the 3d to the 9th of February, excepting the 8th; then from the 10th to the 15th, excepting the 14th. I visited him the 17th, 19th, 20th, 21st, 23d, 25th, 27th and 1st of March; then the 4th and 7th of March, twice that week; then the 11th of March, once that week; then the 16th, 21st, 22d, 23d and 27th of March; then the 31st of March and 8th and 11th of April; then the 16th and 19th of April; then 23d and 27th of April and 3d of May, 6th of May and 10th of May. Then I visited him on the 11th, 13th, 14th, 15th, 16th of May, and the 19th, 20th, 21st, 22d, 23d, and on the 24th; twice on the 25th; to the 31st, inclusive, twice every day; twice on the 1st of June; and twice on the 3d of June, the day of his death."

From what Dr. Holloway says, it was a physical impossibility for Soloman Froman to get his wife with child at the respective dates that he visited him. Is it possible that the swelling could have abated between the 31st of March and the 8th of April enough to enable him to have sexual intercourse at any time during said period? It may be possible, but it seems to us that such a conclusion is wholly irrational. The doctor, in his almost daily visits before and after said time, found him so swollen as to be incapable of performing the sexual act, and growing worse all the time. So it seems that there is no ground whatever for forming any rational conclusion that the swelling so abated within said time as to enable him to have had sexual intercourse. Such a conclusion would be wholly irrational. But we are not left to conjecture about this matter; for the nurse, who was in daily attendance upon Soloman Froman, and slept with him nightly, during said time, says that his swelling did not abate, nor did his condition at all improve. He also says that he knows Soloman Froman did not have sexual intercourse with Mrs. Froman on the morning of the 3d of April, nor at any other time for several months previous. It also appears that Soloman and Mrs. Froman lived like cats and dogs for several months prior to her leaving his house on the 4th of April; that he usually spoke of her as "the damned dirty bitch," and she of him as "the damned old son of a bitch." He accused her of poisoning him, and she said that she had poisoned him in order to get him out of the way. She also said, time and again, he could not, even before he was taken sick, have sexual intercourse; that she and he had ceased, for at least a year before his death, to have intercourse with each other. He said the same thing. It also appears from the proof that she had sexual intercourse with Ed Ward in Bowling Green, on the night of the 4th of April, and several other times during her stay in that city, and afterwards with another. It also appears that during her marriage state, before and after her sojourn in Bowling Green, she wrote this Ed Ward unchaste and lascivious letters. The appellees did introduce proof to the effect that, in April and May, Soloman Froman was seen going about his business, and that no swelling was observed, and, from the way that he handled himself, no unusual swelling existed. These witnesses might be mistaken as to the time. Their recollection may be explained upon the ground of mistake as to time; but these doctors and nurses had reason to fix and recollect the time. There is scarcely any room for an honest mistake. Their story is either true, at least as to the swollen condition of this man, or it is a fabrication. From the high character of the physicians, and the apparent honesty of the nurses, the latter fact is wholly improbable.

But it is contended that the proof of the conduct of Mr. and Mrs. Froman towards each other; their expressions of hatred and fear of each other; their statements during the time that they lived together, apparently, as husband and wife, as to non-access,—are incompetent as tending to show non-access. It is also contended that, where parties have opportunities of access,—sexual intercourse,—the child begotten in wedlock is conclusively presumed to be legitimate. We do not so understand the law as to either proposition. We understand the law to be that where the husband and wife have opportunities of access, there arises a very strong presumption that they did have it; but this presumption may be overcome by clear proof to the contrary, which may consist of proof that the husband was incompetent to have sexual intercourse, or from some cause he had declined to have sexual intercourse with his wife, or she with him. If such proof of conduct, declarations, etc., were not admitted as proof, it would be almost impossible to prove that the husband and wife had declined to have sexual intercourse with each other. It is a fact that husbands and wives, though living in the same house or on the same farm, have often so lived, not as husband and wife, but in fact in a state of separation; so, in the absence of proof of constant watch over them, night and day, it would be impossible to prove non-access, unless the proof of conduct, declarations, etc., were admitted as evidence.

It is also contended that the proof of adultery on the part of the wife was incompetent. Where access is either expressly or impliedly admitted, such proof is ordinarily inadmissible, unless it is such proof as unquestionably es-

tablishes the fact of illegitimacy; as that of the adulterous intercourse by a white woman, having a white husband, with a negro, and the child born in the usual course of time thereafter was a negro. But where proof shows that the husband is not capable of performing the sexual act, or that the parties have abstained from performing the sexual act, then it is competent to prove adultery on the part of the wife as corroborating the main fact. If Mrs. Froman was shown to be, in fact, a virtuous woman, such fact would create the belief that there was some mistake or false swearing in reference to the incompetency or non-access of her husband, or else incline the chancellor to adopt the theory of the expert physicians, to the effect that though, from the swollen condition of Froman, he could not enter Mrs. Froman's person, yet in his effort to make the entry, his semen found its way into the vagina, and the appellee Soloman White Froman was the fruit. But the proof of her adultery drives away these conjectures and strained theories, made in behalf of chastity, and corroborates the proof of non-access.

We do not understand that, where the husband's access is either expressly or impliedly admitted or proven about the time the child is begotten, the child's legitimacy is in all such cases conclusive. The presumption, in such cases, is only conclusive where proof may be introduced, *pro* and *con*, as to the question of legitimacy. No probabilities can be weighed and considered. The fact of illegitimacy in such case cannot be established by the weight of evidence. Nothing short of some fact thoroughly established, and which, when established, cannot be explained away, as the case just mentioned of a white woman having a negro child, will be allowed to prevail against the presumption. The proof of the illegitimacy of the child, begotten in wedlock, is a direct attack upon the mother's virtue, and an accusation of a wanton violation of her marriage vows, and is a stigma upon the child, and taints its blood, if the charge be true. Therefore, to hold that the mother, thus assailed, could not support her own innocence and honor, and the purity of the blood of her child, by her oath that she was true to herself and offspring by keeping sacred what is enjoined by both divine and human law, and upon the keeping of which the refinement and elevation of the race depend, would be a harsh rule indeed. But, while she is allowed to do this, and in dubious cases she should do this, she should not, upon cross-examination, be allowed to withhold any part of the truth. The whole truth should come, although she would have to disclose acts of adultery.

The General Statutes provide, in substance, that if the wife voluntarily leaves her husband, and lives in adultery, she shall forfeit her right of dower and distributable share in the husband's real and personal estate. This Statute does not mean that she shall constantly live with one man in adultery during her abandonment of the husband, in order to forfeit her right of dower or distributable share; but if she admits any man or men to her periodically, or whenever it is convenient or opportunity is afforded, during said abandonment, such conduct constitutes a living in adultery, within the meaning of the Statute. It is clear from the proof in the cause, that Mrs. Froman's conduct was as above described, in consequence of which she forfeited her right to dower and distributable share in Soloman Froman's estate.

The judgment is reversed, with directions to deny Soloman White Froman any interest whatever in Soloman Froman's estate, and to deny Mrs. Froman any dower or distributable share in said estate, and for further proceedings consistent with this opinion.

Petition for rehearing overruled.

WASHINGTON SUPREME COURT.

TERRITORY of Washington, *ex rel.* George O. KELLY, *Appt.*,
v.
J. P. STEWART *et al.*

(.....Wash.....)

A statute authorizing the creation of a municipal corporation by a judicial court, upon petition of a majority of the inhabitants of the territory to be incorporated, is unconstitutional as delegating legislative functions to the court.

(*Dunbar, J., dissents.*)

(February 13, 1890.)

APPEAL by relator from a judgment of the District Court for Pierce County sustaining a demurrer to the complaint in a proceeding to determine by what authority defendants claimed to exercise the powers of trustees of a certain municipal corporation and to dissolve such corporation. *Reversed.*

The facts are fully stated in the opinion.

Messrs. **Fremont Campbell**, *Pros. Atty.*, **C. H. Hanford** and **Thomas Carroll**, for appellant:

Section 1889 of the Revised Statutes of the United States, together with chap. 168, p. 101, 24 United States Statutes at Large, of Congress, Second Session, conferring upon the Legislature the right to create municipal corporations, does not contemplate or permit the Legislature to delegate such right to courts or judges.

Galesburg v. *Hawkinson*, 75 Ill. 153; *People* v. *Carpenter*, 24 N. Y. 89; *People* v. *Nevada*, 6 Cal. 143.

In States where the right is recognized, the courts have universally held that such statutes do not imply any such power against private consent.

Devore's App. 56 Pa. 163; *Borough of Blooming Valley*, 56 Pa. 66; *People* v. *Bennett*, 29 Mich. 451, 18 Am. Rep. 115, 116.

The order incorporating Town of Puyallup is void. The power to make such an order is not judicial and not vested in said judge by law.

See also 33 L. R. A. 638; 39 L. R. A. 214.

People v. *Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *People* v. *Nevada*, 6 Cal. 143.

Messrs. **B. F. Jacobs** and **Town & Likens**, for appellees:

The legislative function is the predetermination of what the law shall be for the regulation of all future cases falling under its provisions.

Bates v. *Kimball*, 2 D. Chipman (Vt.) 77; Cooley, Const. Lim. 5th ed. pp. 109, 110; *Newland* v. *Marsh*, 19 Ill. 383.

The judicial function or power is "to adjudicate upon and protect the rights and interests of the citizens and to that end to construe and apply the law."

Cincinnati, W. & Z. R. Co. v. *Clinton Co.* 1 Ohio St. 77. Examine also *King* v. *Dedham Bank*, 15 Mass. 447; *Gordon* v. *Ingbram*, 1 Grant. Cas. 152; *Beebe* v. *State*, 6 Ind. 501; *Taylor* v. *Place*, 4 R. I. 324.

A statute may be conditional and its taking effect may be made to depend upon some subsequent event.

See *Burlington* v. *Leebrick*, 43 Iowa, 252; *Baltimore* v. *Clunet*, 23 Md. 449; *State* v. *Kirkley*, 29 Md. 85; *Walton* v. *Greenwood*, 60 Me. 356.

Act of Territorial Legislature approved February 2, 1888, does not delegate legislative authority to the courts, as the Legislature by that Act prescribes the liabilities, duties, powers and privileges of said corporations, and the Statute, and not the court, determines the extent and nature of the powers of the corporation.

Morristown v. *Shelton*, 1 Head (Tenn.) 24; *Kayser* v. *Bremen*, 16 Mo. 88; *Burlington* v. *Leebrick*, 43 Iowa, 252.

The Act is not unconstitutional because of certain powers and duties conferred upon the courts in relation to the mode of organizing said towns, as these duties are judicial in their nature, and the Legislature, and not the court, prescribes the powers, duties and liabilities of which the corporation is possessed.

Kayser v. *Bremen*, *Morristown* v. *Shelton* and *Burlington* v. *Leebrick*, *supra*; *Bank of Chenango* v. *Brown*, 26 N. Y. 467; *People* v. *Salomon*, 51 Ill. 37; *Burgess* v. *Pue*, 2 Gill, 11; *Hammond* v. *Haines*, 25 Md. 541; *Com.* v. *Montrose*, 52 Pa. 391.

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

This action was brought in the District Court of the Second Judicial District of Washington Territory, holding terms at Tacoma, in and for Pierce County, to inquire and determine by what warrant or authority the appellees claim to exercise the powers of a board of trustees of the Town of Puyallup, in that county, and to oust them from office as such board of trustees, and to dissolve said municipal corporation. The complaint states: "(1) That the above-named defendants, at a place called 'Puyallup,' in Pierce County, Wash. T., do now unlawfully act as a municipal corporation under the name and style of the 'Town of Puyallup,' without being legally incorporated as a board of trustees of said alleged municipal corporation. (2) That said defendants act as such corporation, and exercise the powers of such board of trustees, under color of authority conferred by an order made by the judge of this court, at chambers, in the City of Tacoma, Wash. T., on the 31st day of July, A. D. 1888, and entered upon record in this court. (3) That a certified copy of the record of said order, and of the proceedings in the matter relating to the alleged incorporation of said Town of Puyallup, marked 'Exhibit A,' is hereto annexed for reference, and made a part of this complaint, and a correct plat, showing the boundaries of said alleged incorporated Town of Puyallup, as defined in said order, and the location of the relator's farm, hereinafter mentioned, marked 'Exhibit B,' is hereto annexed for reference, and made a part of this complaint. (4) That said order is void, and of no effect; for the same was made by the judge, aforesaid, upon the *ex parte* application of John Beverly, Esq., without a hearing being granted to the relator, or to any of the inhabitants, or owners of property, within the boundaries of said alleged Town of Puyallup, and without any notice being given of said application; and no opportunity was at any time given to the relator, or any other person whomsoever, to remonstrate against or oppose the incorporation of said town, or to question the validity or sufficiency of the petition upon which said order was made, or to make complaint as to the boundaries of said alleged town; and no legal or good evidence was produced before the judge upon which to base the findings of fact recited in said order; and power to make said order is not judicial, and not vested in said judge by law. (5) That the relator is the owner of real property situated within the boundaries of said alleged town, as defined by said order; and he and many others, owners of property situated within said alleged town, have not consented to the incorporation of said town, and are unwilling to have said town incorporated with boundaries including their said property, for that said property is partly improved and cultivated farming land, and no part thereof is platted into town lots and streets: and they are unwilling to consent to the laying out of and extending streets across their said land, or to taxation of said land, by such alleged municipal corporation."

To this complaint the defendants demurred for the alleged reason that the same did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer, and caused judgment for costs to be entered against the plaintiff.

From this judgment plaintiff appeals to this court; and we are called upon to determine the question of the legal existence of the Town of Puyallup, which also involves the validity of the Act of the Legislature approved February 2, 1888, entitled "An Act for the Incorporation of Towns and Villages," the first section of which, so far as is material to this case, is as follows: "Where a majority of the taxable inhabitants of any town or village within this Territory present a petition to the judge of the district court, having jurisdiction of real actions in such county, setting forth the metes and bounds of such town or village, together with the adjacent bounds, in all not exceeding in area one square mile, which they desire to include therein, and praying that they may be incorporated, and police established for their local government, and the judge of the district

court shall be satisfied that a majority of the taxable inhabitants of such town or village, as shown by the last assessment roll of said county, shall have signed such petition, such judge of the district court shall cause such petition to be entered in full on the records of such court, together with the names of the petitioners, and shall thereupon make and record an order declaring such town or village duly incorporated, designating in such order the metes and bounds thereof, and the name of such town or village, and thenceforward the inhabitants within such metes and bounds are a body politic and corporate."

The proceedings for incorporating the town were inaugurated by the presentation to the judge of the district court, by one John Beverly, of a petition signed by sixty-three persons therein, representing themselves to be a majority of the taxable inhabitants of the Town of Puyallup, praying that they might be incorporated under the name of the "Town of Puyallup," and police established for their local government, and that trustees be appointed for the government of said town. The petition also specified and defined the metes and bounds of the proposed territory to be incorporated, and alleged the area thereof to be in all not exceeding one square mile. On the 31st day of July, 1888, the judge of the district court, at chambers, in the City of Tacoma, in Pierce County, in response to the prayer of the petition, made and entered of record an order declaring the Town of Puyallup to be duly incorporated under and by virtue of the laws of Washington Territory, and in said order appointed defendants as a board of trustees of the town, in accordance with section 2 of the Incorporation Act.

It is admitted by the demurrer, and was conceded by counsel on the argument of this case, that the relator is the owner of real property situated within the boundaries of the territory described in the petition, and defined by order of the court; that he did not consent to the incorporation of the town; that he was unwilling to have it incorporated with boundaries including his property; that his said real estate is partly improved and cultivated farming land, not platted into town lots and streets, and that he is unwilling to consent to the laying out of and extending streets across the same; that he is unwilling to submit to taxation of his land by said municipal corporation; that no notice of the presentation of the petition was given; and that the relator had no opportunity to be heard, or to remonstrate against, or oppose the incorporation of the town, or to question the validity of the order of the judge, or to make complaint as to the boundaries of the proposed municipal corporation.

The proceedings are assailed by appellant as not being in accordance with the law relating thereto. He objects that the petition is defective in not stating that the signers thereof were a majority of the taxable inhabitants of the town, according to the last assessment roll of the county, and that the order of the judge was made upon the certificate of the county assessor who is not empowered by any law to so certify; that there was no evidence before the judge or court to warrant the order; and that the order was made without jurisdiction of the subject matter by the court. As the law requires that the petition to be presented to the judge shall be signed by a majority of the taxable inhabitants of the town or village to be incorporated, and that the judge shall be satisfied, in some way not specified by law, that a majority of the taxable inhabitants of the town or village, as shown by the last assessment roll of the county, shall have signed the petition, it is quite doubtful whether an omission to state in the petition that the petitioners are a majority of the taxable inhabitants as shown by the last assessment roll of the county, is not a matter substantially affecting the subsequent proceedings. But, however this may be, we are not disposed to hold the incorporation invalid on that account, but will assume that the law was substantially complied with.

We now come to the consideration of validity of the law itself. The object of the Act of the Legislature was the incorporation of towns and villages, as expressed in the title; and, as the meaning of the expression "towns and villages" is not defined by the law, we must presume that the words were intended to be used in their ordinary acceptation, as meaning an aggregation of houses and inhabitants more or less compact. The word "town" was originally from the Anglo-Saxon word "tun," an inclosure, and meant a collection of houses inclosed by a wall. Anderson, Law Dict. title *Town*.

"The fundamental idea of a municipal corporation proper, both in England and in this country, is to invest compact or dense populations with the power of local self-government. Indeed, the necessity for such corporations springs from the existence of centers or agglomerations of population, having, by reason of density and numbers, local or peculiar interests and wants, not common to adjoining sparsely settled or agricultural regions. It is necessary to draw the line which separates the limits of the place and people to be incorporated. This is, with us, a legislative function." 1 Dillon, Mun. Corp. 3d ed. § 183.

In England, this power was formerly given by a royal grant or charter, presumably at the request of the municipalities themselves, but in this country municipal corporations are purely the creatures of statutes. "They possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or other statutes applicable to them." Id. § 21.

It being conceded that the power to create municipal corporations is vested exclusively in the Legislature, the question arises, Can this power be delegated; and, if so, to whom, or to what agencies? Counsel on both sides agree that the Legislature may delegate its functions in some measure; but they disagree as to the legislative power to carry the principle to the extent attempted in the Act in question. On the one side, it is contended that the Act approved February 2, 1888, does not in fact delegate legislative authority to the courts; that the Statute, and not the court, determines the extent and nature of the powers of the corporation; that a statute may be valid, though its taking effect may depend on some subsequent event, and that the powers and duties of the courts in relation to the mode of organizing towns are judicial in their nature; that the

Legislature, and not the court, prescribes the powers, duties and liabilities of the corporation,—and, on the other, it is urged that the law of Congress conferring upon the Territorial Legislature the right to create municipal corporations does not permit the Legislature to delegate such right to the courts or judges; that the law is mandatory upon the court, is against public policy and authorizes the taking of property without due process of law, and without notice or opportunity to be heard; and that the including of farming land in incorporated towns is unreasonable and unjust.

The incorporation of towns by general statutory law is a departure from original methods, and is of comparatively modern date; and it would naturally be expected that the procedure for their organization by this means would not be uniform throughout the different States of the Union. It would be practically impossible for the Legislature, by a general law, to fix and define the boundaries of every municipal corporation that might be organized under it; and that question is therefore determined in some other way, designated by the general law of the particular jurisdiction. But the authority to incorporate, with us as in England, has been restricted to cases in which compact communities already exist who desire to assume a corporate character, and have police established for their local government. Id. § 183. But, unless specially restrained by constitutional provisions, the Legislature may delegate the power to determine the territorial limits of the municipal corporation, and thereby settle what property and persons will be subject to municipal control, to appropriate local bodies or boards of officers. 1 Dillon, Mun. Corp. *supra; People* v. *Bennett*, 29 Mich. 451.

It would hardly seem probable that the Legislature, while professing to pass a law for the incorporation of "towns and villages", really intended to include therein rural districts or farming lands not platted or laid out in lots or blocks, especially against the will of the owner of such property; and yet the Statute, by its terms, covers and includes just such cases; and we do not feel at liberty to construe it otherwise.

We entirely agree with the learned judge who decided the case of *People* v. *Bennett*, when he says that "there are few, if any, acts of state, bearing upon individuals, more important than those which determine their liberty to be included in particular municipalities; and the cases are very rare in which they have not been allowed an opportunity of being heard in every step of the proceedings." And, where the individual has not expressly assented, or impliedly done so, by settling and remaining in a dense community needing corporate powers and privileges, it seems too plain for argument that he should at least be accorded a hearing before being compelled to subject himself or his property to the dominion of a municipality with whose interests he has nothing in common. This view of the law was adopted in the case of *People* v. *Bennett*, above cited.

In the case of *Borough of Blooming Valley*, 56 Pa. 66, it was held that farming land might be included in the limits of a municipal corporation by consent of the owner, but not otherwise.

And in *Borough of Little Meadows*, 28 Pa. 256, it was held that the community proposing to be incorporated was too sparse to be called a "village", within the meaning of the law.

On the contrary, it has been held in New Hampshire, with equally good reason, that the selectmen of a town, in defining the boundaries of a village, could not exclude any part of it, but must include the whole within the village limits. *Osgood* v. *Clark*, 26 N. H. 307.

Appellees contend, as before intimated, that a statute may be conditional, and its taking effect made to depend upon some subsequent event; and, to a certain extent, the principle is recognized by the courts. As an illustration, the Legislature may enact a general statute for the formation of private corporations; and its taking effect, as to any particular corporation, may depend upon the assent of the parties interested. They may withhold their assent at pleasure, but cannot be forced to become incorporators. If they accept the terms and provisions of the law they are presumed to be benefited thereby; but, if they reject, they cannot be injured.

While a statute may be conditional, and only take effect upon the happening of a future event, we hold that the place where it is to operate, its "*situs*," must be fixed definitely by the Legislature itself, or delegated to some body or agency capable of exercising legislative functions, and not left to the will or caprice of localities to determine whether it shall be applicable to their particular community or not. Local Option Laws have been sustained by some courts, but the place where they were to take effect has always been defined by law, and not left conditioned upon the discretion of the people of any and every locality in the State.

To sustain the position of appellees, counsel cite the case of *Burlington* v. *Leebrick*, 43 Iowa, 252. The question there was as to the power of the City of Burlington to enlarge its limits by extending its boundaries over contiguous territory; and the court held that the law authorizing a petition for the purpose by the city council, to be presented to, and acted upon by, the circuit judge, and issues to be found and tried as in other proceedings, was not invalid as an unwarranted delegation of legislative power, basing the opinion on the ground that the determination of the issues by the court was a judicial act,—a mere ascertaining of the condition upon which the law might take effect. But in delivering the opinion the court used the following language: "Nor is it proper to designate the thing to be accomplished by this Statute as the creation of a corporation. A corporation is an artificial being clothed with certain powers. In the present case, such a corporation exists, known as the 'City of Burlington.' When the Act sought in this petition is accomplished, no new corporation will have been created." From this language we might infer that, had the question before the court been that of the formation of a municipal corporation, the decision might have been different.

In the case of *Kayser* v. *Bremen*, 16 Mo. 88, the incorporation of a town by the county court, in pursuance of a general statute, was upheld on the ground that the court acted judicially, and had no discretion, and no

authority to vest any power in the corporation.

And in the case of *Morristown* v. *Shelton*, 1 Head (Tenn.), 24, a law substantially like the one under consideration in this case was held valid and constitutional for the reason that no legislative power was delegated to or exercised by the court. This last decision, however, was under a Constitution which provided that "the Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good." We do not feel bound by the decisions in these cases. If the court in either of the cases acted judicially in the matter before it, then, certainly, it should have had a right or "discretion" to exercise its judgment. If its action was not judicial, then, surely, it must have been a delegated legislative power which it exercised. Counsel for appellees also cite the case of *Blanchard* v. *Bissell*, 11 Ohio St. 96. The controversy in that case was as to the validity of the Statute in relation to the annexation of territory to cities; and it was claimed by Bissell, in a proceeding to enjoin the collection of certain taxes levied upon his property by the city council, that the order of the county commissioners for the annexation of the district embracing his property was void because it included his property with that of others, without his consent, and against his remonstrance The court sustained the law on the ground that the county commissioners were properly clothed with power to do the acts objected to. Each party was entitled to a hearing under that Statute, and the commissioners were empowered to order the annexation or not, as they might deem reasonable and proper. We agree with that decision; and, if our Statute were like the one upon which it was based, it would be stripped of its most objectionable features.

In the late case of *People* v. *Fleming*, 10 Colo. 553, the Supreme Court of Colorado held that a law which provides that when the inhabitants of any part of the county not embraced within the limits of any city or incorporated town desire to be organized into a city or incorporated town, they may apply by petition to the county court, and providing, also, for the manner of procedure in the organization of such contemplated town or city, was not in conflict with the Constitution. The decision in that case seems to have been based upon the broad ground that the Legislature, if not expressly prohibited by the Constitution, may delegate the power to form municipal corporations to unorganized private individuals; in other words, to the people themselves. We cannot consent to follow the reasoning in that case, or to concur in the conclusion reached by the learned court. We think the better doctrine is that laid down by *Judge* Cooley in his work on Constitutional Limitations, 4th ed. 145, 146, which is as follows: "The prevailing doctrine in the courts appears to be that, except in those cases where, by the Constitution, the people have expressly reserved to themselves a power of decision, the function of legislation cannot be exercised by them even to the extent of accepting or rejecting a law which has been framed for their consideration." But we would not be understood as holding that the Legislature could not delegate the power to put the machinery of municipal corporations in motion to courts which are not purely legal tribunals. The Courts of Quarter Sessions of Pennsylvania, and the County Courts of Oregon, and perhaps of other States, are vested with administrative, and, in a measure, representative, powers; and they are properly intrusted with the functions attempted by our late Territorial Legislature, by the law in question, to be imposed upon the district judge.

We hold that a judicial court cannot exercise legislative functions, and that the Legislature cannot impose such power upon it. *People* v. *Bennett*, *supra*; *People* v. *Nevada*, 6 Cal. 143; *Galesburg* v. *Hawkinson*, 75 Ill. 153; *People* v. *Carpenter*, 24 N. Y. 89.

Owing to the importance of this case, we have given it all the consideration in our power, under the circumstances; and we have been greatly aided in our labors by the learning and diligence of counsel on both sides. And we are constrained to hold that the Statute under which the Town of Puyallup was organized is invalid, and cannot be sustained. The cause will therefore be remanded to the court below, with directions to overrule the demurrer, and to proceed in accordance with this opinion. And it is so ordered.

Stiles, Hoyt and **Scott, *JJ.***, concur.

Dunbar, *J.*:

I concur in the result, because I do not think that the petition was sufficient; but I cannot concur in the opinion that the Act of the Legislature was unconstitutional.

MISSOURI SUPREME COURT.

BARBER ASPHALT PAVING CO., *Respt.*,
v.
Mary C. HUNT, *Appt.*

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

1. It will be presumed that an ordinance was properly signed by the Speaker of the House of Delegates, where the journal recites that his signature was affixed in open session, and no objection is noted on the journal although it does not expressly recite that all the matters of detail were complied with, and the charter of the city provides that it shall be signed in open session, and that before the officer's signature is affixed "he shall suspend all other business, declaring that such bill will now be read."

2. The adjournment of the House of Delegates on the day bills are presented to the mayor for his approval will not prevent them from becoming valid ordinances, if duly filed by the mayor, with his approval, in the city register's office, although the charter of the city provides that every bill shall become an ordinance when "returned within ten days to the House in which the same originated, with the approval of the mayor."

3. The facts that the work of street paving prescribed by an ordinance is covered by letters-patent, under which the exclusive right is held by one company, and therefore that no competition for the work is possible, will not prevent letting a contract for the work under a charter providing that such contracts shall be let to the lowest responsible bidder.

(February 24, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for the City of St. Louis in favor of plaintiff in an action to enforce payment of certain special tax bills issued to plaintiff by the City of St. Louis in payment for work done upon certain streets. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. **Charles M. Napton,** for appellant:

The journals must actually show, on their face, every fact necessary to make valid the proceedings of the General Assembly, and when they do not show this, no presumption will be made that the fact existed.

Spangler v. *Jacoby*, 14 Ill. 297; *Turley* v. *Logan County*, 17 Ill. 151.

The Legislature must be in session when a bill is presented to the governor, and when it is returned by him to the House.

People v. *Hatch*, 33 Ill. 9.

The governor or mayor forms one branch of the legislative body, and can do no act as a part of it after an adjournment.

Trustees of School Dist. No. 1 v. *Ormsby Co.* 1 Nev. 340; *Fowler* v *Peirce*, 2 Cal. 165.

A sending of the bill to the city register is not a "return to the House."

Opinion of Judges (*Re Soldiers Voting Bill*), 45 N. H. 607.

Where a city is empowered by its charter to improve streets at the expense of the adjoining lot owners, but required to let all such work to the lowest bidder, it cannot contract for laying a pavement at the expense of such lot owners, the right to lay which is patented and owned by one firm.

Dean v. *Charlton*, 23 Wis. 590; *Wells* v. *Burnham*, 20 Wis. 112; *Nicolson Pavement Co.* v. *Painter*, 35 Cal. 699; *Ruggles* v. *Collier*, 43 Mo. 353, 377; *Burgess* v. *Jefferson*, 21 La. Ann. 143; *Dolan* v. *New York*, 4 Abb. Pr. N. S. 397; 1 Dillon, Mun. Corp. § 467. See also *Merritt* v. *Portchester*, 71 N. Y. 309; *O'Byrne* v. *Philadelphia*, 93 Pa. 225; *Re Eager*, 46 N. Y. 100; *Harlem Gaslight Co.* v. *New York*, 33 N. Y. 324; *People* v. *Flagg*, 17 N. Y. 584; *Hastings* v. *Columbus*, 42 Ohio St. 585.

Messrs. **Hitchcock, Madill & Finkelnburg** for respondent.

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

The grounds upon which the defendant resists the payment of the tax bills in suit are two: *first*, that the ordinances in question were not passed and approved as required by the charter; and, *second*, that the work provided for in the ordinances was not let as provided in § 27, art. 6, of the charter.

The charter provisions in respect to passing ordinances (art. 3, § 22) are as follows: "No bill shall become an ordinance until the same shall have been signed by the presiding officer of each of the two Houses, in open session; and, before such officer shall affix his signature to any bill, *he shall suspend all other business, declare that such bill will now be read, and that if no* objections be made, he will sign the same, to the end that it may become an ordinance. The bill shall then be read at length, and, if no objection be made, he shall, in the presence of the House, in open session, and before any other business is entertained, affix his signature, which fact shall be noted on the journal, and the bill immediately sent to the other House." 2 Rev. Stat. 1879, p. 1584.

Defendant put in evidence the journal of the House of Delegates for March 20, 1883, which, after giving in full the report of the proper committee that these two bills were truly enrolled, proceeds as follows: "The bills, as above, were read at length. No objection being made, Mr. Speaker Marriot, in the presence of the House, in open session, affixed his signature thereto, as required by the charter."

Upon this fact being thus shown by the journal, the defendant contends that the charter provisions marked above in italics were not complied with, and therefore the ordinance passed is null. These provisions of the charter are copied from section 37, art. 4, of our State Constitution; and upon that section it has been ruled that a bill passed by the Legislature became a law where the same was signed by the presiding officer of each of the two Houses in open session; that this provision was mandatory, but the other provisions, relating to mere matters of detail, were but directory; and, as no objection was noted on the journal, the presumption would be indulged that the matters of detail were complied with; that the Legislature proceeded by right, and not by wrong. *State* v. *Mead*, 71 Mo. 266.

Here the journal expressly recites that the signature of the speaker of the House was affixed in open session. On the authority of the case cited, it must be ruled that the bills in question become ordinances, as against the objection already considered.

But it is urged that the bills failed to become laws, because never returned to the House in which they originated. Section 23 of art. 3 of the charter provides: "Every bill presented to the mayor, and returned within ten days to the House in which the same originated, with the approval of the mayor, shall become an ordinance."

The testimony shows the bills, though signed by the mayor, were not thus returned, both Houses having adjourned March 27, 1883, *sine die*,—the day on which the bills were presented to the mayor for his approval. But the testimony also shows that the mayor on the same day filed the bills in the city register's office on the day of their approval.

Section 23 of art. 3 of the charter contemplates that cases will arise where a bill shall not have have been returned to the House where the same originates; and, besides, there is no provision in the charter that "no bill shall become an ordinance," which shall not be returned by the mayor to the House where the same originated. The same considerations, therefore, apply here as were applied in *Mead's Case*, *supra*; and we hold the ordinance as valid, as against this objection also.

Section 27 of article 6 provides how bids

for work shall be awarded, to wit, that the board of public improvements shall "let out said work by contract to the lowest responsible bidder, subject to the approval of the council." Upon this point it is insisted that such provision was violated, because the work of street paving prescribed by the ordinances was covered by letters-patent, under which plaintiff held the exclusive right, and therefore there was no competition for said work. This point, though adjudicated in other jurisdictions, is a case of first impression in this State. In New York it has been ruled, under a statute requiring all city work to be let "to the lowest bidder," that the common council were not prohibited from letting a contract for paving a street with material or in a manner not admitting competitive bids or proposals. *Re Dugro*, 50 N. Y. 513.

This ruling was approvingly followed in *Baird* v. *New York*, 96 N. Y. 567.

Prior to the time the subject was discussed in New York, a similar ruling had been made in Michigan. *Hobart* v. *Detroit*, 17 Mich. 246.

These cases seem to us to rest upon the correct basis. It certainly was never intended that the city authorities should be unable to make a contract, however necessary to the public welfare such contract might be, if the article desired, or the manner of the performance of the contract required the use of a patented article. Such a construction of the charter we regard as "sticking in the bark," and as subordinating the whole powers conferred on the common council to the meaning of two or three words contained in a single section of the charter. Besides, the rights of those interested are protected by the necessity of obtaining the approval of the council to any contract. A different view of the matter under discussion has been taken in Wisconsin (*Dean* v. *Charlton*, 23 Wis. 590), but by a divided court; and it is noteworthy that the Legislature of that State did not approve the view of the statute taken by the court, and so changed the statute, so as to prevent the continued prevalence of the objectionable ruling. *Mills* v. *Charleton*, 29 Wis. 400; *Dean* v. *Borchsenius*, 30 Wis. 239.

For these reasons *we affirm the judgment*.

All concur, but **Barclay, J.**, not sitting.

VERMONT SUPREME COURT.

Mary J. TOWNSHEND
v.
George H. GRAY *et al.*, Censors of the Vermont State Eclectic Medical Society.

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

1. **No power to confer the degree** of M. D., or any other degree, is given to a corporation by the general law of a State authorizing incorporation for the purpose of maintaining a literary and scientific institution.

2. **A diploma from an institution** having no power to give it is not sufficient to entitle a person to demand a license as physician from the censors of a medical society under Rev. Laws, § 3911.

(April 5, 1890.)

PETITION for a writ of mandamus to compel defendants to issue to complainant a certificate authorizing her to practice medicine within the State. *Dismissed.*

The facts are fully stated in the opinion.

Mr. **J. C. Baker** for complainant.

Mr. **A. H. Huse** for defendants.

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

This is a petition by the complainant, claiming to be a graduate of the Vermont Medical College, and holding a diploma of that college conferring upon her the degree of M. D., against the defendants, who are the censors of the Vermont State Eclectic Medical Society, praying that a writ of mandamus be issued commanding the defendants, as such censors, to issue to the complainant a certificate authorizing her to practice medicine in this State.

Our Statute provides that every medical society chartered by the Legislature "shall issue certificates to physicians and surgeons who furnish evidence by diploma from a medical college or university, or by certificate of examination by an authorized board, which satisfies said censors that the person presenting such credentials has been, after due examination, deemed qualified to practice the branches mentioned in such diploma or certificate." The case shows that the complainant presented to the defendants, as such censors, her diploma aforesaid, and the defendants refused to issue the certificate above referred to on the ground that the Vermont Medical College had no legal power to issue a diploma conferring the degree of M. D., and so the complainant had not shown credentials entitling her to a license to practice medicine.

The main question in issue is whether said medical college has the power to issue diplomas which entitle the holder to the license provided for in the Statute. Without going into the question at length, touching the power conferred by the Statute upon the censors, which has been discussed in argument, it is plain that this board has the power to decide in the first instance whether a diploma presented to it as evidence of the holder's right to a license is a genuine or spurious document. So far, at least, the board may sit in judgment upon a diploma; and in this case the board adjudged that this diploma did not have such legal efficacy, as evidence, as would warrant the issue of a licence.

The Vermont Medical College was organized under the provisions of the 10th subdivision of § 3664, Rev. Laws. That section provides that "persons may associate together and have the powers of a corporation for either of the following purposes: . . . (10) To establish and maintain literary and scientific institutions."

Later sections in the same chapter enumerate the powers which such associations may have, namely: may have a corporate name, a

corporate seal; may adopt by-laws; may sue and be sued; purchase and hold real estate; may raise money, and divide their capital stock into shares.

Under this subdivision, it is argued that a medical college may be organized with the power to confer the degree of M. D. It is fundamental that a corporation has such power only as is conferred by its charter, with such incidental powers as are necessary to enable it to exercise its chartered power. No express power to confer degrees can be found in the Statute under which this medical college was organized, and hence the power to confer degrees must be classed as incidental to the general powers of a corporation formed for the purpose of maintaining a literary or scientific institution, if it exists at all. It would hardly do to say that literary or scientific institutions have such power upon any theory that without it they cannot answer the ends of their creation. The degree of M. D. is something more than a mere honorary title. It is a certificate attesting the fact that the person upon whom it has been conferred has successfully mastered the curriculum of study prescribed by the authorities of an institution created by law, and by law authorized to issue such certificate. It thus has a legal sanction and authority. But it has more. In practical affairs, it introduces its possessor to the confidence and patronage of the general public. Its legal character gives it a moral and material credit in the estimation of the world, and makes it thereby a valuable property right of great pecuniary value.

The scope of subdivision 10 of the Statute in question may be discovered by looking at the other subdivisions of the same section. These provide for the organization of library associations; bands of music; associations for breeding fish, for bringing to justice thieves and burglars, building meeting houses, securing burial grounds, etc. The articles of association are to be filed in the town clerk's office, in the town where the association is organized. All this points to association of limited and local scope. The filing of the articles of association, which constitute the charter under which the association proceeds with its work, in the town clerk's office, indicates that the Legislature did not regard such associations as having powers, the exercise of which concerned the general public. The power to confer degrees, not being conferred explicitly by the Statute, and not being necessary to enable a literary or scientific institution to carry forward studies of a literary or scientific character, clearly does not exist at all. *Philadelphia Medical College Case*, 3 Whart. 445.

It is no more appropriate to say that a literary or scientific institution, without special statutory power, can confer the degree of M. D., than to say that it may confer the degree of LL. D. or D. D. or A. B.; for it is plain that law schools, theological schools, universities and colleges can be organized under this subdivision equally well with medical schools. Every State in the Union has chartered these institutions, and it is believed that none of them has ever supposed that, with all the widely enumerated powers delegated to them, it had the power to confer degrees of any kind unless such power was expressly conferred in its charter. In the case of the Castleton Medical School, chartered many years ago, the charter at first granted contained no delegation of power to confer degrees, but at the next session of the Legislature it was amended by an Act giving such power. Such has, manifestly, been the legislative idea respecting the necessity of special authority from the law-making power of the government touching the right to confer degrees; and construing this General Statute, providing for the organization, by voluntary association, of persons for local and comparatively unimportant purposes, in the light of the common usages and common understanding of people respecting the rights, privileges and emoluments universally accorded to persons upon whom degrees have been conferred, we are clearly of the opinion that the Vermont Medical College has no power, under its articles of association, to confer degrees of any kind. To hold that the Legislature, by a general law, intended that any three men in any town of the State, however illiterate or irresponsible, might organize and flood the State with doctors of medicine, doctors of law, doctors of divinity, masters of arts, civil engineers and all the other various titles that everywhere in the civilized world have signified high attainments and special equipment for professional work, is to liken it to the witty French minister who threatened to create so many dukes that it would be no honor to be one, and a burning disgrace not to be one.

The complainant, therefore, in submitting her diploma to the board of censors, did not furnish that board any sufficient evidence of qualification that entitled her to the license asked for.

The petition is dismissed, with costs.

CONNECTICUT SUPREME COURT OF ERRORS.

Mary LAWLER, *Appt.*,
v.
John P. MURPHY *et al.*

(58 Conn. 294)

1. An agreement by an insurance association to pay a sum received from a death assessment, not exceeding $1,000, with a further provision that the death claim shall be payable within sixty days after proof, giving the form of notice and process for collecting death assessments, and containing a promise by insured to pay assessments, imports a promise by the insurance association to make, or cause to be made, the necessary assessment.

2. Whatever is necessary to be done

NOTE.—*Contract of mutual benefit association.* The contract made between a mutual benefit company and its member by the certificate of membership does not differ in any essential particular from an ordinary policy of mutual life insurance, it having all the characteristics of an insurance

See also 37 L. R. A. 587.

in order to accomplish work specially contracted to be performed is parcel of the contract, though not specified.

3. **Whatever may fairly be implied** from the terms or nature of an instrument is, in judgment of law, contained in it.

4. **A complaint alleging a state of facts** from which an agreement to make an assessment upon members of an insurance organization can be implied, and claiming damages for failure to make the assessment, is not insufficient because it does not state in terms an agreement to make the assessment.

5. **Individual members of an unincorporated association** are liable for contracts made in the name of the association without regard to the question whether they so intended, or so understood the law, and even if the other party contracted in form with the association, and was ignorant of the names of the individual members composing it.

6. **An action at law can be sustained** for breach of the contract of a mutual benefit society to make an assessment.

7. **The measure of damages** for breach of an agreement by an insurance organization to make an assessment, and to pay the proceeds thereof, not exceeding $1,000, where each member contracts to pay an assessment of whatever the officials deem necessary, upon the death of any member, is prima facie the sum of $1,000.

(December 30, 1889.)

APPEAL by plaintiff from a judgment of the Superior Court for Hartford County sustaining a demurrer to the complaint in an action brought to recover upon a mutual benefit certificate of life insurance. *Reversed.*

The facts are fully stated in the opinion.

Mr. **C. E. Gross,** for appellant:

This is an agreement to pay $1,000 unless the defendants shall within the sixty days make a death assessment and fail to receive therefrom that sum, in which case the agreement is to pay only the amount so received.

Niblack, Mut. Ben. Societies, § 405; *Freeman* v. *National Ben. Society*, 42 Hun, 252, 254, 257; *O'Brien* v. *Home Ben. Society*, 51 Hun, 495, 499; *Peck* v. *Equitable Accident Asso.* 52 Hun, 255; *Kansas Protective Union* v. *Whitt*, 36 Kan. 764; *Hankinson* v. *Page*, 31 Fed. Rep. 184.

That no assessment was made with reference to this case is some evidence that none was necessary.

Freeman v. *National Ben. Society*, 42 Hun, 257. See also *Bailey* v. *Mutual Ben. Asso.* 71 Iowa, 689, 692.

An averment of demand for an assessment is not necessary.

Niblack, Mut. Ben. Societies, § 396; *Freeman* v. *National Ben. Society*, 42 Hun, 255. See also *Kansas Protective Union* v. *Whitt*, 36 Kan. 760; *Smith* v. *Covenant Mut. Ben. Asso.* 24 Fed. Rep. 685.

When the contract provides that an assessment shall be levied and the proceeds thereof, not exceeding a certain sum named, shall be paid to the beneficiary, it has been held that the insurers are prima facie bound to pay the maximum amount named, and the burden of proof is on them to show that a less amount has been or could only have been collected.

Elkhart Mut. Aid, B. & R. Asso. v *Houghton*,

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contract. Supreme Commandery K. of G. R. v. Ainsworth, 71 Ala. 443; State v. Bankers & M. Mut. Ben. Asso. 23 Kan. 499; Endowment & B. Asso. v. State, 35 Kan. 253; Bolton v. Bolton, 73 Me. 299; Miner v. Michigan Mut. Ben. Asso. 6 West. Rep. 117, 63 Mich. 338; State v. Merchants Exch. Mut. Benev. Society, 72 Mo. 146; State v. Farmers & M. Mut. Benev. Asso. 18 Neb. 276; Folmer's App. 87 Pa. 133.

An association for the transaction of the business of life and casualty insurance on the co-operative or assessment plan is in effect a mutual benefit society, the members of which must take notice of and are bound by its by-laws and articles of association. Hesinger v. Home Ben. Asso. 41 Minn. 516.

The members are presumed to contract with reference to the charter and by-laws of such associations, though they be not recited in the contract. Holland v. Taylor, 9 West. Rep. 606, 111 Ind. 121; Farmer v. State, 69 Tex. 561.

See, as to distinction between mutual benefit associations and life insurance. Burdon v. Massachusetts Safety Fund Asso. 1 L. R. A. 146, 6 New Eng. Rep. 840, 147 Mass. 360.

As to fraternal associations, see Alexander v. Northwestern Masonic Aid Asso. 2 L. R. A. 161, and *notes*, 126 Ill. 558.

Certificates issued entitling the holder to money, to be paid from assessments upon the surviving members, are in legal effect policies of insurance; and the rules of law governing such policies are applicable. Elkhart Mut. Aid B. & R. Asso. v. Houghton, 103 Ind. 286, 1 West. Rep. 284.

A nominee in the certificate is entitled to receive only the amount actually collected, on an assessment made for his benefit, and not a sum equal to $1 assessed to each member. *Re* La Solidarite Mut. Ben. Asso. 68 Cal. 392.

A beneficiary under a policy in a mutual insurance association operated upon the assessment plan cannot recover on the policy by action against the association, where the assessment to pay the policy has not been made; yet he may, by proper proceedings, compel the association to make the assessment. Rainsbarger v. Union Mut. Aid Asso. 72 Iowa, 191.

No claim can be made against a mutual aid association unless a certificate has been issued designating the person who is to receive payment. Bishop v. Grand Lodge E. O. of Mut. Aid, 43 Hun, 472. See Burdon v. Massachusetts Safety Fund Asso. 1 L. R. A. 146, 6 New Eng. Rep. 840, 147 Mass. 360; Davidson v. Old People's Mut. Ben. Society, 1 L. R. A. 482, 39 Minn. 303; Lorcher v. Supreme Lodge K. of H. (Mich.) 2 L. R. A. 206.

Payment of assessments by insured.

Where assured agreed in the application to pay "one assessment" within thirty days from its date, and the by-laws provide for suspension upon failure to pay assessments within thirty days from their date, the certificate lapses upon the failure to pay any one assessment within the prescribed time. Stanley v. Northwestern L. Asso. 36 Fed. Rep. 75.

But to operate a suspension, notice must have been duly given to the delinquent. *Ibid.*

Where the by-laws provide that the time of suspension is to be fixed by vote of the lodge, a suspension by an officer, without such vote, is illegal. Supreme Lodge K. of H. v. Wickser, 72 Tex. 257.

The thirty days within which an assessment is required to be paid should not be estimated from the date of the notice, unless it was sent within a reasonable time after the date of the assessment. Stanley v. Northwestern L. Asso. *supra*.

Where the member holding the certificate was habitually dilatory in the payment of assessments levied against his share, the fact that the association

1 West. Rep. 284, 103 Ind. 286; *Lueders* v. *Hartford L. & Ann. Ins. Co.* 12 Fed. Rep. 465; *Kansas Protective Union* v. *Whitt*, *supra*; *Suppiger* v. *Covenant Mut. Ben. Asso.* 20 Ill. App. 595; *Covenant Mut. Ben. Asso.* v. *Hoffman*, 110 Ill. 606.

There is no need to resort to a chancery court to compel an assessment before a recovery can be had at law.

Niblack, Mut. Ben. Societies, §§ 408, 409; *Hankinson* v. *Page*, 31 Fed. Rep. 184; *Taylor* v. *National Temp. Relief Union*, 12 West. Rep. 92, 94 Mo. 35; *Earnshaw* v. *Sun Mut. Aid Society*, 11 Cent. Rep. 508, 68 Md. 465.

The defendants are liable as individuals.

Davison v. *Holden*, 4 New Eng. Rep. 818, 55 Conn. 103; Niblack, Mut. Ben. Societies, § 105. See also *Fredendall* v. *Taylor*, 26 Wis. 286; *Blakely* v. *Bennecke*, 59 Mo. 193.

Messrs. **Charles E. Perkins** and **A. Perkins**, for appellees:

Defendants could not be made liable personally on a written instrument signed by them only in the capacity of officers of the organization.

Hitchcock v. *Buchanan*, 105 U. S. 416 (26 L. ed. 1078); *Hewitt* v. *Wheeler*, 22 Conn. 557.

Upon such an agreement as this no action lies against anyone for the amount of the insurance, but the remedy is in equity to oblige the proper persons to make an assessment and pay it over.

Smith v. *Covenant Mut. Ben. Asso.* 24 Fed. Rep. 685; *Eggleston* v. *Centennial Mut. L. Asso.* 19 Fed. Rep. 201; *Buffon* v. *Massachusetts Safety Fund Asso.* 1 L. R. A. 146, 6 New Eng. Rep. 840, 147 Mass. 360; *U. S. Mut. Accident Asso.* v. *Barry*, 131 U. S. 100 (33 L. ed. 60); *Bailey* v. *Mutual Ben. Asso.* 71 Iowa, 689; *Newman* v. *Covenant Mut. Ben. Asso.* 72 Iowa, 242.

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

This is an appeal from the judgment of the superior court sustaining the defendant's demurrer. The cause of demurrer upon which the issue was found for the defendants alleges that it appears from the contract for a breach of which the suit was brought, that the only agreement made therein was to pay such sum as might be received from a death assessment, and that it is not alleged in the complaint that any such sum was ever received.

To understand the force of this objection and the considerations applicable to it, it is necessary to set out the contract in full. It is as follows:

Certificate No. 446. Benefit $1,000.

Connecticut State Insurance Fund of the Ancient Order of Hibernians of the State of Connecticut.

In consideration of one dollar, initiation fee, and assessments levied from time to time by the directory, Thomas Lawler, of Division No. 2 of Hartford, County of Hartford, State of Connecticut, receipt of which is hereby acknowledged, and the agreement on the part of the said Thomas Lawler to accept the following conditions and rules as a part of this contract between said A. O. H. Insurance Fund and himself, hereby constitutes the said Thomas

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in many instances received assessments from him after they were due, and reinstated him as a member, was a waiver of these several forfeitures, but not of the future prompt payment of assessments as one of the conditions of the contract. Crossman v. Massachusetts Ben. Asso. 3 New Eng. Rep. 517, 143 Mass. 435.

The by-laws may provide that upon the death of a member, each member should pay $1, in order to make up the amount to be paid to the nominee in the certificate of the deceased member. *Re* La Solidarite Mut. Ben. Asso. 68 Cal. 392.

Under a law of a benevolent society, which makes the nonpayment of assessments for a given period after notice operate as a suspension *ipso facto* of the delinquent member, it is not necessary that the suspension shall be judicially determined by any judicatory of the order. Borgraefe v. Supreme Lodge, K. & L. of H. 5 West. Rep. 98, 22 Mo. App. 127.

The beneficiaries of a member who stands suspended at the time of his death cannot recover on the benefit certificate, upon the ground that the subordinate lodge had continued to treat him as a member, and to treat his unpaid dues to the supreme lodge as dues payable to the subordinate lodge for which it had extended him credit. *Ibid.*

Assessments on death of members.

Where assessments upon the death of members were ordered by the association, they became due only after proper notice thereof was given to the insured; and the objection that the notice given was insufficient, under the provisions of the by-laws, because it failed to give the lists of deaths as required, and that it did not notify the member of the amount due from him to the benefit fund, was properly sustained, where the defense rested upon a forfeiture to defeat plaintiff's claim. Miner v. Michigan Mut. Ben. Asso. 6 West. Rep. 117, 63 Mich. 338.

Where it was the directors' duty under the by-laws to order an assessment, and the chairman was empowered to approve the proofs of death, and at the directors' meeting the notice of death was received, but not the proofs, and they instructed the chairman to examine the proofs upon arrival, and instructed the secretary to issue the notice of assessment if the proofs were found correct, and thereafter the assessment was accordingly made in good faith, it was legal; and a member's failure to pay it barred his beneficiary from recovery on his death. Passenger Conductors L. Ins. Co. v. Birnbaum, 10 Cent. Rep. 63, 116 Pa. 565.

Where, at the time the assessment was laid, the association had money enough in its hands to meet all its obligations, such fact will not render the assessment void. Crossman v. Massachusetts Ben. Asso. 3 New Eng. Rep. 517, 143 Mass. 435.

Where an Act provides that, in an action for the recovery of an assessment, a certificate of a mutual insurance company shall be evidence to prove the claim to the assessment, unless the party sued will make a certain affidavit, if such party makes the affidavit, the company must prove its claim. Susquehanna Mut. F. Ins. Co. v. Gackenbach, 7 Cent. Rep. 588, 115 Pa. 492.

Damages, for neglect to make assessment, recoverable at law.

Damages against a mutual benefit insurance society for refusing to make an assessment are recoverable in an action at law, without resorting to an equitable action to enforce the assessment. O'Brien v. Home Ben. Society, 117 N. Y. 310.

It is so liable where it not only neglects and refuses to make an assessment, but denies all liability. Jackson v. Northwestern Mut. Relief Asso. 2 L. R. A. 736, 73 Wis. 507.

Lawler a benefit member of said A. O. H. Insurance Fund, and agrees to pay Mary Lawler, wife, if living, if not, to the heirs-at-law of said member, in sixty days after due proof of the death of said member, a sum received from a death assessment, but not to exceed one thousand dollars.

CONDITIONS.

The conditions upon which this certificate is issued by the fund and accepted by said member, are the following:

First. That the statements and declarations made by and on behalf of said member in his application to become a benefit member of said fund, which are hereby referred to as a basis of this contract, and are a part thereof, and on the faith of which this certificate is issued, are in all respects true, and that no fact has been suppressed relating to his health and circumstances, affecting the interests of said fund or their inducement to accept the risk.

Second. That the said member must be a member in good standing in the order at the time of his death, otherwise this certificate will be null and void.

Third. Any assignment of this certificate shall be void unless assented to in writing by said fund.

Fourth. The death claim under this contract shall be payable in sixty days after satisfactory proof of death of said member shall have been furnished at the office of the secretary of the fund, by the certificate of the attending physician, if there was any, and the full and particular statement of at least one competent and disinterested member of the order, stating the time, place, cause and circumstances of the death of the party.

Fifth. No officers of divisions are authorized to make, alter or discharge contracts or waive forfeitures, and any such act, to be valid, must be done in writing and signed by the president and secretary of the directory.

Sixth. This contract shall be void if the party shall die in or in consequence of a duel, or by the hands of justice, or in the violation of or attempt to violate any criminal law of the United States or of any State or county in which he may be.

Seventh. A failure to comply with the rules of said fund as to payment of assessments, or falling into gross and confirmed habits of intoxication, shall also render the certificate void.

The measure of damages in such a case is the amount assessable upon all the insured, unless it is shown that the amount would be less because all members did not respond to assessments. Bentz v. Northwestern Aid Asso. 2 L. R. A. 784, 40 Minn. 202.

Action upon the contract

An action at law can be maintained upon a certificate of membership of a mutual benefit association, and it is not necessary, first, to resort to mandamus to compel an assessment. Doty v. New York State Mut. Ben. Asso. 29 N. Y. S. R. 896; Bacon, Benev. Societies, 685; Excelsior Mut. Aid Asso. v. Riddle, 91 Ind. 84; Burland v. Northwestern Mut. Ben. Asso. 47 Mich. 424; Bentz v. Northwestern Aid Asso. 2 L. R. A. 784, 40 Minn. 202.

The proper remedy upon such refusal is by a proceeding in equity. Burdon v. Massachusetts Safety Fund Asso. 1 L. R. A. 146, 6 New Eng. Rep. 840, 147 Mass. 360. See Elkhart Mut. Aid, B. & R. Asso. v. Houghton, 1 West. Rep. 284, 103 Ind. 286; Taylor v. National Temp. Relief Union, 12 West. Rep. 92, 94 Mo. 35.

In such action plaintiff may recover what upon proof he can show such assessment would have yielded if it had been duly made. Earnshaw v. Sun Mut. Aid Society, 11 Cent. Rep. 508, 68 Md. 465.

Even after judgment, upon which execution is returned unsatisfied, sequestration proceedings in the court of equity, and not mandamus, is the proper remedy. Miner v. Michigan Mut. Ben. Asso. 8 West. Rep. 139, 65 Mich. 84.

On a certificate which provides for an assessment upon policy holders within ninety days from the proof of death, and for payment of the sum collected, less 10 per cent, if it does not exceed $5,000, where, at the death of a member, certificates were in force upon which the full amount named could have been realized, but no assessments were made within the time provided, judgment may be rendered against the company for the maximum amount named. Kaw Valley Life Asso. v. Lemke, 40 Kan. 142.

Lack of sufficient money in the death fund to pay a claim on an insurance certificate is no defense to an action at law, although the promise was to pay from the death fund, where by the same contract the association undertook to make a call upon the members if the fund was then insufficient to meet the claim. Darrow v. Family Fund Society, 6 L. R. A. 495, 116 N. Y. 537.

In a suit by the payee and beneficiary, a complaint averring the death of insured and the refusal to pay or to order an assessment on the members is sufficient on demurrer. That the assessment would not produce the amount is matter of defense, and in the absence of such defense plaintiff is entitled to judgment. Elkhart Mut. Aid, B. & R. Asso. v. Houghton, 1 West. Rep. 284, 103 Ind. 286.

A report of the society to the state insurance department, to prove that an assessment would have produced enough to pay a death claim, is of equal dignity and certainty with the records of the society. Freeman v. National Ben. Society, 42 Hun, 252.

Where a certificate of membership provides that the society, in case of the death of the owner, will pay the amount realized from an assessment upon its members, not exceeding a stated sum, no recovery can be had without proof of the amount which would have been realized upon the assessment, or that some amount would have been thus realized. Martin v. Equitable Accident Asso. 55 Hun, 574, 29 N. Y. S. R. 421.

The corporation cannot resist payment of the death claim upon the ground that the promise to pay within ninety days after proof of death furnished was contingent upon an assessment, as there was an implied obligation on the company to make the necessary assessment, and it could not resist payment by omitting to make it. Freeman v. National Ben. Society, 42 Hun, 252.

The furnishing of proofs of death is a demand for payment and for the company to make the necessary assessment. *Ibid.*

An action instituted in a court having no jurisdiction of the defendant will not suspend the running of a condition of limitation in a policy of insurance. Keystone Mut. Ben. Asso. v. Norris, 7 Cent. Rep. 204, 115 Pa. 446.

Eighth. This certificate is subject to all rules and regulations that the state convention may, from time to time, adopt for the general advancement and interest of the fund.

RULES.

The rules governing this contract, and which form a part of the same, are as follows:

First. There shall be paid by the member under this contract to the secretary of the fund, on the day of the month in which this contract was made, the sum of one dollar, and he shall not be liable for any further sum except as follows:

Second. Upon the death of any member the said Thomas Lawler shall at once pay, if required, to its secretary, an additional assessment of whatever the directory shall deem necessary.

Third. The form of notice to, and process of collection from, each of the members of the assessment above named, shall be as follows: A notice shall be sent announcing such assessment, and the number thereof, to the last post-office address given to the secretary of the fund by each member, and if the assessment is not received within forty days from the mailing of said notice, it shall be accepted and taken as sufficient evidence that the brother has decided to terminate his connection with the fund, which connection shall thereupon terminate, and the brother's contract with the fund shall lapse and be void; but said brother may again renew his connection with the fund by a new contract, made in the same manner as at first, or, for valid reasons to the officers of the fund (such as a failure to receive notice of an assessment), he may be reinstated by paying assessment arrearages.

Fourth. The above rule governing the collection of assessments for death claims shall also apply to the collection of the annual assessment.

Fifth. Each applicant to become such member must sign the fund's form of application, countersigned by the board of directors of the division of which he is a member.

In witness whereof the said A. O. H. State Insurance Fund hath, by its president and secretary, signed and delivered this certificate at its office, this 12th day of July, 1886.

John D. Cunningham,
Secretary Ins. Fund.
P. J. O'Connor,
Treasurer Ins. Fund.
John P. Murphy,
President Ins. Fund.

Is it true, as claimed by the defendants, and in the sense in which they claim it, that the only agreement contained in the above contract is to pay such sum as might be received from a death assessment? Or, to put it in another form, what does the agreement to pay a sum received from a death assessment imply and involve, when taken in connection with the other provisions of the contract?

The contract is a peculiar one. It is very inartificially drawn, and it is undoubtedly difficult to give it a satisfactory construction. Of course it should be so construed as to make its contemplated benefits available, if it can legally be done. And we are, at least, warranted in assuming that the insurers, in accepting the money of the insured, and the insured in paying it, understood that some duty devolved upon the former to secure the promised benefits of the contract to the latter.

In addition to the agreement to pay to Mary Lawler, if living, if not, to the heirs of Thomas, in sixty days after due proof of his death, a sum received from a death assessment, but not to exceed $1,000, the contract further provides that the death claim shall be payable in sixty days after satisfactory proof of such death, except in certain cases not necessary to be stated here, and gives the form of notice and process for collecting the death assessment from each member of the association. Each contract contains, also, a promise by the insured that upon the death of any member he will at once pay, if required, to the secretary, an additional assessment of whatever the directory shall deem necessary—additional as the contract shows to the dollar paid upon becoming a member. This is an agreement by the A. O. H. Insurance Fund to pay the proper person, within sixty days after satisfactory proof of the death of the insured, a sum, not to exceed $1,000, received from a death assessment. The contract contains the agreement of members to pay such assessments and specifies the process by which its collection shall be undertaken—"a notice shall be sent" announcing such assessment, etc. All of which, taken in connection with the other provisions of the contract and the situation and manifest intention of the parties, seems to us to import a promise to make, or cause to be made, the necessary assessment to meet the death claim promised to be paid.

It is well established that whatever is necessary to be done in order to accomplish work specifically contracted to be performed, is parcel of the contract, though not specified. It is also a principle of general application that whatever may be fairly implied from the terms or language of an instrument is, in judgment of law, contained in it. *Currier* v. *Boston & M. R. Co.* 34 N. H. 498; *Rogers* v. *Kneeland*, 13 Wend. 114.

Addison, in his work on Contracts, § 1400, says: "Although the words of a contract under seal do not in themselves import any express covenant, yet the law, in order to promote good faith and make men act up to the spirit as well as to the letter of their engagements, will create and supply, as a necessary result and consequence of the contract, certain covenants and obligations which bind the parties as forcibly and effectually as if they had been expressed in the strongest and most explicit terms in the deed itself."

In *White* v. *Snell*, 5 Pick. 425, an action of assumpsit, the defendant "for value received promised to pay a sum of money, if, and when, he should recover his demands against A." It was held competent for the plaintiff to prove that the defendant had no demands against A, and that so the promise was absolute; or that he had not used due diligence to collect them.

In *Savage* v. *Whitaker*, 15 Me. 24, the court says: "An engagement to do a certain thing involves an undertaking to secure and use effectually all the means necessary to accomplish the object."

Marshall, *Ch. J.*, in *Ogden* v. *Saunders*, 25 U. S. 12 Wheat. 341 [6 L. ed. 650], speaking of the power and policy of the law to supply in contracts what in that case is presumed to have been inadvertently omitted by the parties, says that the parties are supposed to have made those stipulations which as honest, fair and just men they ought to have made.

The contract in *Freeman* v. *National Ben. Society*, 42 Hun, 252, is, in many respects, similar to the one under consideration. Although the stipulation in that case was to pay a sum "equal to the amount received from a death assessment, but not to exceed $3,000," instead of "a sum received from a death assessment," etc., yet the court held that "the provision in the body of the certificate that payment should be made of a sum equal to the amount received from a death assessment, not to exceed the sum specified, in ninety days after due proof of the death of the member was given, implies an obligation upon the company to proceed and make the necessary assessment to raise the fund within the time during which it was provided that the claim should remain in abeyance."

We conclude, then, that, in connection with the express promises contained in the contract in this case, there is an implied promise to make an assessment to pay the death claim agreed to be paid; an implied promise which the law, "in order to promote good faith and make the parties act up to the spirit as well as to the letter of their engagements, will create and supply as a necessary result and consequence of their contract." The contract to pay a sum received from a death assessment, taken in connection with the other express provisions, involves, in the language of one of the decisions above quoted, an undertaking to secure and use effectually all the means necessary to accomplish the result, and require that an assessment should be made.

In this view of the case the allegation of the demurrer, that "it appears by said contract that the only agreement made therein was to pay such sum as might be received from a death assessment," is not sustained. There was a further agreement, namely, to make such assessment. The complaint alleges that it was not made nor the amount of insurance paid. This cause of demurrer therefore must fail.

It is true that the complaint does not state, in terms, that the defendants agreed to make an assessment, but it sets out the contract in full and alleges as a breach of it, for which it claims damages, that "said assessment has never been made by the defendants."

This method is sanctioned by the Practice Act and the forms and rules given under it. Rule III., § 5, states that it is unnecessary to allege any promise or duty which the law implies from the facts pleaded.

Whatever, therefore, may have been the theory of the plaintiff, inasmuch as the agreement to make the assessment to pay the death claim is implied in the contract, we cannot sustain the demurrer upon this point.

This disposes of the only ground for demurrer specifically decided by the superior court. The defendants, however, insisted, in the argument before us, that the real question is, whether the suit can be maintained at all against these defendants; that it would be unreasonable not to dispose of the whole matter now and here; and that a demurrer goes back and searches out all the errors in the pleadings. Perhaps, in order to determine whether the plaintiff was injured by the decision of the court sustaining the cause of demurrer already disposed of, we ought to pass upon the other causes assigned, for, if the action cannot, in any event, be sustained against the defendants as individuals, the plaintiff has sustained no injury from the decision that the complaint fails to set forth a cause of action against anybody.

Then, too, all the causes for demurrer were argued before us, and the conclusions to which we have come will not make it unjust to the plaintiff to accede to the defendants' claim, and we should decide all the points which were argued.

The defendants assign for further cause for demurrer, that it appears from the contract declared on that the defendants made no personal agreement upon which they were personally liable, but that the contract was signed by them only as officers of he organization mentioned therein. This issue is raised, not as a question of fact, but as a question of law upon the pleadings.

As a matter of law does the contract, upon its face, show that the defendants made no personal contract upon which they were personally liable? The complaint alleges that they were jointly engaged in carrying on life insurance business under the name of the "Connecticut State Insurance Fund," and that they entered into the contract sued upon. If the facts are so should they not be held liable? Does the contract, as a matter of law, preclude that state of facts? If they had simply been sued as individuals, upon a contract headed with the name of the association and signed by them respectively as president, secretary and treasurer, as appears to have been the case in *Hitchcock* v. *Buchanan*, 105 U. S. 416 [26 L. ed. 1078], cited by the defendants, and the complaint had contained no allegation that they were carrying on the insurance business under a certain name and made the contract with Thomas Lawler, the question would be a different one, especially if it appeared that the association was incorporated. But under the decision of *Davison* v. *Holden*, 55 Conn. 103, 4 New Eng. Rep. 818, the defendants certainly might be liable on a contract signed by them as officers of an organization. If, as the statute permits, the organization consisted simply of individuals united under a distinguishing associate name for business purposes, they did not thereby acquire either corporate power or immunity from individual liability; consequently it could not appear, as a matter of law, from the contract declared on, that the defendar' made no personal contract or agreement upon which they were personally liable.

The case of *Davison* v. *Holden* was a suit against certain individuals who were in fact the president and secretary of an unincorporated association. This court held that "as a matter of law the plaintiff, in giving credit to the associate name, gave credit to the individuals who upon inquiry should be found to

stand behind it." It seems clear, without pursuing the subject further, that this cause for demurrer cannot be sustained. Individual members of an unincorporated association are liable for contracts made in the name of the association, without regard to the question whether they so intended or so understood the law, and even if the other party contracted in form with the association and was ignorant of the names of the individual members composing it. And it is also held in the case just cited that the individual members of such an association do not acquire any immunity from individual liability by force of the statutes which provide that any number of persons associated and known by some distinguishing name may sue and be sued, plead and be impleaded, by such name, and that the individual property of the members shall not be liable to attachment or levy of execution in a suit brought against the association.

The remaining causes assigned for the demurrer are that the only breach of the contract alleged in the complaint is that the defendants did not make an assessment, whereas there is no provision in the contract that the defendants or any of them should make any such assessment; and that the complaint alleges that by the contract the death assessment was to be made by the defendants, whereas it appears in the contract that death assessments were to be made by the directory of the association, and it is not alleged that the defendants are members of the directory. The conclusion to which we have already come, that the contract implies a promise that the defendants will make, or cause to be made, an assessment to meet death claims, makes further discussion of these causes unnecessary. We do not concur in the assertion therein made, that death assessments were to be made by the directory. Its duty was the subordinate one of ascertaining the amount necessary to be raised by assessment. This the contract undertakes that it shall do, and that an assessment shall thereupon be made by the insurance fund.

Two other questions were discussed before us, namely, whether, if it should be held that the contract contains an agreement to make an assessment, the plaintiff's remedy is at law, or whether she must first go into a court of equity to compel the defendants to make the assessment; and, If an action at law can be sustained, what is the rule of damages? As to the first, we think an action at law can be sustained. Neither circuity nor multiplication of actions is favored by our practice. If there is a contract to make an assessment, a breach of which is alleged and damages demanded therefor, and a rule of damages can be provided, why should not an action at law be sustained? Both Niblack and Bacon, recent writers upon the subject of Mutual Benefit Societies, after examining a great number of cases, come to the conclusion, with which we fully agree, that the decided weight of authority is to the effect that an action at law will lie for damages for the breach of a contract to make an assessment.

It makes no difference with the questions raised by the demurrer whether substantial or nominal damages can be recovered, for it ought to have been overruled if the plaintiff is entitled to any damages at all. Still the rule of damages applicable to the case was thoroughly argued and both parties invited a decision upon it.

Referring again to the contract, the insurance fund agrees to pay to the proper person, in sixty days after due proof of death, a sum received from a death assessment, but not to exceed $1,000. Each member pays $1 upon joining the association, and agrees, upon the death of any member, to pay at once, if required, an additional assessment of whatever the directory shall deem necessary. Deem necessary for what? Clearly not what it shall deem necessary to pay, leaving the amount discretionary with the directory and to be settled in each individual case as it may deem necessary, but what it shall deem it necessary for the association to raise by assessments in order to pay the $1,000. In short, the contract is to be taken as an agreement to make an assessment which, if duly paid, will raise $1,000, or so much thereof as, in addition to funds on hand, will make that sum. The insured takes the risk of the neglect of members to meet their assessments, and of the consequent reduction of the maximum sum named. One thousand dollars is, prima facie, the value of the policy, and the insurance fund was bound to take all the steps which it contracted to in order to realize that sum. Cases cited by the plaintiff, and other cases which we have examined, fully sustain this conclusion. And the rule is a fair one, because it is always within the power of the association to live up to its contract, and thus fix the sum which a death assessment will bring.

In *Elkhart Mut. Aid, B. & R. Asso.* v. *Houghton*, 103 Ind. 286, 1 West. Rep. 284, the certificate entitled the beneficiary to $1,000, or so much thereof as might be realized from one assessment. The complaint alleged the death of the beneficiary, proof of his death duly given, and the refusal of the defendant to pay the amount named in the certificate or any part thereof, and its refusal to order or make any assessment to raise the required sum or any part of it. The defendant was held liable for the maximum amount, it not being shown in defense that an assessment would not produce the full amount of the certificate. It was assumed that it was the duty of the defendant to make an assessment, though the contract contained no express agreement to that effect. *Earnshaw* v. *Sun Mut. Aid Society*, 68 Md. 467, 11 Cent. Rep. 508; *Lueders* v. *Hartford L. & Ann. Ins. Co.* 12 Fed. Rep. 465; *Kansas Protective Union* v. *Whitt*, 36 Kan. 760; *Covenant Mut. Ben. Asso.* v. *Hoffman*, 110 Ill. 606; *Suppiger* v. *Covenant Mut. Ben. Asso.* 20 Ill. App. 595; Niblack, Mut. Ben. Societies, § 410, commenting on *Newman* v. *Covenant Mut. Ben. Asso.* 72 Iowa, 242.

There is error in the judgment appealed from.

In this opinion the other Judges concurred.

Cornelia M. BENEDICT *et al.*
v.
Augustus S. CHASE *et al.*, Admrs., etc., of Charles Benedict, Deceased, *et al.*

(58 Conn. 196.)

1. **A case will not be remanded** for a more specific finding of facts where the facts necessary are stated in effect, and have been assumed by both parties, and the case heard on its merits without objection.
2. **The superior court has jurisdiction** of a suit to compel an intestate's estate, which has been saved from insolvency by the voluntary act of all the heirs of legal age, to refund the expense incurred thereby before distribution.
3. **Administrators have no power to guarantee the payment of bonds** of a corporation, issued for the purpose of taking up its paper upon which decedent was liable as indorser, although such guaranty would procure an extension of time and save the estate from insolvency; hence they will incur no liability by authorizing third persons to make such guaranty on behalf of the estate.
4. **Infant heirs are not liable** to a contribution at law for the amount of liability voluntarily incurred by other heirs in saving the estate from insolvency.
5. **Where a decedent's estate is saved from insolvency** by the act of all the parties interested who were of age and legally capable of acting, in guaranteeing, to a certain extent, with the approval of the administrator, the bonds of a corporation, for which the intestate was liable as indorser, the amount which they were compelled to pay on such guaranty should be refunded to them before distribution, although objection is made by the other interested parties who were infants at the time, and although no claim against the estate was presented within the time limited therefor by law. Having voluntarily sacrificed their own private funds to save the estate, and having in fact saved it, they are equitably entitled to have the whole estate, and not merely their shares of it, bear the burden.

(October 30, 1883.)

RESERVATION from the Superior Court for New Haven County of an action to recover from a decedent's estate the amount which plaintiffs alleged they had advanced to save the estate from insolvency. *Judgment for plaintiffs advised.*

The plaintiffs are the widow and two of the children of Charles Benedict, deceased. Defendants are the minor heirs of said Benedict and the administrators of his estate.

The complaint alleged that at the time of his death the decedent was liable as indorser upon a large amount of commercial paper of Mitchell, Vance & Co., which notes were then maturing and if presented and allowed against the estate would have rendered it wholly insolvent; and that, for the purpose of relieving the estate, the plaintiffs, being then all the parties interested who were of age and legally capable to act, entered into an agreement with the corporation that they would guarantee its bonds to the amount of $144,000, the proceeds of which should be used in taking up the notes, other bonds being guaranteed by other stockholders, and that the bonds were issued and guaranteed, and the notes paid with the proceeds; that the corporation failed in 1887 while a portion of the bonds guaranteed by the plaintiffs remained unpaid, and that in consequence thereof they had been compelled to pay upon them the sum of $47,699, which the administrators, upon demand made, had refused to pay; and that the estate of Benedict was being settled as a solvent estate, and that the time limited for presenting claims against it had long since expired. Judgment at law was prayed for against the administrators for the amount so paid, and for equitable relief.

The defendants demurred to the complaint on the ground that the superior court had no original jurisdiction in the matter. The demurrer was overruled and the defendants then filed a denial.

Upon the trial the following facts were found:

Charles Benedict died on the 30th of October, 1881, and the defendants A. S. Chase and Gilman C. Hill were appointed administrators of his estate. The estate was represented solvent, and the court limited six months from and after the 14th day of November in which to present claims against it.

Benedict died intestate, leaving a widow, Cornelia M. Benedict, and two daughters, Amelia C. Benedict and Charlotte B. Hill, plaintiffs in this action, and minor children of a deceased daughter, heirs-at-law to his estate.

At the time of his death he was indorser of a large amount of notes and drafts of Mitchell, Vance & Co. The total amount of his liability was $600,000. Mitchell, Vance & Co. at the decease of Benedict were supposed to be solvent, but could not meet these notes when they matured without renewals; and for the purpose of enabling the corporation to renew its paper without such indorsement and guaranty they entered into an agreement with the plaintiffs, by which the plaintiffs were to guarantee bonds to be issued by the corporation to an amount equal to one half the stock which Benedict at the time of his death owned and held in the corporation, which amount of guaranteed bonds was $144,000.

These bonds were used by Mitchell, Vance & Co. in taking up their obligations which Benedict had indorsed or guaranteed, which were paid by them upon maturity. These notes and drafts were paid by the corporation and not by the plaintiffs, nor were they in any manner assigned or conveyed to the plaintiffs, nor were they ever presented against Benedict's estate, nor any claim made upon the estate therefor. The bonds were so guaranteed by the plaintiffs on or before the 1st of December, 1881. In the summer of 1887 Mitchell, Vance & Co. failed in business, and a receiver was appointed to settle the affairs of the corporation, and on the 1st day of January, 1888, the plaintiffs were obliged to pay to the receiver the sum of $47,699, being one half the amount of the bonds so guaranteed by them still outstanding and unpaid by the corporation, the corporation also settling its debts for 50 cents on the dollar. The plaintiffs in guaranteeing the bonds supposed they were acting for the benefit of the estate, and relieving it from its liability by reason of the indorsements and guaranties of Benedict in his lifetime, so that no claim there-

for would ever come against the estate, believing that Mitchell, Vance & Co. would fully pay and discharge the bonds so guaranteed by them.

The estate of Benedict is now in process of settlement in the probate court. The plaintiffs have presented their claim and made demand of the administrators for payment thereof.

Benedict at the time of his decease was the largest stockholder in the corporation of Mitchell, Vance & Co., and the plaintiffs in making the guaranty of bonds acted as they supposed for the benefit of the estate, to preserve the stock as an asset of value to the estate, as well as to relieve the estate from liability for the indorsements.

If the notes so indorsed by Benedict had matured as a claim against his estate, and been presented against it, it would have subjected the estate to a much larger liability, and rendered it insolvent if compelled to pay them. The bonds were so guaranteed with the knowledge and approval of the administrators, so far as they had any power to approve it.

Upon these facts the case was reserved for the advice of this court.

Mr. **S. W. Kellogg,** for plaintiffs:

The plaintiffs are entitled to judgment against the administrators. It was their duty to take the necessary steps to relieve the estate from liability.

Griswold v. *Bigelow*, 6 Conn. 258; *Davis* v. *Vansands*, 45 Conn. 600.

This was money paid for their benefit as administrators, and can be recovered back.

Bailey v. *Bussing*, 28 Conn. 455; 2 Greenl. Ev. §§ 108, 113, 114; *Exall* v. *Partridge*, 8 T. R. 308.

If the plaintiffs are not entitled to a judgment at law against the administrators, a court of equity will grant them relief.

Wherever there is a wrong there is a remedy. *Hawley* v. *Botsford*, 27 Conn. 80; *Bacon* v. *Thorp*, Id. 251; *Davis* v. *Vansands*, *supra*; *Booth* v. *Starr*, 5 Day, 419.

Messrs. **C. W. Gillette** and **G. E. Terry,** for defendants:

The superior court has no original jurisdiction to grant any relief. The estate is still in process of settlement in the probate court, and all questions relating to the settlement of the estate, or to the administration account, are exclusively within the jurisdiction of that court, and can only come to the superior court by way of appeal.

Pitkin v. *Pitkin*, 7 Conn. 315; *Bailey* v. *Strong*, 8 Conn. 278; *Beach* v. *Norton*, 9 Conn. 182.

The plaintiffs are not entitled to a judgment at law against the administrators for the money paid as they had no power to bind the estate for any such purpose.

Rhodes v. *Seymour*, 36 Conn. 1.

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

There are two facts essential to the plaintiffs' right to recover: (1) that Benedict's estate was in peril; (2) that it was relieved of that peril by the plaintiffs. The finding does not state either fact in so many words. Are they in effect stated? If so, we can dispose of the case; if not, we must remand the case for a more specific finding.

There are two considerations which incline us to regard the finding as sufficient: 1. The case has been heard upon its merits without objection from either party, or suggestions from the court. 2. Both parties have assumed that both facts exist, and have argued the case upon that assumption.

A careful consideration of the facts stated leads us to the conclusion, if not as a necessary inference, yet as a reasonable and proper one under the circumstances, that the estate was in peril, and that the plaintiffs at their own expense rescued it from its liability.

Benedict in his lifetime assumed a contingent liability for Mitchell, Vance & Co., a New York corporation, of which he was a stockholder, to the amount of $600,000; which liability was on his estate at the time of his decease. The corporation was unable to meet the paper indorsed by Benedict as it matured, without renewals, and no renewals could be had. That finding seems to exclude the supposition that the corporation could meet its paper, unless aided by the estate or by someone interested in it. In less than six years the corporation failed. That it was on the verge of insolvency, if not actually insolvent, is evident from the fact that it was unable to meet its maturing liabilities. Something must be done, or that paper will inevitably be presented against the estate. It necessarily follows that the estate was in imminent peril. Presentation meant payment, and payment by the estate meant insolvency.

Did the plaintiffs relieve it of its peril? In about one month after Benedict's death the plaintiffs guaranteed bonds of the corporation to the amount of $144,000. That was done, as it is found, "for the purpose of enabling the corporation to renew its paper without such indorsement and guaranty." It is also found that "the bonds were used by said Mitchell, Vance & Co. in taking up their obligations which said Benedict had indorsed or guaranteed." A portion of the bonds were outstanding when Mitchell Vance & Co. failed, and the plaintiffs were obliged to pay thereon $47,699. Had they advanced $144,000 in cash instead of guaranteeing bonds, and the money had been used to take up the indorsed paper as it matured, it would have conclusively appeared that they relieved the estate. Is the fact that they accomplished the same result by loaning their credit any less conclusive? In either case it may be said that time is of some importance; that insolvency may have overtaken the corporation after the death of Benedict; so that it is uncertain whether the plaintiffs in fact benefited the estate. The reply is that there is no presumption to that effect; on the contrary, if insolvency originated subsequently, the presumption is that the defendants by an appropriate plea would have called the attention of the court to that fact. In the absence of any claim on that subject, the court is not bound to take into consideration mere possibilities. It is possible that the property of the corporation may have been destroyed by fire with no insurance; that they met with heavy losses otherwise, and the like; but these

Woodruff, 49 Ark. 394; *Little Rock & Ft. S. R. Co.* v. *McGehee*, 41 Ark. 207; *Amoskeag Mfg. Co.* v. *Worcester*, 60 N. H. 526; *Low* v. *Concord R. Corp.* 2 New Eng. Rep. 275, 63 N. H. 558; *Goodin* v. *Cincinnati & W. Canal Co.* 18 Ohio St. 181; *St. Louis, K. & A. R. Co.* v. *Chapman*, 38 Kan. 307; *Woodfolk* v. *Nashville & C. R. Co.* 2 Swan, 438.

Messrs. **Vertrees & Vertrees** and **Lytton Taylor**, for appellees:

The property is to be valued on the same principles and considerations as if both parties had agreed upon the sale, and had referred the single question of the intrinsic value of that particular property to the commissioners.

Woodfolk v. *Nashville & C. R. Co.* 2 Swan, 439; *Memphis* v. *Bolton*, 9 Heisk. 508; Code, 1563, *note;* Lewis, Em. Dom. § 478; Mills, Em. Dom. 2d ed. § 168.

It is the market value which is to be ascertained.

Lewis, Em. Dom. § 478; *Mississippi & R. R. Boom Co.* v. *Patterson*, 98 U. S. 408 (25 L. ed. 208).

While the condition and surroundings of the property, and its availability for valuable purposes, may be shown, the witnesses are not to be asked, or be allowed to state, the value of the property for any particular purpose.

Low v. *Concord R. Corp.* 2 New Eng. Rep. 275, 63 N. H. 557; *Stinson* v. *Chicago, St. P. & M. R. Co.* 27 Minn. 291; *Sullivan* v. *Lafayette Co.* 61 Miss. 271; *Black River & M. R. Co.* v. *Barnard*, 9 Hun, 104; *Virginia & T. R. Co.* v. *Elliott*, 5 Nev. 358; *Re Boston, H. T. & W. R. Co.* 22 Hun, 176; *Union Depot, S. R. & Transfer Co.* v. *Brunswick*, 31 Minn. 299; *Albany Northern R. Co.* v. *Lansing*, 16 Barb. 68; Lewis, Em. Dom. p. 624, § 486; Mills, Em. Dom. pp. 344, 355; *Moulton* v. *Newburyport Water Co.* 137 Mass. 163; *Central Pac. R. Co.* v. *Pearson*, 35 Cal. 262; *Searle* v. *Lackawanna & B. R. Co.* 33 Pa. 57, approved in *Reading & P. R. Co.* v. *Balthaser*, 12 Cent. Rep. 175, 119 Pa. 482; 3 Sutherland, Damages, 441, 442; *Haslam* v. *Galena & S. W. R. Co.* 64 Ill. 353.

It is not competent as independent evidence of what the market value was to show that the city contemplated erecting this reservoir on this hill.

Mills, Em. Dom. p. 354; *Cobb* v. *Boston*, 112 Mass. 181; *Re William & Anthony Streets*, 19 Wend. 678.

The award of the jury of view would not bear interest, because the Statute does not provide for interest.

Freem. Judgm. 3d ed. § 441; Code (M. & V.) § 1564; *Williams* v. *Inman*, 5 Coldw. 269.

The money was paid in while the proceedings were pending. If, therefore, interest ought to have been allowed, it should have been allowed only on the difference between $12,532 and $10,327.51.

Mills, Em. Dom. 2d ed. p. 359; *Shattuck* v. *Wilton R. Co.* 23 N. H. 269.

Damages to the residue are to be assessed on the basis that the work will be constructed and operated skillfully and properly.

Mills, Em. Dom. 2d ed. § 220; Lewis, Em. Dom. § 482; *Jones* v. *Chicago & I. R. Co.* 68 Ill. 380; *Jackson* v. *Portland*, 63 Me. 55; *Fremont, E. & M. V. R. Co.* v. *Whalen*, 11 Neb. 585; *Setzler* v. *Pennsylvania S. V. R. Co.* 2 Cent. Rep. 357, 112 Pa. 56; *Nason* v. *Woonsocket U. R. Co.* 4 R. I. 377; *Neilson* v. *Chicago, M. & N. W. R. Co.* 58 Wis. 516.

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

This proceeding was instituted by the City of Nashville, in August, 1887, to condemn and appropriate what is known as "Kirkpatrick's Hill," for reservoir purposes. The jury of view assessed the damages at $9,686. Alloway and wife, the owners of the property, appealed from that report, and obtained a trial in the

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A statute authorizing condemnation of lands for municipal uses must provide an adequate, certain and definite source and mode of payment of just compensation to the owner. *Re* Mayor, etc. of N. Y. 1 Cent. Rep. 149, 99 N. Y. 569.

A municipal corporation acting under legislative authority may be authorized to take private lands for public use without first making compensation to the owner. State v. Perth Amboy (N. J.) Nov. 8, 1889.

Where it takes private lands for public use without first making compensation to the owner there must, at the time of taking, exist a provision by which the owner can have his damages assessed and obtain the compensation on his own motion. *Ibid.*

The compensation to be paid must be fixed by the valuation of the property at the date of the filing of the petition. Hence, rights acquired by third parties after that date are acquired *pendente lite*, and are subordinate to the rights of the petitioner. Schreiber v. Chicago & E. R. Co. 3 West. Rep. 101, 115 Ill. 340.

Measure of damages.

In the assessment of damages for taking private property for public use, it is the duty of courts to exercise their powers with a view of enabling the party whose property is taken to obtain such compensation as is assured to him by the Constitution. Beekman v. Jackson Co. (Or.) Jan. 6, 1890.

In estimating the value of real property the jury may not only look to the land itself and the actual site of it, but also to the use to which it is, or is intended to be, applied by the owner. Meinzer v. Racine, 74 Wis. 166; Haslam v. Galena & S. W. R. Co. 64 Ill. 353; Chicago & E. R. Co. v. Jacobs, 110 Ill. 414; Kankakee Stone & Lime Co. v. Kankakee, 128 Ill. 173.

So far as the adaptability of the land to uses other than that to which it is applied enhances its present market value, such uses may be considered by the jury. Reed v. Ohio & M. R. Co. 126 Ill. 48; Laflin v. Chicago, W. & N. R. Co. 33 Fed. Rep. 415; Calumet River R. Co. v. Moore, 13 West. Rep. 506, 124 Ill. 329.

So the value of land taken for a bridge site for that purpose is an element of damages for the taking, although the owner himself had no authority to build a bridge. Little Rock Junction R. Co. v. Woodruff, 49 Ark. 381.

The present market value of the land taken is the true basis of compensation, to be determined by the jury from evidence of witnesses, or by their personal inspection of the premises. Reed v. Ohio & M. R. Co. *supra;* Atchison, T. & S. F. R. Co. v. Schneider, 2 L. R. A. 422, 127 Ill. 144.

In Michigan a jury is not authorized to fix and determine the award to be made in condemnation proceedings, upon a mere view of the premises, regardless of the evidence. Grand Rapids v. Perkins (Mich.) Nov. 15, 1889.

circuit court, when verdict and judgment were rendered for $12,532. From that judgment Alloway and wife prosecuted an appeal in error to this court.

The assignment of errors presents several important and interesting questions of law and practice, which it is necessary to consider somewhat in detail in order to reach an intelligent decision of the case. It is objected, and assigned as error, that the owners of the land were not permitted to show its particular value as a reservoir site; and, again, that the trial judge, in his charge, instructed the jury that, in determining the value of the property taken, they could not single out from the elements of general value its value for one special purpose. These two objections raise the same legal question, and will for that reason be considered together.

The "just compensation" required by our Constitution (art. 1, § 21) is the fair cash value of the land taken for public use, estimated as if the owner were willing to sell, and the corporation desired to buy, that particular quantity at that place and in that form. *Woodfolk* v. *Nashville & C. R. Co.* 2 Swan, 437; *East Tennessee & V. R. Co.* v. *Love*, 3 Head, 67; *Tennessee & A. R. Co.* v. *Adams*, 3 Head, 600; *Memphis* v. *Bolton*, 9 Heisk. 509.

This value means the market value. Lewis, Em. Dom. § 478; *Mississippi & R. R. Boom Co.* v. *Patterson*, 98 U. S. 408 [25 L. ed. 208]; Cooley, Const. Lim. 5th ed. 699.

It includes every element of usefulness and advantage in the property. If it be useful for agriculture or for residence purposes; if it has adaptability for a reservoir site, or for the operation of machinery; if it contains a quarry of stone, or a mine of precious metals; if it possesses advantage of location, or availability for any useful purpose whatever,—all these belong to the owner, and are to be considered in estimating its value. It matters not that the owner uses the property for the least valuable of all the ends to which it is adapted, or that he puts it to no profitable use at all. All its capabilities are his, and must be taken into the estimate. This does not mean that all the capabilities are to be priced separately, and the aggregate put down as the true value; for they do not exist independently of each other, and cannot all be realized at the same time. Nor will it do to restrict the estimate to any one of them, because in one view that would exclude the other elements altogether, and in the other view it would tend to make the degree of benefit to the party appropriating and condemning for a particular purpose the real measure of value, which is never allowable.

The field of investigation, in the case before us, was a very broad one. The location and elevation of the property were given. Its surface, area and present use were described. The existence and character of stone within its compass, and the fact that the best of the stone was used in the construction of the walls of the reservoir, were disclosed. The City's engineer said that the hill had some value for residence purposes, but was valuable "mostly for a reservoir site," and this view was confirmed by Mr. John Overton, who said that there was only "one or two more good places for a reservoir" in reach of the City. No witness was allowed to put a price upon any single element of usefulness or advantage, but all the foregoing facts and circumstances were stated in detail by one witness and another, and from them all the witnesses gave their opinions as to the market value of the property. The questions calling for such opinions were generally in this form: "Considering the property sought to be condemned in the form it was taken, and as it was taken, and having regard to the entire property, and the uses to which it was put, and also the uses to which it was adapted, and assuming that Mr. Alloway wanted to sell, but was not obliged to sell, this piece or parcel of land, and the City wanted to buy it, but was not obliged to have it, what was the cash market value of the same in August, 1887, and what would be just compensation to Mr. Alloway, and what damages should be allowed him?" Some of the witnesses, especially those put upon the stand by the owners, answered that question as to their acquaintance with the property and its market value.

With respect to the mode of ascertaining the value of the land taken, the circuit judge instructed the jury in these words: "In estimating its value, all the capabilities of the property, and all the uses to which it may be applied, are to be considered, and not merely the condition it is in at the time, and the use to which it is then applied by the owner. It is not a question of the value of the property to the owner, nor can the value be advanced by his unwillingness to sell. On the other hand, the damages cannot be measured by the value of the property to the party condemning it, nor by its need of the particular property. The City is entitled to have the land at its fair, market, cash value, unaffected by the fact that it needs it, or desires it. If it were otherwise, the value of land would not be measured by what it is actually worth in the market, but by the extent to which it might be necessary for public use; and so, when an appropriation of land is made for a city reservoir, the question is not what the land is worth to the City for the special purpose, for that would be to measure the value by the immediate necessities of the public, rather than the actual worth of the land. In determining the market cash value, you cannot single out from the elements of general value the value for an especial purpose, but you are to consider all the constituent elements that make up the market value,—its availability, adaptability and capacity for different uses and purposes. In determining the market cash value, everything which enhances or depreciates its worth should be taken into consideration. If the existence of a rock quarry under the surface of the hill augmented or entered into the market value of the land, that fact should be considered; but the jury could make no separate allowance for the rock, for that would necessitate an inquiry into the cost of excavating and raising it. The cash market value of the land with the rock in it would be the proper consideration." To a great extent, and entirely so, so far as the cases are alike, this charge is sustained by the opinion of this court in *Woodfolk* v. *Nashville & C. R. Co.* 2 Swan, 437; and in that and all other respects it is in accord with the doctrine laid

down in Lewis, Em. Dom. §§ 478, 479, 486; 3 Sutherland, Dam. 441, 442; Mills, Em. Dom. 2d ed. § 168; *Moulton* v. *Newburyport Water Co.* 137 Mass. 163; *Searle* v. *Lackawanna & B. R. Co.* 33 Pa. 57, and in other cases not necessary to be cited.

Thus, as we think, every legitimate question on this branch of the case was developed, and properly submitted for the consideration of the jury. The action of the trial judge was right, both in the rejection of evidence of the amount of value for a reservoir site, and in the instruction that the jury could not single out and estimate the value for a special purpose.

We fully agree with the learned counsel of Alloway and wife, that "the particular purpose for which a piece of property is most applicable" must be considered in estimating the value of such property. That was done in this case. It was distinctly proven that "Kirkpatrick's Hill" was applicable, "mostly, for a reservoir site," and the jury was told to consider that, and every other element of value. That they did so cannot be doubted for a moment, in the light of the whole proof, and the amount of the verdict returned. Our holding is that, while adaptability for a reservoir site must be considered, the value for such a purpose exclusively cannot be shown in proof, and made the sole basis of a recovery, especially when the property possesses other capabilities, as in this case.

There is a lack of harmony in the decisions on this subject, some of them permitting the inquiry as to the value of the property for one special use, and others holding, as we do, that the market value in view of all available uses is the measure of compensation. It is not desirable to review all the cases in this opinion, but some of them will be mentioned. The latest one in the former line is that of *San Diego Land & Town Co.* v. *Neale*, decided by the Supreme Court of California in 1888, and published in 78 Cal. 63, 3 L. R. A. 83. In that case it was held, distinctly, that it was competent to prove the value of land for a reservoir site, and to make that value the measure of damages, independent of any other consideration or element of value; and that, too, when the land sought to be condemned was in fact not the real site of the reservoir, but only necessary to contain backwater from the dam below. To reach that conclusion, two former decisions by the same court, holding a contrary rule, were overruled, and other authorities cited in the opinion, were followed. In a case of the other line this language is used: "But, where a condemnation is sought for the purposes of a railroad, to single out from the elements of general value the value for the special purposes of such railroad is, in effect, to put to a jury the question, What is the land worth to the particular railroad company? rather than, What is it worth in general? The practical result would be to make the company's necessity the land owner's opportunity to get more than the real value of his land." *Stinson* v. *Chicago, St. P. & M. R. Co.* 27 Minn. 291.

The case of *Mississippi & R. R. Boom Co.* v. *Patterson*, 98 U. S. 403 [25 L. ed. 206], is cited by the California court, and is relied on as sound authority by counsel on both sides of this controversy. Patterson owned one island, and parts of two others, in the Mississippi River, which the boom company condemned. The value was first appraised by commissioners, and afterwards by a jury in the circuit court of the United States. When the case reached the Supreme Court, *Mr. Justice* Field, delivering the opinion of the court, said: "The jury found a general verdict assessing the value of the land at $9,358.33, but accompanied it with a special verdict assessing its value, aside from any consideration of its value for boom purposes, at $300, and, in view of its adaptability for those purposes, a further and additional value of $9,058.33. . . . In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, What is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted? That is to say, What is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities and conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances to be taken into the account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule, but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the land. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands." 98 U. S. 405, 407, 408 [25 L. ed. 207, 208].

This lengthy extract presents the rule for compensation, and its application to the facts of the case. Both, as we understand them, are in harmony with, and suggest, the views expressed in this opinion. There the adaptability of the islands for boom purposes was held to be an element of value to be considered by the jury; here it is decided that the adaptability of the hill for purposes of a reservoir is an element of value to be taken into the estimate. There it was treated as an element

only, to be considered in connection with other elements of value; so it is here. In that case the contention of the condemning party was that the adaptability of the islands for boom purposes should not enter into the estimate at all. The court said it should, in the words quoted. No comment is made in the opinion on the fact that the jury, in a special verdict, assessed the value for boom purposes separably. That method is neither approved nor disapproved, by intimation or otherwise. The general verdict, as reduced by the owner on suggestion of the lower court, was affirmed.

A late author, speaking on this subject, says: "The market value of property includes its value for any use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation. Some of the cases held that its value for a particular use may be proved; but the proper inquiry is, What is its market value, in view of any use to which it may be applied, and of all the uses to which it is adapted? . . . The conclusion from the authorities and reason of the matter seems to be that witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property, and all its surroundings, may be shown and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown, and if such peculiar adaptation adds to its value the owner is entitled to the benefit of it. But, when all the facts and circumstances have been shown, the question at last is, What is it worth in the market?" Lewis, Em. Dom. § 479.

By statute the owner is entitled to compensation for land actually appropriated, and, in addition, to incidental damages for injury, if any, to the residue of the tract. Mill. & V. Code, § 1562.

Both were claimed in this case, but only the former was allowed by the jury. As ground for incidental damages, the use, amount and relative position of the residue, and the capacity (50,000,000 of gallons) and dimensions of the reservoir, were shown. It was also proven that the walls of the reservoir were made of stone taken from the hill; that some of the stone was good for such purpose, and some of it was not, the yield, altogether, being largely more than was used in the wall. Upon these and some other circumstances the witnesses express various opinions on the question of depreciation or no depreciation in the market value of the residue.

The general charge with respect to incidental damages is not assailed, but error is assigned upon this paragraph: "Damages are to be assessed on the basis that the work will be constructed and operated in a skillful and proper manner. All damages resulting from the neglect in these respects, or from negligence in the use of the reservoir, may be recovered, by appropriate suits, when such damages occur." The objection to this is "because a reasonable apprehension of danger would impair the whole of the property in the vicinity, and, when it had been shown that the walls were built from the stone taken from the site, and that most of the stone in the hill was of bad quality, this was ground to apprehend danger. And, besides, the present owner is entitled to the incidental damages." It seems to be well settled that damages to the residue are to be estimated on the assumption that the part actually appropriated will be used in a skillful and proper manner. Mills, Em. Dom. § 220; Lewis, Em. Dom. § 482.

Clearly, this must be so when the damages are assessed before the construction and operation are commenced. If it were otherwise, no appraisement could be made until after the work is completed, because it could not sooner be known how defective the work will be, nor the amount of depreciation caused thereby. The rule should be the same when the construction is in progress, and not completed. When the trial below occurred, the work on the reservoir had been going on a long while, and was approaching completion, but it could not be finished for several months to come. The City was under legal obligation to so construct its improvement as to do the least injury to the residue of the land; and the presumption that it would perform that duty faithfully should be indulged until the work was finished, and the presumption rebutted. Even though some defects should, through negligence, occur in the construction, it is fair to assume that it will be detected and cured before putting the reservoir to its ultimate use. In like manner, the law devolves upon the City the duty of operating the reservoir carefully and skillfully; and it would be unjust to assume in advance that it will not do so. A different rule would be impracticable, as well as unjust; for no one could tell the amount to be allowed for improper operation until the fact itself should be ascertained, and the consequences seen and weighed.

The owner is entitled to all his damages, those for the land taken, and those to the residue, so soon as the condemnation is made. Neither he nor the condemning party can await future developments to enhance or diminish the amount of damages. These must be estimated on the assumption that the land appropriated will be properly and in a reasonable time put to the use for which it is condemned. We by no means intend to decide that incidental damages must be estimated upon the assumption that the construction and operation of the improvement will be absolutely safe, and that apprehension of danger therefrom may not be considered by the jury. Our meaning is that such damages cannot be enhanced by the suggestion that the corporation appropriating the land will act negligently. The presumption is that it will act carefully. If it act otherwise, and injury result from its negligence, that affords an independent cause of action; and the liability so incurred forms no part of the incidental damages. There may be reasonable apprehensions of danger from inherent defects and unavoidable accidents, notwithstanding skillful construction and careful operation of the improvement. If so, such apprehension, so far as it depreciates

the present market value of the land not taken, is an element of incidental damages, and should be considered by the jury in making up their verdict. Such apprehension was not excluded from the consideration of the jury in this case. Only that resulting from the neglect or negligence of the city was so excluded. At this point, it is well to note the fact that there was no proof that any of the inferior stone had been placed in the wall, or that any of the work had been unskillfully done.

Each side claimed the right to open and close the argument before the jury. The trial judge decided in favor of the City, and that action is assigned as error. This question has been decided in several of the States, some of them holding one way, and some the other. The majority of the cases seem to give the opening and conclusion to the land owner. Lewis, Em. Dom. § 426.

The conflict in the decisions is largely due, no doubt, to difference in local practice, or statutory provisions. In this State the proceeding is inaugurated by the party seeking to appropriate the land. It is done by a petition setting forth the land wanted, the object for which it is to be condemned, the name of the owner, and concluding with appropriate prayers. Notice is to be given the owner, after which a jury, to inquire and assess the damages, is summoned and sworn. Either party may appeal from the finding of this jury, and have a trial anew before a jury in the circuit court. Mill. & V. Code, §§ 1549–1566, inclusive.

Not only is the corporation seeking the condemnation required to take the first steps, and bring the land owner before the court, in the prescribed order, but it must, of necessity, show that it is entitled to exercise the right of eminent domain, and that the particular land is necessary for its corporate use. In all this the petitioner is plaintiff, with the affirmative of its claim and the burden of proof upon it. The question of the amount of damages is then considered, and generally one side seeks to make it as small, and the other as large, as possible. Starting out as plaintiff, with the *onus* upon it, the petitioner should be allowed to open and close the case, even though the burden of proof may be shifted to the other party on some question arising in the progress of the trial. Concession by the owner of petitioner's right to condemn, and to take the particular land, and contesting the question of damages only, cannot change the rule; nor can the fact that the owner alone appealed from the appraisement by the jury of inquest, for on that appeal the trial is *de novo*, and the attitude of the parties is the same as before.

The jury allowed no interest. No instructions on that subject were given or requested; but after the verdict was returned, and before judgment was entered, Alloway and wife moved the court to add interest. This the court refused to do; and his action in that regard is now assigned as error. The Statute authorizing the condemnation of private property for public use, and prescribing the mode of proceeding, is silent on this subject; and the General Statutes (Id. § 2702) which enumerates instruments that bear interest as a matter of law, does not embrace a case like that before us. Nevertheless, we have no hesitation in holding, upon general principles, that interest should have been allowed from the time of the appropriation of the property. From that time the original owner was deprived of the use and possession of the land taken. The liability of the City accrued at that date, though the amount thereof is not determined finally until long thereafter. Damages are properly assessed with reference to the value of the land taken, and the depreciation of the residue at the time of condemnation. The legal rights of both parties, so far as the damages are concerned, are fixed at that time. Subsequent enhancement or diminution of the value, though ever so great, cannot be considered by the jury in estimating damages. Witnesses are examined as to the amount of damages at the time of appropriation, and not at the time of the trial. That method was properly adopted in this case. The City, especially, asked her witnesses the value of the property "in August, 1887."

In the case of *East Tennessee, V. & G. R. Co.* v. *Burnett*, 11 Lea, 526, the jury of inquest, though reporting several years after the land was appropriated, failed to allow interest. The petitioner did not appeal, and have a trial *de novo*, but excepted to the report because it did not include interest. The exception was overruled, and the petitioner prosecuted a writ of error. This court allowed the interest. Id. 527.

A discussion of the subject is found in § 499, Lewis, Em. Dom. Refusal to allow interest was error. In the language of one of the counsel for appellants: "If the party in whose favor there is verdict is, as a matter of law, entitled to something additional, the court may allow it." Inasmuch as the error can be readily corrected here, that will be done, instead of reversing and remanding. This court will render the judgment that should have been rendered below. The land was taken about the 10th of August, 1887; hence judgment will be entered for the amount of the verdict, with interest from that date.

On September 22, 1888, the City paid into court, subject to the order of Alloway and wife, the sum of $10,872.51, that being the amount of damages returned by the jury of view, with interest and costs added. Because of this tender, the City now insists that it can in no event be liable for interest on a larger sum than the difference between the verdict and the amount so paid into court. This contention, though plausible at first view, is not sustained by sound reason. A tender of part of a debt, in satisfaction of the whole of it, is no tender at all in law. The sum paid into court in this case was more than $2.000 less than the amount due Alloway and wife, as has since been demonstrated by the verdict of the jury; hence they were under no obligation to receive it, and cannot have their claim for interest abated on account of their refusal to do so.

The other grounds of error assigned, so far as material, fall within principles already announced, and for that reason they will not be further mentioned.

Let the judgment be modified by adding interest, and affirmed, with costs.

OHIO SUPREME COURT.

STATE OF OHIO, *ex rel.* ATTORNEY-GENERAL,
v.
WESTERN UNION MUTUAL LIFE & ACCIDENT SOCIETY of the United States.

(47 Ohio St.....)

***1. Corporations organized under section 3630 of the Revised Statutes,** which do not comply with the laws regulating regular mutual life insurance companies, have no power to issue policies guaranteeing any fixed amount to be paid at the death of the member, "except such fixed amount shall be conditioned upon the same being realized from the assessments made on members to meet it;" and those corporations so organized, which do comply with such laws, are authorized to issue endowment policies "promising to pay to members during life any sum of money or thing of value." Such Ohio corporations are not permitted to do business in another State upon substantially the same basis and limitations as they are in Ohio, when by the laws of such other State they are not permitted to issue such endowment policies, nor any policy of insurance so conditioned, nor any that does not specify the sum of money to be paid, and unconditionally obligate such corporation to pay the amount so specified, to the beneficiaries of such payment; and corporations organized on the assessment plan under the laws of such other State are not entitled to do business in this State.

2. The business, which corporations of other States organized to insure lives of members on the assessment plan "shall be permitted to do in this State," under the provisions of § 3630*e*, Rev. Stat., is that contemplated by section 3630, which does not include the business of insuring the lives of members for the benefit of others than their families and heirs. A corporation of another State, organized for insuring lives upon the plan of assessments upon its members, without other limitation than that the policy holder shall have an insurable interest in the life of the member, is not embraced within either of said sections.

3. That clause of section 3630 of the Revised Statutes, which provides that "such company or association shall not be subject to the preceding sections of this chapter," does not apply to corporations of other States organized for insuring the lives of members for the benefit of others than their families and heirs. Corporations of that class are not entitled to transact any business of insurance in this State, until they procure from the superintendent of insurance a certificate of authority so to do; nor can any person act as agent in this State for such company, until a license to do so is procured from the superintendent of insurance, as required by § 3604, Rev. Stat. Such licenses continue in force, unless suspended or revoked, until the first day of April of the year next after the date of their issue, and no longer.

4. When a foreign corporation doing business in this State is exercising its franchises in contravention of the laws thereof, it may be ousted therefrom, by proceedings in *quo warranto*.

*Head notes by the COURT.

NOTE.—*Foreign insurance companies; conditions imposed by statute.*

A law of a State requiring insurance companies of other States or countries to file security, or take out a license, or pay a specific tax or certain fees and percentages, before they can issue policies in the State, is constitutional. Ducat v. Chicago, 77 U. S. 10 Wall. 410 (19 L. ed. 972); Liverpool & L. L. & F. Ins. Co. v. Oliver, 77 U. S. 10 Wall. 566 (19 L. ed. 1029); Home Ins. Co. v. Augusta, 93 U. S. 116 (23 L. ed. 825); Paul v. Virginia, 75 U. S. 8 Wall. 168 (19 L. ed. 357). See *note* to Pennypacker v. Capital Ins. Co., post, —.

A State may require a deposit from a foreign company as a condition precedent to its right to do business. Phenix Ins. Co. v. Burdett, 11 West. Rep. 239, 112 Ind. 204.

Such a statute is constitutional, whether the moneys are regarded as taxes for revenue or as a license. State v. Ins. Co. of North America, 15 West. Rep. 93, 115 Ind. 257.

Under the laws of Michigan requiring a deposit of securities as a condition for the prosecution of their business, a British company must make such deposit, although it may have made the same in another State to acquire a license to do business there. Employers L. Assur. Co. v. Insurance Comr. 7 West. Rep. 851, 64 Mich. 614.

Under the Statute of Louisiana license is imposed on the business pursued by an insurance company in the State of Louisiana, and not on business done by branches or agencies established in other States, subject to their laws and subject to taxation imposed thereby. Sections 6 and 7 of the same Act provide for rate of taxation. State v. Hibernia Ins. Co. 38 La. Ann. 465.

Act 1872, chap. 24, § 110, relating to incorporation of cities, was repealed by Act 1879, § 30, which declares the tax directed to be levied upon the net receipts of foreign insurance companies to be in lieu of all town and municipal licenses. Chicago v. James, 1 West. Rep. 345, 114 Ill. 479.

Section 30 requires affirmative action by the city entitled to it, in fixing the rate, which may be less, but cannot be more, than 2 per cent upon the gross, and not upon the net, receipts of the agents of foreign corporations. *Ibid.*

A foreign corporation suing in Colorado on an insurance policy cannot be defeated by the fact that it has not complied with the statutes in regard to foreign corporations doing business within the State, where the only business done within the State relates to the insurance policy in suit. Tabor v. Goss & P. Mfg. Co. 11 Colo. 419.

The Act making it unlawful for anyone to aid a foreign insurance company in transacting business within the State renders any person so aiding liable, although acting under a contract with the insured as his agent only. People v. People's Ins. Exchange, 2 L. R. A. 340, 126 Ill. 466.

A condition in a policy of a foreign company doing business in this State, that anyone except the insured who procures insurance to be taken by the company shall be deemed the agent of the insured, is null and void. North British & M. Ins. Co. v. Crutchfield, 7 West. Rep. 85, 108 Ind. 518.

An agent of an insurance company incorporated in the District of Columbia is an agent of a company incorporated by a "State" other than the State of Indiana, within Ind. Rev. Stat. 1881, § 3765, requiring a license from such agent. State v. Briggs, 116 Ind. 55.

A state statute, which provides that insurance companies of other States shall not do business in

See also 16 L. R. A. 611; 23 L. R. A. 86.

(March 4, 1890.)

PETITION for a writ of *quo warranto* to oust defendant from exercising the franchise of transacting the business of a life insurance company within the State. *Judgment of ouster.*

Statement by **Williams**, *J.:*

The petition states that the defendant is a corporation organized under the laws of the State of Michigan for the purpose of carrying on, upon the assessment or co-operative plan, the business of insuring the lives of its members, and of providing to its members indemnity for disability by accident; that since the 1st day of April, 1889, the defendant has exercised and claims the right to exercise, in this State, the privilege and franchise of transacting the business of insuring lives upon the assessment plan, which it is not entitled to do, because neither it nor any of its agents obtained from the superintendent of insurance of this State the necessary certificate of authority or license to do business in this State, and also because, by the statutes of Michigan, corporations organized under the laws of Ohio, for the purpose of insuring the lives of members upon the assessment plan, are not permitted to do business in the State of Michigan upon the same basis and limitations as they are in this State; and, the commissioner of insurance of the State of Michigan has refused, and still refuses, to issue to such Ohio corporations his certificate of authority to transact business in that State. The provisions of the Michigan statutes upon the subject are set out in the petition. Such of them as are deemed material to the decision of the case will be noticed in the opinion.

The petition prays for a judgment of ouster against the defendant.

The answer admits that the defendant was incorporated under the Michigan Statute set forth in the petition; that it has exercised, and claims the right to exercise, in this State, the privilege and franchise referred to in the petition, and alleges that it is entitled to do so, because, it avers that on the 9th day of June, 1886, it made application to the superintendent of insurance of this State for permission to carry on in the State of Ohio the business of life insurance, as contemplated in section 3630e of the Revised Statutes of Ohio; and that on the 13th day of September, 1886, the superintendent of insurance duly authorized the defendant to transact business in this State; since which time the defendant has continuously prosecuted its business in this State as contemplated in section 3630 of the Revised Statutes. The answer further alleges that Ohio corporations organized for the purpose of insuring their members upon the assessment plan are not debarred by the laws of Michigan from transacting business in that State, and that the insurance commissioner of that State has not refused to issue certificates of authority to transact business in that State, to such Ohio corporations as can and will comply with the laws of the State of Michigan. It is also alleged in the answer that the petition was filed at the instigation of "The People's Mutual Benefit Association of Westerville, Ohio," which corporation, on or about the 24th of October, 1888, made application to the insurance commissioner of Michigan for authority to do business in that State, but was refused such authority, because, upon examination, it was ascertained its business, in part, was that of endowment insurance, which the laws of Michigan did not permit corporations organized on the assessment plan to do.

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the State until they shall have designated an agent therein upon whom process may be served, confers jurisdiction upon a circuit court of the United States sitting in such State over an action by a citizen of the State against an insurance company of another State, commenced by service upon an agent therein, designated by it under the statute. *Ex parte* Schollenberger, 96 U. S. 369 (24 L. ed. 853).

No foreign insurance company can take fire risks within the State of Michigan unless authorized by the commissioner of insurance. Hartford F. Ins. Co. v. Insurance Comr. 14 West. Rep. 632, 70 Mich. 485.

The statutes of Missouri make it the duty of a foreign insurance company desiring to transact business in the State to file with the superintendent of the insurance department a written instrument designating someone as agent to receive service of process. A sheriff's return on a writ of garnishment served "on one of the agents" is insufficient. Gates v. Tusten, 4 West. Rep. 662, 89 Mo. 131.

It makes the certified copy of the certificate evidence of authority to do business in the State. American Ins. Co. v. Smith, 2 West. Rep. 149, 19 Mo. App. 627.

Where a foreign company, undertaking to prove the existence of its certificate to carry on business for several years, omits proof of the year in question, the submission of the question to the jury, whether it had authority to do business at that time, is proper. *Ibid.*

The mere absence from a recorder's office of a certificate issued to a foreign corporation, will not warrant the inference that no such certificate exists. *Ibid.*

The Legislature has fixed no limit as to the amount of cash business these companies may do; and if the law is defective in this respect, the remedy must come from the law-making power. State v. Manufacturers Mut. F. Ins. Co. 8 West. Rep. 258, 91 Mo. 311.

In New York the Legislature did not intend to prohibit such adjustments by uncertified agents of fire insurance companies of other States and foreign countries, where there appeared to be nothing unlawful in the contract out of which the indebtedness had arisen. People v. Gilbert, 44 Hun, 522.

Under the Nebraska Statute a foreign insurance company, to be authorized to transact business in Nebraska, must be possessed of at least $200,000 of actual paid-up capital, exclusive of any assets of such company deposited in any other State or Territory. State v. Benton, 25 Neb. 834.

The provision of the Wisconsin Statute which imposes a penalty upon every life or accident insurance company doing business in Wisconsin which fails to file the annual statement thereby prescribed, does not apply to a nonresident corporation which has not been licensed, although doing business within the State in violation of law. State v. United States Mut. Accident Asso. 69 Wis. 76.

The Statute of Wisconsin which enacts that a corporation organized in another State shall not transact business within its limits unless it agrees in advance that it will not remove into the federal courts any suit that may be commenced against it by a citizen of Wisconsin, is repugnant to the Constitution of the United States, and void; and the

The defendant also filed a supplemental answer (so called), which charges that the superintendent of insurance has embodied in the annual report which he is required to make to the General Assembly, relating to the conduct and condition of all insurance companies doing business in this State, a statement to the effect that he has lawfully revoked the authority of the defendant to do business in Ohio after April 1, 1889, since which time it has been doing business in this State without authority of law; and that he has omitted to make any statement in his report showing the condition of the defendant Company.

By this pleading, it is sought to make the superintendent of insurance a party to the action, and enjoin him from making such report.

The case is submitted upon demurrers to the answer, and the supplemental answer.

Messrs. **David K. Watson,** *Atty-Gen.*, and **R. A. Harrison** for plaintiff.

Mr. **C. D. Robertson,** for defendant:

Corporations of the class of this defendant, by the provisions of § 3630, Rev. Stat., are not subject to the laws of this State relating to life insurance companies, and are not required to receive annual renewals of authority.

State v. *Mutual Protection Asso.* 26 Ohio St. 19; *State* v. *Standard Life Asso.* 38 Ohio St. 281.

To be permitted to do business in this State foreign companies are simply required to comply with the laws of this State regulating like companies and organizations in this State, and obtain from the superintendent of insurance a certificate of such compliance.

State v. *Moore,* 38 Ohio St. 10.

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

It is contended, in behalf of the plaintiff, that the defendant is not entitled to carry on its business of insurance in this State, and that it is therefore exercising its franchises here in contravention of law, because: (1) Ohio corporations organized under section 3630 of the Revised Statutes are not permitted to do business in the State of Michigan on substantially the same basis and limitations as they are in Ohio; (2) the law under which the defendant is organized authorizes it to engage in the business of insuring lives on the plan of assessments upon surviving members, without other restriction than that policy holders shall have an insurable interest in the lives of the members, which companies organized for the mutual protection of its members within this State are not permitted to do; and (3) the defendant has failed to comply with the laws of this State, which require that such corporations shall obtain annually, from the superintendent of insurance, a certificate of authority, and licenses to their agents, to do business in this State.

1. The business of life insurance, and the terms and conditions upon which foreign companies may be admitted to carry on that business, are regulated in this State by statute; and the right of the defendant to transact its business of insurance within the State, if possessed by it, must be derived, it is conceded, from § 3630*e*, Rev. Stat., which is as follows: "Any corporation, company or association organized under the law of any other State to insure lives of members on the assessment plan, and authorized to transact the business contemplated in section 3630, shall be permitted to do such business, to wit: the business contemplated in section 3630, in this State, by first complying with the laws of the State of Ohio, regulating corporations, companies or associations organized for the mutual protection of their members

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agreement of an insurance company made in conformity to this Statute is also void. Home Ins. Co. v. Morse, 87 U. S. 20 Wall. 445 (22 L. ed. 365).

In Vermont an information under Acts 1884, charging an agent with receiving risks for insurance in behalf of a foreign insurance company which has not complied with the Statute, must allege assured's name. State v. Hover, 2 New Eng. Rep. 201, 58 Vt. 496.

Retaliatory legislation.

Under Iowa Code, § 1154, providing that, where another State imposes prohibitions upon Iowa insurance companies doing business therein, the law of such State shall be the law of Iowa, as against insurance companies from such State doing business in Iowa, there need not be any enforcement in such other State of the prohibition imposed on Iowa insurance companies. The existence of such law is sufficient to warrant enforcement of said section. State v. Fidelity & Casualty Co. 77 Iowa, 648.

The Illinois statutory provision that, whenever any other State shall require Illinois insurance companies doing business therein to deposit and pay a greater amount than the Illinois laws require of such companies, then companies of such State doing business in Illinois shall be required to pay or deposit the same amount of tax or license fee, becomes operative upon the passage of a law laying an additional burden upon Illinois companies, whether any such companies are doing business within the State passing the law or not. Germania Ins. Co. v. Swigert, 128 Ill. 237.

A statute of New York providing that if any State shall require a greater deposit of securities or payment of any kind from a corporation of New York, than from foreign corporations of other States, a corporation of such State in New York shall be required to make the same deposit or payment, does not "deny to any person within its jurisdiction the equal protection of the laws." Philadelphia Fire Asso. v. New York, 119 U. S. 110 (30 L. ed. 342).

Article 4, § 2, U. S. Const., giving citizens of each State all privileges and immunities of citizens in the States, does not apply to corporations. *Ibid.*

In accordance with the policy of Minnesota and of the Interstate Law of Comity, foreign insurance corporations are allowed to carry on business in that State. A foreign corporation which has complied with Minnesota laws should not, as measure of retaliation, by force of the retaliatory Statute (Minn. Gen. Stat. chap. 34, § 269), be excluded from doing business in Minnesota, upon the ground that the laws of the State where such foreign corporation was created would exclude corporations of Minnesota from doing business there, unless it is clearly apparent that such is the effect of the foreign law. The proper effect of the statutes of New York in this particular being considered doubtful, and the manner of their practical administration being undisclosed, a judgment of ouster against the New York corporation was refused. State v. Fidelity & C. Ins. Co. 39 Minn. 538.

Quo warranto is a proper proceeding to try the right of a foreign corporation to carry on its corporate business in Minnesota. *Ibid.*

within this State, upon obtaining from the superintendent of insurance of this State a certificate of such compliance, which certificate shall not be granted until such foreign corporation, company or association shall have appointed an agent or attorney within this State upon whom service of process may be had. Provided, that the superintendent of insurance shall not be required to issue certificates to do business in Ohio to an agent of any such corporation, company or association organized in any State in which such Ohio corporations, companies or associations are not permitted to do business on substantially the same basis and limitations as they are in Ohio."

In view of the proviso contained in this section, it becomes important to determine upon what basis and limitations Ohio corporations are permitted to do business in Ohio. These are ascertained by reference to section 3630 and 3630c of the Revised Statutes. The former section is as follows:

"Sec. 3630. A company or association may be organized to transact the business of life or accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of such company or association, and may receive money either by voluntary donation or contribution, or collect the same by assessment on its members, and may accumulate, invest, distribute and appropriate the same in such manner as it may deem proper; that all accumulations and accretions thereon shall be held and used as the property of the members and in the interest of the members, and shall not be loaned to, used, appropriated or invested for the benefit of any officer or manager of such company or association; and, provided, that no company or association shall issue a certificate for a greater amount than such company or association shall be able to pay from the proceeds of one assessment; and such company or association shall not be subject to the preceding sections of this chapter."

It is provided in section 3630c that, "no such corporation, company or association issuing endowments, certificates or policies, or undertaking, or promising to pay to members during life any sum of money, or thing of value, or certificate, or policy guaranteeing any fixed amount to be paid at death, except such fixed amount or endowments shall be conditional upon the same being realized from the assessments made on members to meet them, shall be permitted to do business in this State, until they shall comply with the laws regulating regular mutual life insurance companies."

Whatever powers such companies possess are derived exclusively from the laws of this State, and the limitations and restrictions imposed upon them by those laws, both with respect to the classes of business they may transact, and the mode of doing it, operate upon them as well when doing business outside of the State as within it. Their corporate capacity, in these respects, cannot be enlarged by the laws of any other State in which they may be permitted to do business. By the plain provisions of these Statutes, no company organized under section 3630, unless it complies with the laws regulating regular mutual life insurance companies, can issue any policy guaranteeing any fixed amount to be paid at death, "except such amount shall be conditional upon the same being realized from the assessments made on members to meet them." In other words, the obligation of the policy, and the only one the company can thus contract, is to pay, upon the death of the member, such sum, and only such, as may be realized from the assessments made on members to meet it. The policy does not create an unconditional obligation to pay the amount specified in it, nor has the company corporate power to issue such policy, or contract such obligation, in this State or elsewhere. Then those companies, so organized, which do comply with the laws regulating mutual life insurance companies, are authorized to issue endowment policies, undertaking to pay members "during life, any sum of money or thing of value," and policies guaranteeing a fixed amount to be paid at death. These are the basis and limitations upon which such companies are authorized to do business in Ohio, and the question to be determined here is whether they are permitted by the laws of Michigan to do business there upon substantially the same basis and limitations. It is not enough that they be permitted, there, to exercise some of their franchises, or transact a part only of the business they are authorized to do in Ohio, but they must there be permitted to do substantially the same business upon substantially the same terms and conditions as they are in Ohio. If by the laws of Michigan any substantial limitation or restriction is placed upon such Ohio companies in regard to the character or extent of the business they may transact there, to which they are not subject in Ohio, it cannot be said that they are permitted to do business there upon substantially the same basis and limitations as they are in Ohio.

By section 15 of the Michigan Statute, under which it is admitted by the answer the defendant was reorganized, it is provided that "every policy or certificate issued by any corporation in that State and doing business under that Act, and promising a payment to be made upon a contingency of death, or of disability by accident, shall specify the sum of money it promises to pay upon such contingency insured against, and the number of days after satisfactory proof of the happening of such contingency at which such payment should be made; and that upon the occurrence of such contingency, unless the contract shall have been voided by fraud or by breach of its condition, the corporation shall be obligated to the beneficiaries of such payment, at the time and to the amount specified in the policy or certificate; and that this indebtedness shall have priority over all indebtedness thereafter incurred, except as provided in case of the distribution of assets of an insolvent corporation."

And section 17 of the same Act provides that no corporation or association organized under the laws of any other State for the purpose of insuring lives or furnishing accident indemnity upon the co-operative assessment plan shall be authorized to do business in Michigan until it shall have obtained a certificate of authority from the commissioner of

insurance of that State; and that no such certificate of authority shall be issued unless the corporation or association applying therefor "has in force policies of insurance upon which the proceeds of one assessment will pay the highest amount insured upon each of the lives of the members for which the assessment is levied, the full amount agreed to be paid upon the death of any one member, and that it is paying, and for twelve months next preceding has paid, the highest amount named in its policies or certificates in full."

Thus it appears that by the laws of Michigan every policy issued by a corporation in that State "promising a payment to be made upon a contingency of death, . . . shall specify the sum of money it promises to pay, . . . and, upon the occurrence of such contingency, . . . the corporation shall be obligated to the beneficiaries of such payment, . . . to the amount specified in the policy," and no certificate of authority to do business in Michigan shall be issued to any corporation or association organized under the laws of any other State unless for the twelve months next preceding it has paid, and is paying, the full amount named in its policies, nor unless it has in force policies upon which the proceeds of one assessment will pay the highest amount insured upon the lives of the members for which the assessment is levied, the full amount agreed to be paid upon the death of any one member. While, as we have already seen, corporations organized under the Ohio Statute are not obligated to pay the full amount specified in the policy, but only such sum as may be realized from assessments made on its members; and their policies must so provide. They are incapable of making any other contract, or issuing any policy of insurance not so conditioned, unless they comply with the laws regulating mutual life insurance companies; in which event they are permitted in Ohio to issue endowment policies.

It is admitted by the answer that the laws of the State of Michigan do not permit endowment policies to be issued or contracts of that kind to be made by corporations organized to do business on the assessment plan, and for that reason the commissioner of insurance of that State refused to issue his certificate of authority to an Ohio company, organized under section 3630, to do business in that State.

Whether, therefore, the Ohio corporation does or does not comply with the laws regulating regular mutual life insurance companies, it is not, in either event, permitted to do business in the State of Michigan upon substantially the same basis and limitations as it is in Ohio.

2. Does the defendant come within the class of companies which, under the provisions of section 3630, may be admitted to do business in this State? It will be observed that only companies organized under the laws of any other State to insure the lives of members on the assessment plan, and authorized to transact the business contemplated in section 3630, are entitled to do business in this State; and furthermore, that it is only the business contemplated in section 3630 that such companies shall be permitted to transact. The language of the Statute is: "Any corporation, company or association, organized under the laws of any other State to insure lives of members on the assessment plan, and authorized to transact the business contemplated in section 3630, shall be permitted to do such business, to wit: the business contemplated in section 3630, in this State," upon the conditions therein specified. As often as the question has been presented, it has been held by this court that section 3630 does not contemplate or permit the business of insuring the lives of members otherwise than for the benefit of their families and heirs.

In *State* v. *Moore*, 38 Ohio St. 7, it is decided that "a company of another State organized for insuring lives upon the plan of assessment upon surviving members, without limitation, does not come under the class of companies provided for in section 3630. That section does not embrace companies insuring the lives of members for the benefit of others than their families and heirs."

And in *State* v. *Moore*, 39 Ohio St. 486, the relator, a New York corporation, organized on the assessment plan and authorized by the law governing it to issue policies payable to the legal representatives of the member, or to any beneficiary designated by such member, sought to compel, by mandamus, the insurance commissioner of this State to issue to it the necessary certificate entitling it to do business in this State. But the writ was refused. Doyle, *J.*, in the opinion, after quoting the above paragraph of the syllabus in *State* v. *Moore*, 38 Ohio St. 7, says: "The principle thus announced must exclude the relator unless the law has been changed by subsequent legislation."

The legislation has not in this respect been changed. It is admitted by the pleadings that the defendant is authorized by the law of its reorganization to issue policies on the lives of its members for the benefit of any person who has an insurable interest in such life.

By section 15 of the Michigan Statute set out in the petition, it is provided that corporations doing business under the Act shall not issue any policy "upon a life in which the beneficiary has not an insurable interest;" and it is further provided by the same section that any member "shall have the right at any time, with the consent of such corporation or association, and with the consent of the beneficiary, if he be a creditor, to make a change in his beneficiary," within certain specified limits; and further, that "such corporation shall not issue policies or certificates to beneficiaries as a creditor or creditors that do not state that they are for collateral security payable as the interest of such beneficiaries may appear; and in every such case said creditor or creditors shall only be entitled to such portion of the amount insured (not exceeding the face of the policy) as shall cover the indebtedness of the member to said creditor at the date of his death. And section 17 of the same Statute provides that "no corporation or association organized or doing business under or by virtue of the laws of any State or Territory of the United States, or District of Columbia, or foreign country, for the purpose of insuring lives, or furnishing accident indemnity upon the co-operative assessment plan, shall be authorized to do business