days for delivery, Barclay made this contract with Rose, the appellant:

409 Chestnut Street, Philadelphia.

Received, Philadelphia, July 6, '93, of W. F. Rose, $4,500 in full payment for thirty shares of the capital stock of the Camden Gaslight Company, including all dividends due or to become due thereon.

[Signed] Charles Barclay.

The price was at the rate of $150 per share. The par value was $100 per share. The price agreed to be paid was considerably higher than the stock had theretofore sold for; the highest before that being $135 per share. The thirty shares were transferred and delivered by Barclay to Rose, on payment to him by Rose of the full consideration. Rose then had the certificate for the thirty shares duly placed in his name on the books of the company, but, when he demanded those embraced by the stock dividend, he was informed that Barclay had given the company notice not to deliver them to him (Rose), as they did not pass by the contract, and, being a mere stakeholder, as between the seller and purchaser, it could not act until the disputed ownership was settled. Rose then brought this bill against both Barclay and the company to compel a transfer of the stock dividend. It is, really, not

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yearly meetings, and are to be payable twenty-one days afterwards, no shareholder to receive any dividend after the period at which he ceased to be a proprietor of shares if the testator specifically bequeaths his shares and dies sixty-nine days after a half-yearly meeting but before notice has been given that the dividend is payable, it will go to the legatee and not to his executor. Clive v. Clive, Kay, 600, 23 L. J. Ch. N. S. 981.

Where the corporation attempts to pay a dividend of a certain amount on the day of the date when it is declared, and another of like amount at the option of the corporate agent from earnings of last year, owners of stock at the time are entitled to the latter dividend, although it is not declared by the agent until after they have parted with their stock. Hill v. Newichawanick Co. 8 Hun, 459, Affirming 48 How. Pr. 427.

Where a pledgee fraudulently sells the stock the fact that dividends already declared are made payable at certain times in the future to those who are then the stockholders of record will not carry the dividends to the transferee if he never has the shares transferred to him. Warner v. Watson, 4 Misc. 12.

Apportionment.

Some attempt has been made to apply the old equity doctrine of apportionment of income accruing day by day to dividends where different persons were successively interested in the stock. But in the absence of statute this attempt has for the most part been discountenanced, although the doctrine has been applied in a few cases.

Dividends on South Sea annuities cannot be apportioned. Wilson v. Harman, 2 Ves. Sr. 672, 1 Ambl. 279.

Where a person is to have all dividends and profits on stock so long as he remains in a certain employment, if he quits before any dividend is made he cannot have an apportionment of a general dividend afterwards declared. Clapp v. Astor, 2 Edw. Ch. 379.

A statute providing that income of property given by will until the happening of a contingent event shall be apportioned upon the happening of such event at any time before the end of a year from the time when the whole of the annual amount for the preceding year had become due does not make apportionable dividends from the profits of an incorporated company not declared at the time when the event happens. Granger v. Bassett, 98 Mass. 462.

Under the English act of 1870, dividends and other periodical payments in the nature of income are to be considered as accruing from day to day, and are to be apportioned in respect to time accordingly; but this act does not govern in case a testator bequeaths specifically all dividends so that a dividend declared after the testator's death out of profits partly earned during his lifetime will not be apportioned between the state and the legatee. Jones v. Ogle, L. R. 14 Eq. 419, 41 L. J. Ch. N. S. 633, 27 L. T. N. S. 367, 20 Week. Rep. 794.

Where the charter of the corporation provides that dividends shall be declared from net profits at each half-yearly meeting, the dividends as accruing are apportionable under the statute of 4 & 5 Wm. IV. chap. 22, making apportionable all dividends made payable or coming due at fixed periods; but a special dividend of money coming to the corporation through a sale of its stock is not apportionable. Hartley v. Allen, 4 Jur. N. S. 500, 27 L. J. Ch. N. S. 621.

In *Ex parte* Rutledge, Harp. Eq. 65, 14 Am. Dec. 696, where a life tenant died a few days before the declaration of the regular semiannual dividend, the dividend was apportioned between his estate and the remaindermen. The court places the ruling upon the ground that the life estate was created for maintenance, and that the profits out of which the dividends were payable were daily accruing so as to bring the case within the rule as to apportionment.

Where the corporation has promised to pay its shareholders interest at a certain rate upon their stock the right of the shareholder ceases upon the transfer of his stock, although he may recover for the proportion of the interest period during which he retains such ownership. Bates v. Androscoggin & K. R. Co. 49 Me. 491.

In case stocks are sold for reinvestment between dividend periods the court will not apportion the undeclared dividends which may enhance the value of the stock as between life tenants and remaindermen. Scholefield v. Redfern, 8 L. T. N. S. 487, 2 Drew. & S. 173, 9 Jur. N. S. 485, 32 L. J. Ch. N. S. 627, 11 Week. Rep. 453.

Right to deal with dividend separately.

A stockholder may sell or transfer his shares of stock with or without gains or accrued dividends, and a dividend which has been declared may be made the subject of a contract in the same manner and to the same extent as other kinds of personal property. Cook v. Monroe, 45 Neb. 340.

Before the dividend has been declared the right to it cannot be sold separately from the stock. Manning v. Quicksilver Min. Co. 24 Hun, 361.

No valid reservation of future dividends can be made upon sale of a stock certificate. Marble v. Van Wert Nat. Bank, 3 Ohio C. C. 464.

Right to demand order for dividend as condition of performing contract to purchase.

Although the transferee is entitled to dividends which accrue after the consummation of

a bill for specific performance of a contract between the buyer and seller of stock, but one to compel the performance of an alleged corporate duty by a corporation which has before it the contract, and, by the pleadings, has submitted itself to the order of the court. The court below, after full hearing, decreed a rescission of the contract. Whether the court shall direct the company to transfer to appellant the stock dividend depends on the interpretation and validity of the contract between the parties to it, Rose and Barclay.

We first peruse the writing to ascertain the terms of the contract. The paper is not, as argued by appellee, a memorandum. It is a contract complete in all its parts, with no omission of expression of intention. We do not see in it the least sign of ambiguity. It was written by Barclay, a lawyer of standing in the profession, who certainly must be presumed to have known the legal effect of the words he adopted to describe his own property, the subject of the sale. He sold thirty shares of stock, "including all dividends due or to become due thereon." It is argued that only cash dividends were intended by these words. That, however, is not the meaning of the word "dividend." In Weimer on Pennsylvania Corporation Law this definition of dividend is given (page 342): "A dividend is that portion of the profits and surplus funds of a corporation

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the contract, he is not entitled to refuse to perform his contract of purchase because the seller refuses to execute an order upon the corporation for the payment of the dividends to the transferee. Phinizy v. Murray, 83 Ga. 747, 6 L. R. A. 426.

Right as between corporation and transferee.

The corporation is bound to pay dividends to the registered owner until notice of a transfer. Bell v. Lafferty, 1 Pennyp. 454.

If stock stands in the name of a pledgee the corporation is bound to pay dividends to him. Boyd v. Conshohocken Worsted Mills, 149 Pa. 363.

The corporation is protected in paying dividends to the registered owner until notice of the transfer. Smith v. American Coal Co. 7 Lans. 317; Brisbane v. Delaware, L. & W. R. Co. 25 Hun, 438; Cleveland & M. R. Co. v. Robbins, 35 Ohio St. 483; Brisbane v. Delaware, L. & W. R. Co. 94 N. Y. 204; Gemmell v. Davis, 75 Md. 546.

In Bank of Utica v. Smalley, 2 Cow. 770, 14 Am. Dec. 526, it is intimated that the bank will be protected in paying dividends to the one in whose name the stock stands without regard to any secret transfer.

After the corporation has recognized the transferee as the owner of the stock by transferring it to his name it is estopped to deny his title to the dividends subsequently declared. Richmondville Mfg. Co. v. Prall, 9 Conn. 487.

A pledgee of stock is entitled to dividends as against the corporation which has notice of the pledge. Central Nebraska Nat. Bank v. Wilder, 32 Neb. 454.

An assignee of stock who has notified the corporation of his rights may compel payment of dividends to him as against the claim of the corporation to apply them upon indebtedness of the former stockholder to it. Timberlake v. Shippers' Compass Co. 72 Miss. 323.

In Kellogg v. Stockwell, 75 Ill. 73, the rule is recognized that the transferee is entitled to dividends, although the transfer is not entered on the books of the corporation.

Where a person holds a full and perfect equitable title to stock of which the corporation has notice he is also entitled in equity to the dividends thereafter accruing on it. Conant, E. & Co. v. Reed, 1 Ohio St. 298.

In the absence of specific contract a pledgee of stock has the right to collect the dividends and apply them to the debt, and if with notice of the pledge the corporation pays the dividends to the pledgeor it will be liable to account to the pledgee therefor. Guarantee Co. of N. A. v. East Rome Town Co. 96 Ga. 511.

But in Sargent v. Essex Marine R. Corp. 9 Pick. 202, it is said that a transferee cannot compel the corporation to pay the dividends to him until he has obtained a transfer of the shares on the books of the corporation as required by the by-laws.

As between the corporation and the stockholder the dividends may be paid to the one who is the registered owner of the shares when the dividends become payable, where the resolution by which the dividend is declared provides for a closing of the books for a short time before each dividend period, thereby indicating that the dividend shall be payable to the registered owner. Burroughs v. North Carolina R. Co. 67 N. C. 376, 12 Am. Rep. 611. In that case, however, the court takes the general position that he who is the stockholder when the dividend becomes payable is entitled to it.

In case an administrator transfers stock without authority the corporation will be compelled to pay the dividends to the rightful owner notwithstanding the transfer. Southwestern R. Co. v. Thomason, 40 Ga. 408.

If shares of stock are sold for nonpayment of taxes under proceedings which are apparently legal the corporation will be justified in transferring the stock to the name of the purchaser, and in paying the accruing dividends to him. Smith v. Northampton Bank, 4 Cush. 1.

Where the rule of the corporation forbids a transfer of the stock until it has been fully paid, and the corporation obtains an equitable lien on the shares for a claim against the subscriber before notice of the transfer, it may retain dividends declared on the stock to be applied upon such indebtedness prior to the time that the stock becomes fully paid. Bates v. New York Ins. Co. 3 Johns. Cas. 238.

The corporation may, under the West Virginia statutes, go by its books in determining who is entitled to receive dividends, for the purpose of determining whether or not it may retain them to apply upon indebtedness of the stockholder. Donnally v. Hearndon, 41 W. Va. 519.

Where one in whose name stock has been standing for a long period of time purchases it from the equitable owner without inquiring of the corporation as to the true state of the title he is bound to give the corporation notice of his claim, and upon his failure to do so he cannot hold the corporation liable for dividends which have been paid to a third person who has acquired title to the stock under attachment against the former owner. Sabin v. Bank of Woodstock, 21 Vt. 353.

Where a bondholder surrenders his bonds and takes stock in lieu thereof he will be entitled, as against the corporation, to share in dividends subsequently declared, although the profits were earned before he made the exchange. Jones v. Terre Haute & R. R. Co. 57 N. Y. 196, Affirming 29 Barb. 353.

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which has actually been set apart by a valid resolution of the board of directors, or by the shareholders at a corporate meeting, for distribution among the stockholders, according to their respective interests, in such a sense as to become segregated from the property of the corporation, to become the property of the shareholders distributively. It is a matter of no difference whether the dividend is declared in stock, or paid in cash, and thereafter converted into stock by the shareholders. In either event it is a distribution of the surplus profits of the corporation." And this text is amply supported by *Com.* v. *Cleveland, P. & A. R. Co.* 29 Pa. 370, which was followed in *Com.* v. *Pittsburg, Ft. W. & C. R. Co.* 74 Pa. 89, and then by *Allegheny* v. *Pittsburgh, A. & M. Pass. R. Co.* 179 Pa. 421.

The express language of the contract, therefore, passed to Rose absolutely the stock dividend, and Barclay is bound by his own words, unless Rose perpetrated a fraud upon him. It is not sufficient answer for him to say, "I did not know of the stock dividend, and consequently did not mean what I said." A lunatic, or one under some mental disability, such as gross ignorance or intoxication, might perhaps make such answer; but it cannot avail a lawyer, who ought to be presumed to know, not only the common meaning of common words, but also their legal signification. Nor was there any evidence of overreaching, or of such constraint as at times is exercised over a weak and impecunious owner by a hard and grasping buyer. According to Barclay's own evidence, when, in a casual conversation, he learned that Rose would have given $150 for the one share he had sold to Stiles for $135 his cupidity was at once aroused, and he within an hour sought out Rose, and solicited him to buy his remaining shares at $150. There is no evidence that, before this second interview, Rose even knew that Barclay owned other than the one Stiles share. The party claiming to have been wronged hunted up the wrongdoer, and besought him to purchase his wares. Hard and fraudulent bargains are not often thus initiated. Then, the question of dividends was not a mere trivial incident of the negotiations, which might have inadvertently crept into the contract by reason of its insignificance. It was the one prominent point of the bargain over which they "higgled." Rose exacted, as a prerequisite to negotiations, this concession on part of the seller, and peremptorily refused to buy unless the dividends passed by the contract. Nor was the bargain such a hard one as is assumed in the argument. There was no such disparity between the value and the price paid as suggested. The $600,000 of stock stood for precisely the same value as the $300,000. The increased issue only operated to make available the increased value to the individual stockholders. In a certain sense, they simply divided what they had theretofore held in common. Rose paid $150 per share for thirty shares, and with the stock dividend was entitled to thirty more, or sixty shares. For these he paid $4,500. But the stock soon after dropped to $100 per share, making the whole sixty shares worth $6,000, only $1,500 more than he had paid, instead of being worth $4,500 more, as argued. In fact, at the time of the purchase, it was largely a matter of opinion as to a probable future profit. There was no such hardship in the bargain as shocks equity, and of itself gives rise to a suspicion of fraud.

Up to this point, there is nothing in the contract itself, the subject of it, or in the conduct of the party claiming its enforcement, to move a chancellor to destroy it. But three other facts are found by the learned judge of the court below, on which, in the main, he bases his conclusion that the contract should be set aside: (1) Rose knew, before he purchased, that the stock dividend had been declared. (2) Barclay did not know it. (3) Rose did not disclose his knowledge of the stock dividend to Barclay. It will be noticed this dividend was declared at a regularly called meeting of the stockholders. The corporate action was binding on all the stockholders. As to them the resolution was public, and, constructively, all knew of it. Both of the parties were stockholders. It was the case of two stockholders of the same corporation, men of equal intelligence and business shrewdness, dealing at arm's length about property concerning which each had abundant and equal opportunities of knowledge; for the office of the company was within five minutes' walk of the room where they bargained. The seller reposed no trust in the buyer, and relied on no representation of his as to value, or circumstances affecting the value. The buyer made no representation. The seller sold for the highest price he thought he could get. It may be that, in bargaining, each of the parties should disclose to the other his real belief as to actual value of the thing to be sold; that is, Rose's conscience should have been tender enough to impel him to say to Barclay, "A stock dividend has been declared on this stock, which, in my opinion, will enable me to make a profit." And, as we understand it, that is the rule of the civil law, which, in theory, denies any rule of action except that derived from a rigorous inspection of the anatomy of conscience. But, as said by Gibson, Ch. J., in *Kintzing* v. *McElrath*, 5 Pa. 467: The civil law "professes to deal with principles of morality too subtle for administration by an earthly tribunal, and to enforce duties which are not regarded by the common law." The rule, too, he further says, "is predicated of the duty of the vendor, who alone is presumed to know the quality and condition of the commodity, and I doubt very much whether even a Roman judge would have set aside a sale of land containing a mine which was known only to the vendee." Says this court in *Hazlett* v. *Powell*, 30 Pa. 297, quoting with approval Atkinson on Marketable Titles: "When the means of information as to the facts and circumstances affecting the value of the subject of sale are equally accessible to both parties, and neither of

them does anything to impose on the other, the disclosure of any superior knowledge which one party may have over the other is not requisite to the validity of the contract." And this is the common-law rule as stated by Story, Contr. § 516. It is also laid down by Chief Justice Marshall in the celebrated case of *Laidlaw* v. *Organ*, 2 Wheat. 178, 4 L. ed. 214; and it is said, in *Hershey* v. *Keemboriz*, 6 Pa. 128, referring to *Laidlaw* v. *Organ*, "a severer rule of morality would be impracticable in a commercial community."

Therefore, assuming the facts to be as the learned judge of the court below found them, they did not warrant him in decreeing a rescission of this contract. We hold that, Barclay by his contract having devested himself of the stock dividend, which was thirty additional shares, and the contract having been presented to the company, and a transfer requested by Rose, it was the duty of the company to transfer to him on its books, not only the thirty old shares, but also to issue in his name and deliver to him the thirty new shares embraced in the terms of the resolution of the 5th of June, 1893; and it is accordingly decreed that such transfer and delivery be made by said company.

Further, *the decree of the court below of the 2d of February, 1899, declaring the contract between Rose and Barclay rescinded, etc., is reversed* and set aside, at the costs of Charles Barclay, the appellee.

Hiram DE WALT'S APPEAL.

Re J. F. BOYLE'S RETAIL LIQUOR LICENSE.

(190 Pa. 577.)

1. **The state has power to regulate the sale of intoxicating liquors**, and, in the exercise of that power, to authorize the granting of licenses to fit persons, under such conditions as the legislature may impose.
2. **The construction or application of the Constitution of Pennsylvania is not involved** for the purpose of an appeal to the supreme court by reason of a so-called constitutional question, which has theretofore been raised, fully considered, and more than once definitely settled.
3. **An application for an appeal to the supreme court of Pennsylvania should be by petition** stating clearly and distinctly the reasons, so that the court or any of its justices may readily determine whether it is within the letter as well as the spirit of the superior court act.

(April 3, 1899.)

APPEAL by remonstrant from a judgment of the Superior Court affirming an order of the Court of Quarter Sessions for Philadelphia County granting a retail-liquor license to James F. Boyle. *Dismissed.*

The facts are stated in the opinion.

Mr. **Hiram De Walt,** *in propria persona:*

The record showing that the case involves the construction of the Constitution of the United States and of Pennsylvania, no special allowance was necessary.

Re Melon Street, 182 Pa. 397, 38 L. R. A. 275.

The retail liquor saloon or dram shop is a common nuisance.

License Cases, 5 How. 626, 12 L. ed. 311; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205; *Crowley* v. *Christensen*, 137 U. S. 86, 34 L. ed. 620.

The retail liquor saloon or dram shop exists only by permission of the acts of legislature.

Youngblood v. *Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *State* v. *Hipp*, 38 Ohio St. 206.

There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States.

Crowley v. *Christensen*, 137 U. S. 86, 34 L. ed. 620; *Raudenbusch's Petition*, 120 Pa. 342.

On the contrary, our law creates a monopoly in this business, but not in any other business.

The effort to muddle this question by specious allusions on the part of advocates of the system of saloon licensing, to the police power of the state, does not dim nor obscure the fact that the saloon as it now exists and is conducted is *malum in se*.

Acts of legislature creating, permitting, or attempting to regulate the retail liquor saloon or dram shop are unconstitutional and void.

The United States Constitution in its preamble declares that it was ordained and established in order to insure domestic tranquillity and to promote the general welfare.

The Constitution of Pennsylvania in its declaration of rights declares that all men have certain inherent and indefeasible rights, among which are those of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.

No law can be enacted by Congress or the state legislature contrary to these.

What is wrong cannot be law.

If a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge, and thereby give effect to the Constitution.

A statute creating a retail-liquor saloon

NOTE.—The constitutionality of statutes regulating and licensing sales of intoxicating liquors, which has been sustained in many cases against the contention of those engaged in the traffic, has been recently attacked in several cases by those who contend that the state has no power to permit the sales. This contention has been uniformly rejected by the courts. See Haggart v. Stublin (Ind.) 22 L. R. A. 577, and Plumb v. Christie (Ga.) 42 L. R. A. 191, which agree with the present case on this point.

45 L. R. A.

See also 47 L. R. A. 278.

or dram shop does not promote the general welfare.

I contend against the constitutionality of the feature creating the dram shop. This is a new contention in our state, and the courts must now consider it as a new question.

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

This appeal from the judgment of the superior court affirming the order granting a retail-liquor license to James F. Boyle is here without any allowance by that court or by this court or any of its justices.

It is claimed by appellant, who appears in person, that the appeal is rightly here, because, in his opinion, "the case involves the construction or application of the Constitution of the United States," as well as "the construction or application of the Constitution of Pennsylvania." Superior Court Act, June 24, 1895, Pub. Laws, 217. He says, the retailing of intoxicating liquors "is a common nuisance," which exists only by permission of acts of the legislature. His broad proposition is, that any act of assembly which regulates or attempts to regulate the retail sale of spirituous, vinous, or malt liquors is necessarily and essentially unconstitutional; and, applying that principle to the facts of this case, his contention is that our acts of assembly providing for the granting of hotel, saloon, and restaurant licenses, and regulating the sale of intoxicating liquors thereunder, are, *ex necessitate rei*, unconstitutional and void, and should be so declared by the courts, notwithstanding the fact that the same question has been repeatedly presented to them, and, after full consideration, such acts have been adjudged constitutional.

Adhering to that line of decisions, the superior court in this case said [8 Pa. Super. Ct. 523]: "And notwithstanding the very earnest argument of the appellant, who appeared in person, we see no reason to doubt the constitutionality of the law under which the license was granted. The power of the state to regulate the sale of intoxicating liquors, and, in the exercise of that power, to authorize the granting of licenses to fit persons under such conditions as the legislature may impose, is too well settled to be open to discussion." We unanimously concur in this conclusion; and if we thought that this case should be disposed of on its merits alone, we would affirm the judgment of the learned court below for the reason so accurately and tersely stated in the last sentence of the foregoing quotation from its opinion.

But, aside from the want of merit, we are of opinion that, according to the true intent and meaning of the provision above referred to, this case does not involve any such constitutional "construction" or "application" as is contemplated by the superior court act. It contemplates only actual, open, and unsettled constitutional questions—not so-called questions that have theretofore been raised, fully considered, and more than once definitively settled, as had been appellant's supposed question in this case. It was never intended that such practically dead issues of law should be revived and re-revived and agitated *ad infinitum*. The *ipse dixit* of an appellant, that his case involves a constitutional question, does not make it so; and it is the duty of this court or one of its justices to be satisfied, preliminarily, that the case is one in which a right of appeal is contemplated by the act. If it is not a case in which the right of appeal from the judgment or decree of the superior court is given, the sooner that fact is determined the better for all parties concerned. Such a course of practice will, in many cases, avoid useless expenditure of time and money, and tend to prevent useless and vexatious delays.

In addition to all that, regular and orderly practice requires that applications for all appeals should be by petition, setting forth clearly and distinctly the reason therefor, etc., so that this court or any of its justices may readily determine whether the application is within the letter as well as the spirit of the superior court act. In this connection it is worthy of notice that the last sentence of § 18 of the act May 10, 1897, Pub. Laws, 71, appears to contemplate, that, as the first step in the proceeding, petitions for allowance of appeals be filed with the prothonotary of this court, so that a record of the same may be kept, etc. If the court is in session, they will be laid before it and acted upon; if not, they will be forwarded to such justice or justices as the petitioners may suggest. Our established practice is that, as far as practicable, each member of the court shall participate in the disposition of such petitions.

Without further elaboration, our opinion is that there is no ground on which an appeal in this case can be based, and hence *the appeal is quashed*, and it is ordered that the appellant pay the costs.

TENNESSEE SUPREME COURT.

Robert LOUD
v.
N. A. HAMILTON, *Appt.*
(.....Tenn.....)

1. Duress is not a defense to notes and a deed given by a man to settle a claim against his son-in-law and release him from arrest for felony, when he enters into the transaction deliberately, after manœuvering for a compromise, and on an understanding with his daughter that the payment shall constitute an advancement to her.

NOTE.—As to contracts procured by threats of prosecution of a relative, see City Nat. Bank v. Kusworm (Wis.) 26 L. R. A. 48, and *note*. See also Mack v. Prang (Wis.) *post*, 407.

45 L. R. A.

See also 43 L. R. A. 407; 47 L. R. A. 417, 495.

2. **It will be presumed that the law of another state** as to which there is no proof is the same as that of the forum in respect to public policy.

3. **An obligation given for the settlement of a claim for embezzlement** by an agent of a private person, although the purpose of the transaction is to prevent a prosecution of the embezzler, is not void on grounds of public policy.

4. **Oral evidence that a deed was given merely as security for notes** can be given by the grantee to disprove a claim by the grantor that the deed was intended to pay the notes.

(March 2, 1899.)

APPEAL by defendant from a decree of the Court of Chancery Appeals reversing a decree of the Chancery Court for Lincoln County which dismissed the bill filed to enforce payment of certain promissory notes. *Affirmed.*

The facts are stated in the opinion of the Court of Chancery Appeals, which was delivered by NEIL, J., and was as follows:

The complainant filed his bill seeking to recover judgment of the defendant on four promissory notes, of $247 each, and interest due. With the bill, and as an exhibit thereto, is filed an instrument executed by defendant to complainant, conveying certain real estate, and bearing the same date as the note sued on, which appears in form to be a deed, but which complainant insists is, in effect, and was at the time, intended to be simply security for the note, and hence should be construed as a mortgage, and the real estate subjected to the satisfaction of the judgment sought on the notes. The notes were each dated August 14, 1893, and due, respectively, at six, twelve, eighteen, and twenty-four months after date. The bill was filed on December 5, 1895. On March 13, 1896, the defendant filed his answer, in which he denied that the deed was given merely as security for the notes, and averred that the deed and notes were given under the following circumstances, namely: That he had a daughter who had married one W. C. Murphy; that the said Murphy became the agent or salesman of the complainant for the sale of pianos and organs; that, after Murphy had acted as such agent or salesman for a while, a difference arose between the complainant and the said Murphy, in which the complainant charged said Murphy with not having accounted for the amounts received by him for the complainant; that complainant, at Decatur, Alabama, had Murphy arrested, charged with felony in not accounting for what complainant alleged he was liable for; that defendant was telegraphed for to come to Decatur, where he went, and found there complainant and said Murphy, that defendant's daughter was then advanced in pregnancy, and was prostrated with grief on account of the arrest of her husband charged with felony; that, after some talk with complainant and Murphy and wife, defendant agreed to give the complainant a deed to the house and lot described in the bill, for the release of said Murphy from arrest, and from the charge of felony, and in full discharge of said Murphy's liability to complainant; that, upon this being agreed to by the complainant, the notes above referred to were drawn up and signed by the defendant for the purpose of showing an indebtedness of defendant to complainant upon which to base the consideration for the deed to the house and lot, that, so far as defendant was concerned, he gave the deed in full discharge of the notes, and for the discharge of Murphy, as above stated; that the reason the complainant did not deliver the notes to defendant, but, on the contrary, retained them, was that defendant agreed with Murphy and wife to give them this property as an advancement out of his estate, and Murphy and wife desired to repossess themselves of the house and lot conveyed in said deed, or get it by paying off the notes to complainant, the intention being to pay off the notes to complainant, and that complainant should make a deed thereto to said Murphy or Murphy and wife; that defendant's daughter Mrs. Murphy died in February, 1894, and that from that time Murphy ceased to manifest any desire to secure the house and lot by paying off the notes held by the complainant. It is further averred that the consideration above mentioned for the execution of said note, as well as said deed, was against public policy and illegal.

On the 8th of March, 1897, the defendant filed a cross bill, in which, after setting out the contents of the original bill and the answer, the following allegations were made: "That, in addition to the allegations contained in his said answer, this complainant states and charges that the defendant, Loud, had complainant's son-in-law Murphy arrested on the charge stated in the answer above set forth, for the purpose of extorting the notes and deed referred to, and to extort money from this complainant; that said notes and deed were executed by this complainant without any consideration whatever, and were executed by compulsion and duress of this complainant by the defendant, Loud, in having complainant's son-in-law arrested, while complainant's daughter was in the condition set forth in the said answer, for the unlawful purpose of coercing payment, or a contract from the complainant to pay the whole of the alleged demand of the said Loud against complainant's son-in-law, the said Murphy." The prayer of the cross bill is that the notes and deed be declared void and canceled.

On the 8th of March, 1897, cross defendant, Loud, filed his answer, in which he denied that he had complainant's son-in-law arrested for the purpose of extorting the notes and the deed referred to, and to extort money from complainant, and that said deed and notes were executed by complainant without consideration, or under duress, or that Murphy was arrested for the unlawful purpose of coercing payment or a contract on the part of complainant to pay the whole of cross defendant's demand or any part thereof. The answer admits that Murphy had been

arrested in Alabama, and at the instance of cross defendant, for having collected and for appropriating to his own use certain moneys belonging to cross defendant, and that Murphy was at that time cross complainant's son-in-law, but denies all knowledge as to the condition of Mrs. Murphy's health. It is also denied that the notes were for the release of said Murphy from arrest, but it is averred they were given in settlement of what Murphy really owed cross defendant, the amount he collected for the latter, and appropriated to his own use, and failed to account for. It is further averred that at the time of this settlement, at the earnest solicitation of Murphy and his wife and cross complainant, cross defendant did agree to withdraw the prosecution of Murphy, so far as he was concerned, but that no part of the consideration of settlement was paid, or agreed to be paid, to cross defendant for his withdrawal of said prosecution, and that in fact the settlement was made wholly upon the basis of what Murphy owed cross defendant; that what was done in the way of arranging said indebtedness was not of cross defendant's procurement or solicitation, but was done out of considerations moving between cross complainant and his son-in-law.

The facts are as follows: Mr. Murphy, the son-in-law of defendant, Hamilton, was agent of complainant, Loud, for the sale of pianos and organs, and at the time of his arrest, referred to in the pleadings, was short in his accounts the amount of the above-mentioned notes, being something over $089. At the instance of complainant, Loud, he was arrested on the charge of embezzling the funds of his employer, and had so embezzled them. At the time of his arrest, Mr. Murphy's wife was considerably advanced in pregnancy. She was deeply disturbed over the arrest of her husband, and telegraphed to her father, at Elora, Tennessee, that she and her husband were in deep trouble, and asked him to come to Decatur. The proceedings at Decatur in behalf of complainant, Loud, were in the hands of his attorney, Mr. Oceola Kyle. Mr. Kyle gives the following account of the matter: "Murphy, who was Hamilton's son-in-law, had become indebted to complainant in the sum of $089.21, as I remember now. This money had been embezzled by Murphy from Loud, and we were threatening Murphy with a criminal prosecution therefor. He (Murphy) begged for time, some three days, saying he had telegraphed for his father-in-law, Mr. Hamilton, and that he would come from Elora, Tennessee, on the first train, and satisfactorily adjust the shortage. To the best of my recollection, within about two days thereafter, defendant, Hamilton, came to Decatur, and was introduced to me and complainant, Loud, as being Murphy's father-in-law. He at once agreed to make good the amount owing by Murphy to Loud, but claimed that he did not have cash money, but would give his notes, and would make his deed to certain real estate, situated in Elora, Tennessee; it being agreed by and between Loud and Hamilton that when the notes were paid, with interest thereon, the said real estate was to be reconveyed by Loud to Hamilton. In order that there should be a valuable consideration for the agreement, and before the same was put in writing, at my suggestion, Loud transferred and assigned to defendant, Hamilton, all of his right, title, and interest in and to the debt owing to him by Murphy, absolutely. This agreement was made, and Murphy was released from any obligation to Loud on account of said debt. . . . It was not agreed and understood that the house and lot were transferred absolutely in full settlement of Murphy's release. On the contrary, it was agreed and understood that, on the payment of the notes with interest, the property was to be reconveyed to Hamilton. It was agreed that Loud should give Hamilton credit on the notes for whatever amount the house and lots should rent for." Being asked at whose suggestion the matter was thus arranged, he said: "I do not know how to answer this question, further than to say that, when Murphy was confronted with embezzlement, he begged for time until his father-in-law could come, claiming that he would adjust it. When defendant, Hamilton, came, the principal negotiations were in trying to find out from Murphy the full amount and extent of his defalcation. Hamilton seemed willing to do anything, except he was anxious to have the amount made as small as possible, and that the rents as received by Loud should be credited on the notes." Mr. Kyle further states that Mrs. Murphy was not present at the time of the negotiations above referred to, and that they took place at his office in Decatur, Alabama. He says that he had seen Mrs. Murphy a few days before at her home in New Decatur, when her husband was under arrest, and about two or three days before her father, Mr. Hamilton, came; that she looked worried about her husband's condition, but otherwise seemed well; that she seemed at this time about six or seven months advanced in pregnancy. He further states that Mr. Hamilton was not represented by any attorney or counselor in making the arrangements above referred to.

We adopt the foregoing statement of Mr. Kyle as setting forth the facts of the transaction, with the following additions and modifications: Mr. Loud testifies that, when the negotiations were first entered into, Mr. Hamilton wanted him to take the property in settlement for the claim, but he would not agree to this, as he did not consider that the property was of sufficient value. He says: "We refused to release Murphy from arrest on this settlement, and Mr. Hamilton then agreed to give his notes for the full amount of the claim." Mr. Hamilton testifies: "The consideration for the deed was the releasement of Murphy. Mr. Murphy was under arrest at Decatur, Alabama. The complainant stated that if this conveyance was not made, and Murphy released, he would have him put in the coal mines, and work it out at 40 cents per day, and he stated this in my presence, after I had got to Decatur." This

statement is not denied by Mr. Loud. We find, then, as a fact, that the purpose of the transaction was to release Murphy from arrest, and to quiet his prosecution for the offense of embezzlement; and, further, that it was entered into after the above-mentioned threat was made.

Mr. Hamilton testifies that when the papers were executed by him he was very much excited, and hardly knew what he was doing, on account of the condition of his daughter. This statement, however, is not borne out by the other facts in the record. The negotiation was begun in the morning, and the terms agreed on, but the papers were not executed until the afternoon of the same day. Mr. Hamilton's daughter told him that, if he would execute the deed to the house and lot in Elora, she would consider it as her part of his estate, and would ask no more from him. When asked about this matter in cross-examination, as to why his daughter made such a proposition to him, and if he was hesitating about making the deed, he answered: "Well, I did not know what I would do. I did not know what kind of a compromise I could make with Mr. Loud." This is not the conduct of a man overwhelmed with grief, or whose self-poise is overthrown by mental excitement. It seems rather the act of one who was holding back, or feigning to do so, with expectation, or hope, at least, of getting better terms. In addition to this, after he returned home, he went to Nashville to see Mr. Loud, and said to him that it was not right for him to hold both the property and the note. This was on the theory that seemed to be entertained by Mr. Hamilton at the time that the deed was an absolute conveyance. As he returned from Nashville, he consulted his attorneys at Fayetteville. These gentlemen, on the 28th of August, 1893, just two weeks after the transaction, addressed the following letter to Mr. Loud:

Dear Sir:—Mr. N. A. Hamilton, of Elora, Tennessee, has submitted to us a copy of a deed made by himself and wife to you to property in Elora, and an assignment by you to him of one W. C. Murphy's indebtedness to you, and, if we understand the transaction had between you and Mr. Hamilton, an injustice has been done Mr. Hamilton, perhaps unwittingly, and we write to get your explanation of it, which we hope you will kindly give us, as you understand it. It appears that you have an absolute deed to the property in Elora covered by the deed, and also Hamilton's note, amounting to $989.20, and that Hamilton only gets Murphy's indebtedness to you of $800. What was Murphy indebted to you, and was the deed only to secure that? And, if it was, why was it that Hamilton gave you his note for the $989.20? By giving us a full explanation, in your own way, you will oblige us very much. Was the deed intended as a security, or as absolute and unconditional? Let us hear from you on receipt of this.

This letter was turned over by Mr. Loud to his attorney, Mr. Kyle, who, on August 30, 1893, replied as follows:

Gentlemen:—Mr. Robert L. Loud, of Nashville, Tenn., requests me to reply to your favor of the 28th inst., directed to him. W. C. Murphy was indebted to Mr. Loud in the sum of $989.20. This was transferred by Mr. Loud to Mr. Hamilton. Mr. Hamilton makes a deed to certain real property, its estimated value being $800, and Hamilton executes his notes for $989.20. When the notes are paid, with interest, the real property is to be reconveyed to Hamilton. That was the oral agreement made, as I remember it, prior to the execution of the deed and bill of sale. I do not recollect what provision, if any, the notes provide in the event there is default in payment. You will see, from this, Mr. Loud does not claim $1,789.20 from Mr. Hamilton, but only $989.20.

To this Mr. Hamilton's attorneys replied on September 2, 1893, to Mr. Kyle as follows:

Dear Sir:—Yours of the 30 ult. received. Your explanation of the transaction between Mr. Hamilton and Mr. Loud comports with Mr. Hamilton's statement to us. The ground of complaint on the part of Mr. H. is that the papers do not properly express the transaction, nor the rights of the parties, in this: that the conveyance of the real estate of Mr. H. to Mr. Loud appears to be a deed in fee to the property, whereas it should have been, and was only intended as, a mortgage security to the $989.20 note. In the deed there should have been the expression of a defeasance to the effect that, upon payment of the note ($989.20), the conveyance should be void, or reconveyance of the property. In the absence of such expression, it is within the power of Loud to transfer the note and the real estate to innocent persons without notice, thereby causing Mr. Hamilton to pay the note and also lose the real estate. We would suggest that this can be remedied by Mr. Loud making a deed to the real estate to Mr. Hamilton, retaining a lien, in the deed, for the payment of the $989.20 note. If this meets your approval, we will draw the deed and send it to you for examination.

The matter rested in this condition until the original bill was filed, on the 5th of December, 1895, more than two years thereafter. During all this time there was no intimation, so far as the record shows, that Mr. Hamilton had acted under duress, or while in such a state of mind as he testifies to in his deposition. When the answer was filed, also, on the 13th of March, 1896, nearly three years after the transaction, there was still no intimation of duress. In this pleading the defense was placed upon two grounds: First, that the defendant, Hamilton, was not liable on the notes, because the deed had been given in payment of them; and, secondly, that the transaction was illegal, as we infer from the answer, on the ground that the consideration given was that a felony was com-

pounded. Finally, on the 8th of March, 1897, nearly four years after the transaction, the cross bill was filed, charging duress. This was the first intimation of duress in the record, and the first complaint of that character which Mr. Hamilton made. Under these circumstances, we cannot believe that he was so overwhelmed with excitement and grief at the time he gave the deed and notes that he hardly knew what he was doing, as he testifies. Nor can we believe that he was seriously influenced by the threat which he proves that Mr. Loud made about putting Mr. Murphy in the penitentiary, and thence in the coal mines, to work at 40 cents per day. We do believe, however, that, while Mr. Hamilton did purchase the indebtedness of Murphy to Loud, that was merely subsidiary to the main consideration, which was to release his son-in-law from custody and from prosecution for the embezzlement of which he was guilty, and we find that this was the chief consideration of the transaction, as understood by both Hamilton and Loud, and that in view of this the deed and notes were executed.

As to the contention that the deed to the land was given in satisfaction of the notes, the weight of the evidence is very decidedly to the contrary. This is shown both by the testimony of Mr. Loud and Mr. Kyle; also by the fact that Mr. Loud retained the notes, and that there was an agreement that the rents of the place should be collected by Mr. Hamilton, and that he should have credit therefor on his notes when he should forward the amount to Mr. Loud; and also by the correspondence which we have above copied. The chancellor, upon the hearing below, dismissed the original bill, and taxed the complainant with all of the costs, except the costs of filing Hamilton's cross bill and of taking Hamilton's deposition. Upon the cross bill he decreed that Hamilton was not entitled to have the deed to the house and lot set aside, and the title reinvested in him, and as to this matter he decreed that the cross bill should be dismissed, but, further, that Hamilton was entitled to have the four notes above mentioned declared void and canceled, and a decree was so entered. He taxed Hamilton with the costs of filing his cross bill and with taking his own deposition. The complainant appealed from so much of the decree as dismissed the original bill. The defendant, Hamilton, appealed from so much of the decree as denied him relief against the deed. Both appeals were granted, but only the first was prosecuted. But the defendant assigns error upon the chancellor's failure to grant relief against the deed. The complainant's assignments are as follows: First, the court erred in dismissing complainant's bill, because the proof clearly shows that the instrument was intended as a mortgage; second, the court erred in not dismissing defendant's cross bill, because the proof fails to show that defendant signed the deed under any misapprehension or duress, and does show that the transaction was supported by a valid consideration, and was clearly understood and freely entered into.

First, as to the subject of duress. In the earliest case we have upon this question (*Blair* v. *Coffman*, 2 Overt. 176, 5 Am. Dec. 659), it is said: "Upon an issue of duress, the inquiry must necessarily be as to the state of mind of the person pleading it; and not as to the existence of some fact, such as acts done or things which are susceptible of demonstration from the senses. . . . Evidence of conversation, acts before, at the time, and after the supposed duress, would be proper to show the state of mind in which the act was done. In the nature of things, it is the best evidence of which the case is capable; for no man can swear particularly how another felt at the time he did an act. It is not the mere affair of a person being in prison, or under circumstances of hardship, that will enable him to avoid an act. Such things may exist, and yet no coercion. Hence the necessity of the inquiry as to the state of the plaintiff's mind, and no evidence so proper as his own acts and conversation to show it." In the case of *McSween* v. *Miller*, 1 Heisk. 104, note, it is said: "The rule is, where a threat of unlawful mischief or injury to the person, property, or good name of a party is of sufficient importance to destroy his free agency, the law, because of such duress, will not enforce any contract which he may be induced by such threats to make. The controlling question is, Was the threat of such a character as, under the circumstances surrounding the parties at the time, was sufficient to overcome the mind and will, or, in other words, to destroy the free agency, of a person of ordinary firmness, and, his free agency being thus destroyed, was he thereby induced to give his assent to the contract? If so, the contract can have no validity whatever, because it is wanting in the essential elements of a valid binding contract, to wit: the free and voluntary assent of the minds of the parties making it." In the case of *Rollings* v. *Cate* it was held that, in order to constitute "duress," in its legal sense, it must appear that the party acted under "some threatening of life, or member, or of imprisonment, or beating of the party acting, or of his wife, with the view to procure the execution of the deed or other instrument, and the danger existing or threatened" should affect the person or goods or property. 1 Heisk. 97, reaffirmed in *Bogle* v. *Hammons*, 2 Heisk. 141, 142. In *McCartney* v. *Wade*, 2 Heisk. 369, 374, it is said: "It is not necessary, in the view of a court of equity, to show that a party acted under the influence of extreme terror in making a contract. If he acted under threats or apprehensions, short of duress, but under such circumstances as to show that he was not a free agent, and was unable to protect himself, the contract will be annulled." In *Johnson* v. *Roland*, 2 Baxt. 203, 206, it is said: "The threat must be of such a character as to overcome the mind and will, and destroy the free agency, of a person of ordinary firmness." To the same general effect, see *Belote*

v. *Henderson*, 5 Coldw. 471, 98 Am. Dec. 432; *Wilkerson* v. *Bishop*, 7 Coldw. 24; *Looper* v. *Philips*, 1 Shannon, 269; *Coffman* v. *Lookout Bank*, 5 Lea, 232, 40 Am. Rep. 31. The last-mentioned case is very striking in its facts. The substance of it is that a father was called into the back room of a bank, in the presence of some of its officers, and suddenly informed that his son had forged two notes, of $900 each, and got the money on them from the bank, and the notes were exhibited to the father. He was greatly agitated, and, as the court said, "literally overwhelmed by the calamity." The bank officers said that he was greatly moved and distressed, and wept bitterly. He himself said in his testimony that during his interview with the bank, owing to the suddenness of the communication, and the nature of the calamity, he was incapacitated from entering into any contract with full knowledge of its scope. The proof of his brother and his neighbors was that he was thoroughly unnerved by the calamity; "almost in a state of mental aberration," to use the language of a neighbor and a physician; "and wellnigh crazy," to use the words of other witnesses. This was the state of mind in which he executed the note to the bank. Promptly, within a few days after the transaction, he repudiated it, and demanded back his note which he had given to cover the two $900 notes. In this case it seems that there was no imprisonment of the son, nor any threat to prosecute him, or promise to refrain from doing so. The case goes off on the idea that, owing to the shock, surprise, and grief under which the father labored when he executed the note, he was not in such a mental condition as to enable him to execute a contract.

We are referred by counsel to the case of *City Nat. Bank* v. *Kuscorm* (Wis.) 26 L. R. A. 48, and the full note attached thereto, and especially to pages 64 and 65, or the section of the note there appearing. The doctrine referred to in the pages last mentioned may be prefaced with this statement from Lord Bacon's maxims: "So, if a man menace me that he will imprison or hurt in body my father or my child, except I make unto him an obligation, I shall avoid this duress, as well as if the duress had been to my own person." In section VI. of the note referred to it is said that the doctrine applies to other relations besides those of husband and wife or parent and child. Continuing, it is said: "Yet, when such a state of mind ensues upon the prosecution or oppression of a brother, and the conveyance, or other obligation, is thereby extorted, relief will not be granted as readily as where the conveyance or contract has been extorted from either a father or son by the duress of the other. In such cases, circumstances of oppression or imposition must clearly appear, and it must not be simply a case where a party may have purchased immunity for his brother from lawful prosecution,"—citing *Davis* v. *Luster*, 64 Mo. 43. It is said in the same note that in *Sharon* v. *Gager*, 46 Conn. 189, the court refused to foreclose a mortgage executed by an aunt to secure her nephew's defalcation as town treasurer, procured by one of the selectmen under threats and menace of the prosecution of the nephew; and that, in *Bradley* v. *Irish*, 42 Ill. App. 85, where the notes were extorted through fraud and duress, in connection with the criminal process issued against a grandson charged with embezzlement and forgery, the mortgage and notes in question being obtained by means of a scheme whereby a warrant was procured for his arrest, the accused being taken by the deputy sheriff to his grandmother's home, where, by threats of putting him in the penitentiary, knowing her great affection for him, the note and mortgage in question were procured, the court held the mortgage null and void, and directed it set aside as a cloud upon title and delivered up for cancelation, and enjoined its enforcement. Referring, again, to the case of *Davis* v. *Luster*, it is said in the same note that this was a case where it was sought to set aside a conveyance procured by means of threats of prosecution of the plaintiff's brother, and that the court held that, in order to entitle the plaintiff to the relief sought, he must show that it was given for the express purpose of freeing his brother from prosecution upon an innocent charge, and that the prosecution was unlawful, and also must show that the deed was executed upon the belief that its nonexecution would lead to a criminal prosecution. We are referred by defendant's counsel especially to the case of *Snyder* v. *Willey*, 33 Mich. 483, mentioned in the same note. In this case it appears that a joint and several promissory note was given, and a material part of the consideration was the stifling of two criminal prosecutions, one for forgery, commenced by the plaintiff against defendant's son-in-law, and it was held that the notes were void, and their collection could not be enforced, the consideration being illegal. In the case just referred to the father-in-law's signature was procured mainly by the entreaties of the daughter, urged on, and her fears played upon, by the plaintiff, the court admitting her evidence as to the inducement as part of the *res gestæ*. The case last cited does not go to the extent of holding that a son-in-law would stand in the same relation with regard to the question we now have in hand as would a son or wife, the case going off on a different ground altogether. But we are inclined to the opinion that where a son-in-law and his wife are living in harmony, and there is nothing to show any estrangement between the father-in-law and the son-in-law, the latter would stand in the same relation, so far as concerns the present question, as would the daughter herself. It is without doubt true that the danger to the son-in-law, and the consequent grief and terror of the daughter, would act upon the father's heart with substantially the same force as if the daughter herself were in danger, or, at least, nearly so. We may go further and hold, as was done in the case of *Coffman* v. *Lookout Bank*, 5 Lea, 232, 40 Am. Rep. 31, that if a party's mind is so agi-

tated from the peril in which a near relative stands, even though there is no prosecution or threat of prosecution, as that his free agency is substantially canceled, a contract made by him under such circumstances could not stand. But it is said in some of the cases that if a father is appealed to to take upon himself a civil liability, with the knowledge that, unless he do so, his son will be exposed to a criminal prosecution, with the moral certainty of conviction, even though that is not put forward by any party as a motive for the arrangement, he is not a free and voluntary agent, and the agreement he makes, under such circumstances, is not enforceable in equity. See cases cited on page 56 of 26 L. R. A., and *note*. We cannot yield our assent to the full extent of the doctrine thus stated. We do not think it can be said with truth that, owing to parental affection, such a proposition made to a father for the release of his son,—that is, by the execution of the father's obligation,—would leave him no alternative but to execute the obligation, and thus substantially for the time destroy his free agency. If this were a sound view, few bail bonds, where the father executes them as surety for the son, could be held good, and the same infirmity would exist in obligations executed for counsel fees. The principle would be the same. What we mean to say is that a proposition of the nature referred to, made to a father, would not be such as, under the normal operation of the principles and emotions governing human conduct, would necessarily command his compliance, or deprive him of his free agency. The situation referred to would no doubt be very strong evidence to support a charge of duress, and, in the absence of other evidence, sufficient, but not necessarily conclusive. In the face of these facts, it may yet be shown that the father was in such a state of mind as that he was able to consider the propriety of the act proposed, not only from the standpoint of parental affection, but also from the standpoint of moral and legal duty. This we say with regard to legal prosecutions. Of course, the same situation may also arise in case of the threat of a prosecution without legal justification. Whether obligations so obtained would not be invalid for another reason—that is, as being without consideration, and against public policy, as, in the case of legal prosecutions, the compounding of felonies—is another matter, the above observations being confined merely to the defense of duress.

And in this connection it is proper to observe that confusion occurs in citing cases under the law of duress, if we fail to distinguish between those instances in which obligations are given for the purpose of compounding criminal prosecutions and those in which a party may be lawfully released from custody upon the payment of a sum of money. It is said that, in order to put a party under duress by imprisonment,—that is, legal duress,—the imprisonment must be unlawful, or there must be an abuse of, or an oppression under, legal process or legal detention. 6 Am. & Eng. Enc. Law, p. 62. In a note to the above authority, it is said that where there is an arrest for an improper purpose without just cause, or where there is an arrest for a just cause but without lawful authority, or for a just cause but for an unlawful purpose, the rule is that, in either of the events, the party arrested, if he is thereby induced to enter into a contract, may avoid it as one procured by duress. Again, it is said that it is a general rule that imprisonment by order of the law is not duress; but, to constitute duress by imprisonment, either the imprisonment, or the duress after, must be tortious and unlawful. If, therefore, a man, supposing that he has a cause of action against another, by lawful process cause him to be arrested and imprisoned, and the defendant voluntarily executes a deed for his deliverance, he cannot avoid such deed by duress of imprisonment, although in fact the plaintiff had no cause of action, but although the imprisonment be lawful, unless the deed be made freely and voluntarily, it may be avoided by duress; citing *Watkins* v. *Baird*, 6 Mass. 506, 4 Am. Dec. 170. Again, it is said (p. 64) a contract made by one under arrest, through lawful process, as a condition of his deliverance from imprisonment, cannot be avoided on the ground of duress, although it be shown that no cause of action really existed; citing Clark v. Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157, and numerous other authorities. The case last referred to was as follows: The plaintiff, Clark, advanced money to Henry E. Turnbull, in the city of New York, to the amount of about $4,000. She insisted that he received the money, as her agent, to invest for her in good interest-bearing security, and that he fraudulently appropriated the money to his own use. The defendant, who was a brother of Henry E. Turnbull, claimed that the money so advanced to him—that is, to Henry E. Turnbull—was placed with him as a stock broker, under instructions to invest in stock speculations on margins, and that it was used in such gaming transactions, and lost. To assert her claim for this money as a debt, the plaintiff brought suit against Henry E. Turnbull in one of the courts of New York, under which legal proceedings the defendant therein was arrested and taken into custody. While so in custody, in an arrangement to settle that suit, Walter A. Turnbull, his brother, the defendant in the case above referred to, was called in to participate, and did so by advancing for Henry $1,200 in cash, and giving to him the promissory note sued on, which Henry indorsed to the plaintiff for the balance. Henry was thereupon released from his imprisonment, and the suit against him was subsequently discontinued. This state of facts it was held did not support the defense of duress. So, in this state, it is held that, under our statute, an agreement based upon the settlement of an embezzlement by a private agent of the funds of his principal would be a legal agreement, even if

there were included in a part of it a stipulation not to prosecute the agent criminally. *Allen* v. *Dunham*, 92 Tenn. 257, 269. The making of a contract to be released from imprisonment in such a case could not be defeated by the defense of duress put forward by the embezzler himself, and *a fortiori* could not be defeated by a near relative who should execute such a contract for the deliverance of the prisoner.

To apply what has been said: We are of opinion that the facts stated fail to show that the defendant acted under duress; and that they also show that he ratified the contract. The absence of duress is shown by the deliberation with which the contract was made at Decatur; by the understanding had between the father and daughter as to the advancement; by his own statement that he was manœuvering for a compromise; by his trip to Nashville, and conference with complainant, Loud; by the correspondence instituted on his behalf by his attorneys, with his sanction; and by the long delay to bring forward any objection to the contract on the ground of duress. The ratification is shown by the same acts, above referred to, which happened subsequent to the execution of the contract, and also by the delay mentioned. Where a contract is sought to be avoided as procured under duress, the party wronged must proceed promptly. If he remain silent, keeps the property received, or recognizes the contract by affirmative acts, he will be held to have waived the duress. 6 Am. & Eng. Enc. Law, p. 88. We have also an authority in this state to the effect that contracts procured by duress may be ratified. *Belote* v. *Henderson*, 5 Coldw. 471, 476, 98 Am. Dec. 432.

As to the point that the consideration of the obligation given was the compounding of a felony, and therefore that it was void on grounds of public policy, this is met by the case of *Allen* v. *Dunham*, 92 Tenn. 257, 269, and the discussion in connection therewith. It is true that the transaction occurred in Alabama, but, there being no proof as to the law of Alabama in this class of cases, we must presume that it is the same as our own. We therefore hold that the contract was not void, as against public policy.

It is insisted by defendant that it was not proper to hear proof below to show on behalf of complainant that the deed above referred to was a mortgage, and not a deed. It is said that such proof is competent in favor of the maker of an instrument, but no authority authorizes its introduction in behalf of the vendee. No objection was urged in the court below on this ground. But the objection itself has no real weight, as we think, in any event. It was certainly competent for the complainant to defend the charge of the cross bill, and show, as a matter of fact, the notes were not paid, or intended to be paid, by the deed. We have held that this was very clearly proved. The defendant also insisted, in the correspondence which we have copied, that the deed was only intended as security for the notes, and the complainant admits that this was true. So it is established that the deed was in fact a mere security. It is established in the manner just stated, and also by the direct proof of two witnesses, as against the defendant's testimony alone. But if it be conceded that the deed was indeed absolute, inasmuch as it is shown that the notes were never paid the defendant could not be heard to object that the complainant should sell his own land for their payment. However, as stated, it is fully proved that the notes are unpaid, and that the deed was intended as a mere security.

The result is *the decree of the chancellor dismissing the original bill, and decreeing relief against the notes under the cross bill, must be reversed*, and a decree must be entered here in favor of the complainant, Loud, against the defendant, Hamilton, for the amount of the notes and interest, and also to sell the land described in the bill for the payment thereof. The decree will direct a sale on a credit of twelve months, and in bar of the equity of redemption, a special prayer to this effect appearing in the bill. The defendant will pay the costs of this court and of the court below.

All the Judges concur.

Messrs. **Chambers & Zarecor** for appellant.

Messrs. **Holman & Carter** for appellee.

The above decision was affirmed by the supreme court March 2, 1899, without any written opinion.

WISCONSIN SUPREME COURT.

Bertha MACK, Guardian of Alma Mack, *Appt.*,
v.
Marie PRANG, Impleaded, etc., *Respt.*

(.....Wis.....)

1. **Threats to arrest a man for embezzlement** unless his wife will execute a mortgage constitute duress, which will avoid the mortgage made by her, if they were sufficient to control her will.
2. **A guardian is a bona fide holder of an unmatured note** taken from a former joint guardian, who has resigned, to pay an indebtedness to the ward for property which the resigning guardian has had and failed to account for.
3. **The defense of duress** is one of the defenses to negotiable paper which is cut off by transfer to a bona fide holder.

(June 22, 1899.)

NOTE.—As to effect of duress on relatives, see case of Loud v. Hamilton (Tenn.) *ante*, 400, also *note* to City Nat. Bank v. Kusworm (Wis.) 26 L. R. A. 48.

As to the defense of fraud against bona fide holder of a negotiable instrument, see *note* to Green v. Wilkie (Iowa) 36 L. R. A. 434.

45 L. R. A.

See also 45 L. R. A. 400; 47 L. R. A. 417.

APPEAL by plaintiff from a judgment of the Superior Court for Milwaukee County in favor of defendant in a proceeding to foreclose a mortgage which defendant alleged to be void for duress. *Reversed.*

Statement by **Winslow, J.:**

This is an action of foreclosure of a note and mortgage for $2,500 executed June 10, 1892, by the defendant Marie J. Prang and her husband, William Prang, and delivered to one Herman S. Mack, and assigned by him to the plaintiff, as guardian of Alma Mack, December 19, 1894, and before maturity. The mortgage covered real estate in the city of Milwaukee, which was the property of the defendant Marie Prang, and both note and mortgage were given to secure payment of an indebtedness then owing by the husband, William Prang, to Herman S. Mack. The defense was that both note and mortgage were executed by the defendant Marie Prang under duress, consisting of threats of imprisonment of her husband, William Prang. The action was referred to W. J. McElroy, Esq., to hear, try, and determine the same. The referee found that prior to the 10th of June, 1892, William Prang was a traveling salesman in the employ of H. S. Mack & Co., of Milwaukee, and that at said time he had appropriated to his own use, of the moneys of said firm, more than $5,000; that during three days prior to and on the 10th day of June, 1892, Herman S. Mack, directly and through the defendant William Prang, threatened Marie that, if she did not execute the note and mortgage in question, he would prosecute her husband, William Prang, and have him sent to prison, and that Marie executed said note and mortgage only under the fear that, if she refused to execute the same, her husband would be prosecuted and sent to prison; that no money was ever paid or authorized to be paid by the defendant Marie Prang upon said note and mortgage, nor had she knowledge of any payment being made thereon; that the amount due on the note from William Prang to the plaintiff amounted to the sum of $3,321.25. And as conclusions of law the referee found that the defendant Marie Prang was entitled to judgment of dismissal of the action with costs, and that as to her, said note and mortgage be canceled, and that the plaintiff was entitled to judgment against William Prang for the amount of the note with costs. Upon motions being made by the plaintiff to modify said report, and by the defendant to confirm the same, the court modified the findings by adding a finding, in effect, that the plaintiff was and is a bona fide purchaser, for value and before maturity, of the note and mortgage in question, and also that at the time of the execution of said mortgage the will of said Marie Prang was overpowered by said threats, and that the execution of said mortgage by her was not her voluntary act. Thereupon judgment was entered in favor of the defendant Marie J. Prang, setting aside the said note and mortgage as to her, and from that judgment this appeal is taken.

45 L. R. A.

Messrs. **Miller, Noyes, Miller, & Wahl,** for appellant:

The evidence on behalf of the defendant does not show that there was any danger of the alleged threat being immediately carried out, nor that such threat implied any harsh or unusual use of criminal process. Under these circumstances the defense of duress was not made out.

Wolff v. *Bluhm*, 95 Wis. 257; 6 Am. & Eng. Enc. Law, pp. 64–69; *Compton* v. *Bunker Hill Bank*, 96 Ill. 301; *Nealley* v. *Greenough*, 25 N. H. 325; *Alexander* v. *Pierce*, 10 N. H. 494; *Eddy* v. *Herrin*, 17 Me. 338, 35 Am. Dec. 261; *Harmon* v. *Harmon*, 61 Me. 227, 14 Am. Rep. 556; *Higgins* v. *Brown*, 78 Me. 473; *Hilborn* v. *Bucknam*, 78 Me. 482, 57 Am. Rep. 816; *Taylor* v. *Jaques*, 106 Mass. 291; *Landa* v. *Obert*, 45 Tex. 539.

The defense of duress cannot be set up as against the appellant, who was a bona fide purchaser before maturity for value, of the note and mortgage.

4 Am. & Eng. Enc. Law, 2d ed. p. 334; 10 Am. & Eng. Enc. Law, 2d ed. p. 335; *Martineau* v. *McCollum*, 3 Pinney, 455; *Andrews* v. *Hart*, 17 Wis. 298; *Fisher* v. *Otis*, 3 Chand. (Wis.) 83; *W. W. Kimball Co.* v. *Mellon*, 80 Wis. 133; *City Nat. Bank* v. *Kusworm*, 91 Wis. 166; *National Bank* v. *Wheelock*, 52 Ohio St. 534.

The respondent ratified the note and mortgage, and is estopped to deny their validity.

10 Am. & Eng. Enc. Law, 2d ed. p. 337.

Where a party relies upon duress in equity as a ground for avoiding his security, he ought, as in other cases of fraud, to move promptly and not sleep upon his rights. If he goes on and by his conduct assumes the contract to be in force until the position of the other party in respect to it has changed, he ought to be held to have affirmed it.

Lyon v. *Waldo*, 36 Mich. 346; *Eberstein* v. *Willets*, 134 Ill. 101; 10 Am. & Eng. Enc. Law, 2d ed. p. 337; *Schultz* v. *Culbertson*, 46 Wis. 313; *Hildebrand* v. *Tarbell*, 97 Wis. 446; *Franey* v. *Wauwatosa Park Co.* 99 Wis. 40.

Messrs. **Sylvester, Scheiber, & Orth,** for respondent:

An arrest, even upon a legal warrant and upon a criminal charge to compel the payment of a mere debt, would be misuse of legal process, and the threat of such an arrest may constitute unlawful duress.

Taylor v. *Jaques*, 106 Mass. 294; *Hackett* v. *King*, 6 Allen, 58; *Morse* v. *Woodworth*, 155 Mass. 252.

The facts proved and found by the court constitute duress.

Kuelkamp v. *Hidding*, 31 Wis. 503; *Schultz* v. *Culbertson*, 46 Wis. 313, 49 Wis. 122; *Schultz* v. *Catlin*, 78 Wis. 611; *City Nat. Bank* v. *Kuswcrm*, 88 Wis. 188, 26 L. R. A. 48; *Taylor* v. *Jaques*, 106 Mass. 291.

Duress is available as a defense against a bona fide purchaser for value before maturity.

Story, Bills of Exchange, § 185; 1 Dan. Neg. Inst. 858; 1 Parsons, Notes & Bills, 276; *Palmer* v. *Poor*, 121 Ind. 135, 6 L. R. A. 469; *Barry* v. *Equitable Life Assur. Soc.* 59

N. Y. 587; *Hatch* v. *Barrett*, 34 Kan. 233; *Duncan* v. *Scott*, 1 Campb. 100; Tiedeman, Com. Paper, § 287.

The extorted act is nothing more nor less than the act of H. S. Mack, who used the helpless person of Mrs. Prang as the influence of forging her name.

Earle v. *Norfolk & N. B. Hosiery Co.* 36 N. J. Eq. 192; *Jordan* v. *Elliott*, 12 W. N. C. 56.

Fraud in the inception of a negotiable note, whereby the supposed maker was misled into the signing of the note, he innocently believing it to be a paper of a different kind or character, and being free from fraud or negligence on his part, renders it void in the hands of innocent purchasers for value before maturity.

Walker v. *Ebert*, 29 Wis. 194, 9 Am. Rep. 548; *Kellogg* v. *Steiner*, 29 Wis. 626; *Tischer* v. *Beckworth*, 30 Wis. 55; *Andrews* v. *Thayer*, 30 Wis. 228; *Butler* v. *Carns*, 37 Wis. 61; *Chipman* v. *Tucker*, 38 Wis. 43, 20 Am. Rep. 1; *Roberts* v. *McGrath*, 38 Wis. 52; *Griffiths* v. *Kellogg*, 39 Wis. 260; *Bowers* v. *Thomas*, 62 Wis. 480.

Appellant is not a bona fide holder for value of the mortgage in question.

Herman S. Mack had no right to invest his ward's money in his (Mack's) business. By so doing he was guilty of a conversion thereof and made himself personally liable to the estate for the amount. Consequently the ward could not be compelled to accept the note and mortgage in payment of his guardian's liability to him.

Martin v. *Davis*, 80 Wis. 378.

Plaintiff is chargeable with notice of the acts of Mack, and took the note and mortgage subject to all equities.

Conceding that he obtained it for himself as an individual, nevertheless whatever knowledge he acquired in that capacity—to say nothing of his express acts—is imputable to him as guardian.

McDonald v. *Fire Asso. of Philadelphia*, 93 Wis. 348.

The plaintiff and Herman S. Mack were coguardians at the time, and their acts as such were joint and entire. The act of one must be taken to have been the act of both. They are one and the same person in legal effect.

Schouler, Exrs. & Admrs. § 400.

There was no consideration for the assignment of the note and mortgage from Mack to her.

Bowman v. *Van Kuren*, 29 Wis. 209, 19 Am. Rep. 554; *Black* v. *Tarbell*, 89 Wis. 390; *Burnham* v. *Merchants' Exch. Bank*, 92 Wis. 277.

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

It is admitted that this was a mortgage given by the wife, upon her own property, to secure the debt of her husband, but it is claimed by the appellant that there was not sufficient evidence to establish the defense of duress. We cannot agree with this contention. The defendant William had been for several years a traveling salesman for Herman S. Mack, the original mortgagee, and was short in his accounts to the amount of $5,000. The evidence of both Marie and William Prang was to the effect that both Mack and his bookkeeper personally came to see Mrs. Prang, and threatened to prosecute William for embezzlement, and send him to jail, unless she would give the mortgage; that she at first refused, and that they gave her a day or two to think the matter over; that she was greatly excited and alarmed at these threats, and had fainting spells both before and after she executed the mortgage, and that she only executed it to prevent her husband being sent to jail. It is true, this testimony was substantially contradicted by Mack and the bookkeeper, but we cannot say that the findings on this point were against the weight of the evidence. Facts substantially similar to these have frequently been held to constitute duress which renders voidable a security or contract executed under their influence. *McCormick Harvesting Mach. Co.* v. *Hamilton*, 73 Wis. 486; *City Nat. Bank* v. *Kusworm*, 88 Wis. 188, 26 L. R. A. 48, and cases cited in opinion. It is true that the will of the person making the contract must be overcome so that the act is not his voluntary act, but that fact is found in the present case, upon evidence which we think sufficient. Nor is this doctrine in any way in conflict with what was said by this court in *Wolff* v. *Bluhm*, 95 Wis. 257. That was a case, as distinctly stated in the opinion, where the evidence showed that the will was not overcome, and the party acting under the alleged duress was free to act as he chose, and only acted after consulting his friends and neighbors. It was also there said that in order to constitute duress "the threat must be of such a nature, and made under such circumstances, as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by such person while in such condition."

The fact of duress being found upon sufficient evidence, two further questions require consideration, namely: Was the plaintiff a bona fide holder? and, if so, does such fact cut off the defense of duress?

The court below found that the plaintiff was a bona fide holder before due, and this was plainly correct. The facts were these: Herman Mack and Bertha Mack, the plaintiff, were joint guardians of Alma Mack, an infant. Herman received $10,000 of the property of Alma, and in December, 1894, was in failing circumstances, and unable to account for it. Thereupon he resigned his guardianship, which resignation was accepted by the county court, leaving Bertha sole guardian. After resigning, he turned over this note and mortgage to Bertha, who received it in payment, *pro tanto*, at its face value, upon Herman's indebtedness to his ward. It had not matured when thus sold to Bertha. No reason is perceived why the remaining guardian might not receive the mortgage in payment of the former guard-

ian's liability to the ward,—at least, to the amount of its actual value. A transfer of negotiable paper before due in payment of a pre-existing debt constitutes the purchaser a bona fide holder. *Shufeldt* v. *Pease*, 16 Wis. 659; *Kellogg* v. *Fancher*, 23 Wis. 21, 99 Am. Dec. 96.

There is some conflict in the authorities upon the question whether the defense of duress by threats can be successfully urged against a bona fide holder for value of negotiable paper, but the better opinion and weight of authority is that such defense stands upon the same footing as other defenses which may be made as between the original parties, but is cut off when the paper reaches the hands of a bona fide holder. *Fairbanks* v. *Snow*, 145 Mass. 153; *Farmers' & M. Bank* v. *Butler*, 48 Mich. 192; *Clark* v. *Pease*, 41 N. H. 414; *Beals* v. *Neddo*, 1 McCrary, 206, 2 Fed. Rep. 41; *Martineau* v. *McCollum*, 3 Pinney, 455; 4 Am. & Eng. Enc. Law, 2d ed. p. 334. Duress which consists of threats of imprisonment of a husband or a child is a species of fraud, which renders the contract made under its influence voidable only, and not void. *City Nat. Bank* v. *Kuswcrm*, 91 Wis. 166. If it be simply a voidable contract, then it follows naturally that, when the contract consists of negotiable paper, the defense is cut off by transfer to a bona fide purchaser before maturity, in the same manner that other defenses upon the ground of fraud are cut off. The conclusion is that the plaintiff was entitled to a judgment of foreclosure notwithstanding the duress.

Judgment reversed, and action remanded, with directions to enter the usual judgment of foreclosure and sale.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

Julia E. HOFFMAN, Exrx., etc., of Lee Hoffman, Deceased,
v.
John McMULLEN.

(48 U. S. App. 596, 83 Fed. Rep. 372, 28 C. C. A. 178.)

1. **An agreement between bidders for public work to pool their interests,** procure the contract at the highest price possible, each having knowledge of the other's bid for that purpose, and divide the profits while representing themselves as rival bidders, is void so that in case the contract is procured in the name of one of them, the work done and the money paid to him, the others will have no standing in court to compel an accounting.
2. **That a municipal corporation has accepted work done under a contract** let upon competitive bidding, and paid the price with knowledge of a partnership agreement between the bidders which enhanced the contract price, will not entitle the partners to an account of the profits from one of their number who received the money on the ground that the municipality was not injured by the illegal partnership agreement.
3. **A contract by intending bidders for public work to procure the contract for a price as high as possible** and become partners in its execution is not, after the work has been done, and the money paid to one of them, within the rules that a contract will be enforced even if incidentally connected with an illegal transaction, provided it is supported by an independent consideration, and that after the illegal contract has been fully executed one party in possession of the gains will not be tolerated to interpose the objection that the business was in violation of law, so as to enable the other parties to compel an accounting.

(October 4, 1897.)

CROSS-APPEALS from a decree of the Circuit Court of the United States for the District of Oregon in a suit to compel an accounting of alleged partnership transactions; defendant appealing from so much of the decree as sustained the partnership and directed the accounting, and plaintiff appealing from so much as allowed the managing partner his salary and refused to allow interest and costs. *Reversed on defendant's appeal.*

The facts are stated in the opinion.

On writ of certiorari from the Supreme Court of the United States the decision in this case was affirmed May 22, 1899. See *McMullen* v. *Hoffman*, 174 U. S. 639, 43 L. ed. 1117.

Messrs. **Dolph, Mallory, & Simon,** for appellant:

Any agreement which in its object or necessary operation tends to diminish competition for the obtainment of a public or quasi-public contract to the detriment of the public or those awarding the contract is void.

Gibbs v. *Smith*, 115 Mass. 592.

Nor is it any answer to show that no injury has been done to the party selling.

Atcheson v. *Mallon*, 43 N. Y. 141, 3 Am. Rep. 678; *Doolin* v. *Ward*, 6 Johns. 194; *Wilbur* v. *How*, 8 Johns. 444; *Woodworth* v. *Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Holman* v. *Johnson*, 1 Cowp. 343; *Belding* v. *Pitkin*, 2 Cai. 147; *Breslin* v. *Brown*, 24 Ohio St. 565, 15 Am. Rep. 627; *Swan* v. *Chorpenning*, 20 Cal. 182; *Gulick* v. *Ward*, 10 N. J. L. 107, 18 Am. Dec. 389; *Weld* v. *Lancaster*, 56 Me. 453; *Hannah* v. *Fife*, 27 Mich. 172; *Hunter* v. *Pfeiffer*, 108 Ind. 197; *Sharp* v. *Wright*, 35 Barb. 236; *Buck* v. *Albee*, 26 Vt. 184, 62 Am. Dec. 564; *Scott* v. *Duffy*, 14 Pa. 18; *Providence Tool Co.* v. *Norris*, 2 Wall. 45, 17 L. ed. 868; *Jenkins* v. *Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Wooton* v. *Hinkle*, 20 Mo. 290; *Noyes* v. *Day*, 14 Vt. 384; *Kelly* v. *Devlin*, 58 How. Pr. 487;

NOTE.—As to the effect of preventing or checking bids upon the validity of sales at auction, see *note* to Herndon v. Gibson (S. C.) 20 L. R. A. 545.

Loyd v. *Malone*, 23 Ill. 43, 74 Am. Dec. 179; *Woodruff* v. *Berry*, 40 Ark. 251; *Jones* v. *Caswell*, 3 Johns. Cas. 29, 2 Am. Dec. 134; *Thompson* v. *Davies*, 13 Johns. 112.

The law looks to the general tendency of such contracts. The vice is the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate.

Richardson v. *Crandall*, 48 N. Y. 348; *Atcheson* v. *Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; *Swan* v. *Chorpenning*, 20 Cal. 182; *Weld* v. *Lancaster*, 56 Me. 453; *Hunter* v. *Pfeiffer*, 108 Ind. 197; *Buck* v. *Albee*, 26 Vt. 184, 62 Am. Dec. 564; Greenhood, Pub. Pol. 178; *Holladay* v. *Patterson*, 5 Or. 177.

The question of the validity of a contract does not depend upon the circumstance whether it can be shown that the public has, in fact, suffered any detriment, but whether the contract is in its nature such as might have been injurious to the public.

Gibbs v. *Smith*, 115 Mass. 592; *Engelman* v. *Skrainka*, 14 Mo. App. 438; *Woodruff* v. *Berry*, 40 Ark. 251; 2 Pom. Eq. Jur. § 934; 2 Kent, Com. 11th ed. 466, 467.

The courts of justice will allow the objection that the consideration of the contract was immoral or illegal to be made by the guilty party to the contract; for the allowance is not for the sake of the party who raises the objection, but is grounded on the general principles of policy.

Hope v. *Linden Park Blood Horse Asso.* 58 N. J. L. 627.

The rule is the application of the maxim, *Ex turpi causa non oritur actio.*

Den, Wooden, v. *Shotwell*, 23 N. J. L. 474; *Holman* v. *Johnson*, 1 Cowp. 343; *Marlatt* v. *Warwick*, 19 N. J. Eq. 439; *Nellis* v. *Clark*, 20 Wend. 24; *Fermor's Case*, 3 Coke, 78a; *Cadogan* v. *Kennett*, 2 Cowp. 434; *Smith* v. *Hubbs*, 10 Me. 71; *Cockshott* v. *Bennett*, 2 T. R. 763; *Clugas* v. *Panaluna*, 4 T. R. 466; *Wamell* v. *Reed*, 5 T. R. 599; *Bayley* v. *Taber*, 5 Mass. 286, 4 Am. Dec. 57; *Lynch* v. *Rosenthal*, 144 Ind. 86, 31 L. R. A. 835; *Leonard* v. *Poole*, 114 N. Y. 371, 4 L. R. A. 728.

In an action upon a void contract, the defendant may prove illegality or fraud which renders it void, although the plaintiff may not disclose the infirmity in making a prima facie case.

McMullen wholly failed to make good his agreement to furnish funds at a time when it appeared that the enterprise was liable to fail for want of them.

Hoffman, on the 16th of September, 1893, dissolved the copartnership, and refused thereafter to recognize McMullen as a partner, and proceeded to complete the work on his own account.

If a partnership be without any definite period any partner may withdraw at a moment's notice, when he pleases, and dissolve the partnership.

3 Kent, Com. 11th ed. 60, *53, 55; 2 Lindley, Partn. 571; *Skinner* v. *Tinker*, 34 Barb. 333; *McElvey* v. *Lewis*, 76 N. Y. 373; *Fletcher* v. *Reed*, 131 Mass. 312; *Blake* v. *Sweeting*, 121 Ill. 67; *Walker* v. *Whipple*, 45 L. R. A. 58 Mich. 476; *Solomon* v. *Kirkwood*, 55 Mich. 256; *Slemmer's Appeal*, 58 Pa. 168, 98 Am. Dec. 255; *Carlton* v. *Cummins*, 51 Ind. 478; *Lawrence* v. *Robinson*, 4 Colo. 567; *Pine* v. *Ormsbee*, 2 Abb. Pr. N. S. 375; *Berry* v. *Folkes*, 60 Miss. 576; *Whiting* v. *Leakin*, 66 Md. 255; *Blaker* v. *Sands*, 29 Kan. 551; *Mason* v. *Connell*, 1 Whart. 381; *Sweeney* v. *Neely*, 53 Mich. 421; *Skinner* v. *Dayton*, 19 Johns. 513, 10 Am. Dec. 286; *Miller* v. *Brigham*, 50 Cal. 615; *Bank* v. *Carrollton R. Co.* 11 Wall. 624; *Fourth Nat. Bank* v. *New Orleans & C. R. Co.* 20 L. ed. 82; *Marquand* v. *New York Mfg. Co.* 17 Johns. 525; *Berry* v. *Folkes*, 60 Miss. 576; *Gaty* v. *Tyler*, 33 Mo. App. 494; *Blake* v. *Dorgan*, 1 G. Greene, 537; *Kinloch* v. *Hamlin*, 2 Hill, Eq. 19, 27 Am. Dec. 441.

Messrs. **William A. Maury, R. Percy Wright,** and **L. B. Cox,** for appellee:

The contract of March 6, 1893, established the relationship of partners between Hoffman and petitioner, and out of this relationship and not out of the partnership agreement, grew the rights which petitioner is seeking to enforce in this suit.

After the partnership has once been launched, if a controversy arises between the partners, the cause of action grows out of and rests upon the partnership relation; and if a claim to property is involved, it is the property right of the partner, growing out of the partnership relation, although the extent of the right may be defined by the contract, which gives him his standing in court.

Lindley, Partn. 2d Am. ed. 2; Mechem, Elements of Partnership, 3; 1 Bates, Partn. § 78; Pollock, Digest of Partnership, § 1; Parsons, Partn. 4th ed. § 6, note d; Story, Partn. § 1; *Cox* v. *Hickman*, 8 H. L. Cas. 268.

A partner who receives money or other property on behalf of a partnership owes substantially the same duty as an agent owes to his principal, *viz.*, to account for and deliver the money or property received.

1 Lindley, Partn. 2d Am. ed. *107, 108; *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 21 L. ed. 473.

The underlying principle in *Brooks* v. *Martin* and cognate cases is, that the plaintiff in each of them had a property interest in the subject of the suit and a right to require the defendant to respond to his demand, growing out of the relationship between the parties; and the plaintiff's right to recover could not be defeated by showing that he had participated in some illegal transaction which had been consummated before the subject of the controversy came into existence.

Sharp v. *Taylor*, 2 Phill. Ch. 801; *Brooks* v. *Martin*, 2 Wall. 70, 17 L. ed. 732; *McBlair* v. *Gibbes*, 17 How. 232, 237, 15 L. ed. 132, 134; *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 21 L. ed. 473; *Union R. Co.* v. *Durant*, 95 U. S. 576, 24 L. ed. 391; *Burke* v. *Flood*, 6 Sawy. 220; *Western U. Teleg. Co.* v. *Union P. R. Co.* 1 McCrary, 418; *Wann* v. *Kelly*, 2 McCrary, 628; Lewin, Tr. 68; *Hall* v. *Corcoran*, 107 Mass. 251; *Woodman* v. *Hubbard*, 25 N. H. 67, 7 Am. Dec. 310.

If respondent's contention as to the character of the verbal agreement between Hoffman and petitioner which antedated the bidding were true, the matters set up by her cannot avail as a defense, for the reason that the stipulations which she contends were entered into were divisible, and the legal part of the agreement would stand alone. *Oregon Steam Nav. Co.* v. *Winsor*, 20 Wall. 64, 22 L. ed. 315; *Pickering* v. *Ilfracombe R. Co.* L. R. 3 C. P. 250; *Bank of Australasia* v. *Breillat*, 6 Moore, P. C. C. 201.

It was the respondent who brought into the case the matters which the court of appeals found to be fatal to the petitioner's right of recovery.

Welch v. *Wesson*, 6 Gray, 505; *Armstrong* v. *American Exch. Nat. Bank*, 133 U. S. 433, 33 L. ed. 747; *Swan* v. *Scott*, 11 Serg. & R. 155.

Hawley, District Judge, delivered the opinion of the court:

This is a suit in equity brought by John McMullen against Lee Hoffman for an accounting for the profits earned on a contract to construct a pipe line by which the city of Portland is supplied with water. Pending the suit, Lee Hoffman died, and the suit was revived against Julia E. Hoffman, executrix of the last will and testament of Lee Hoffman, deceased. The water committee representing the city of Portland having advertised for bids to construct the line, the original parties hereto entered into an agreement by which the defendant, Hoffman, bid for the work, in the name of Hoffman & Bates. The plaintiff, McMullen, with the knowledge and concurrence of the defendant, made a separate bid in the name of the San Francisco Bridge Company, a company controlled by him. This bid was some $40,000 higher than the bid of the defendant. The contract having been awarded to the defendant, a written agreement of partnership was entered into by the parties for the execution of the contract to be entered into by the defendant with the city, which agreement reads as follows:

"This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That whereas, said Hoffman and Bates have, with the assistance of said McMullen, at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expect to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman and Bates on said bid: It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one half of the expenses of executing the same, and each to receive one half of the profits, or bear and pay one half of the losses, which shall result therefrom. And it is further hereby agreed that, if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike."

The contract awarded on defendant's bid was formally entered into by the water committee, of the one part, and by the defendant in the name of Hoffman & Bates, of the other. The contract proved to be a profitable one, the profits thereunder amounting to nearly $140,000. Hoffman refused to account to McMullen for any part of these profits, upon the ground that the bids made by them tended, under the circumstances, to lessen competition, and operated as a fraud upon the city, and could not be enforced in equity, and upon the further ground that McMullen wholly failed to comply with the contract between the parties, and refused to perform the conditions upon which the defendant's agreement to share the earnings of the contract with the complainant was made.

The whole transaction grows out of the enterprise undertaken by the city of Portland to conduct the water of Bull Run river some 30 miles to the city. The water was to be conveyed through steel pipes, and had to be conducted across streams which required the construction of bridges, and expensive and permanent works had to be erected at Bull Run river, where the water was diverted from the river to the pipe. The construction of this work was placed by the legislature in the hands of a committee composed of fifteen persons, who managed the business for the city. This committee decided to let this work at a public letting to the lowest bidder, and to that end the work was divided into the following general classes: (1) Head works; (2) bridges; (3) wrought-iron plates; (4) steel conduit from head works to Mt. Tabor; (5) manufacturing and laying wrought-iron or steel pipes from head works to Mt. Tabor; (6) steel plates for pipe; (7) conduits from head works to Mt. Tabor, of cast iron; (8) cast-iron pipe for Mt. Tabor to City Park; and (9) submerged pipes.—and separate bids invited for each. The letting was the ordinary public letting upon sealed proposals. Hoffman and McMullen each undertook to secure contracts to do this work, or some portion of it, by bidding for it, in response to the invitation of the water committee. Bids for each of the following items were accordingly submitted by them to the water committee, Hoffman bidding in the name of Hoffman & Bates, and McMullen bidding in the name of the San Francisco Bridge Company: Head works: Hoffman & Bates, $17,890; San Francisco Bridge Company, $16,550. Bridges: Hoffman & Bates, $33,562.94; San Francisco Bridge Company, $31,993. Steel conduit from head works to Mt. Tabor: Hoffman & Bates, $359,278; San Francisco

Bridge Company, $348,781. Conduit from head works to Mt. Tabor, of steel or wrought iron, making and laying pipe: Hoffman & Bates, $465,722; San Francisco Bridge Company, $514,775.

McMullen submitted a bid in the name of the San Francisco Bridge Company for the submerged pipe of $97,340. For this work Hoffman did not bid. They agreed in advance upon what items of the work they should bid, upon what their respective bids should be, and upon what portion the bid of the San Francisco Bridge Company should be cheapest. There was also an understanding between them, as to some portions of the work, that the lowest bid should be withdrawn in the event that there were no other outside bids lower than those of Hoffman & Bates. In other words, they were to pool their bids, and so arrange matters that the highest bid, as between themselves, should, if possible, be accepted, and they would divide the proceeds of the contract. Suggestions were freely made as to the propriety of taking in other bidders, and also the secretary of the committee, so that honest bids might be withheld, and others ascertained, by fraudulent and improper means. The following extract from a letter written by McMullen to Hoffman fairly illustrates the means they proposed to use to accomplish the object they had in view:

"I do not want to let go on that submerged pipe; want to get the job. I think we can make $25,000 on that job, but we must pool it. To do this, we will have to let the secretary, Frank T. Dodge, in, and, if any bids come without personal representatives, have him not receive them until after the letting, and then return them unopened; and we will gather in everybody that is personally represented. Don't think there are many."

The circuit court, upon final hearing, rendered a decree in favor of McMullen for $52,241.18, and one half of the assets, consisting of plant and tools, furniture, and camp fixtures, of the cost value of $7,857.36, and a disallowed claim against the city of Portland for $16,961.25. From this decree Hoffman appeals. There is also a cross-appeal taken by McMullen from the decree of the court allowing Hoffman a salary of $1,000 per month, and from the refusal of the court to allow him interest on the money found due and refusal to allow him costs. The appeal of Hoffman will first be considered.

The contention of appellant is that the manner in which the parties hereto presented their bids, and sought thereby to procure contracts from the committee, was illegal. It is not seriously denied that the city of Portland could have successfully defended any action that might have been brought against it by the contractors, Hoffman & Bates, upon the ground that the contract was secured by illegal means. It did not do so. It payed the money to Hoffman. The question here presented is: Can the defendant avail himself of this defense? The authorities answer this question in the affirmative. It is true that the objection that a contract was immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. But it is not for his sake that the objection is ever allowed. The refusal of courts to enforce such contracts is always founded on general principles of public policy, which the defendant may take advantage of, contrary to the real justice of the case, as between the parties plaintiff and defendant. It is the duty of all courts to keep their eye steadily upon the interests of the public, and when they find an action is founded upon a claim which is injurious to the public, and which has a bad tendency, to give no countenance or assistance to it *in foro civili*.

In dealing with illegal contracts, courts do not and cannot look alone to those who are parties to the illegal transaction. The law regards the welfare of society as paramount, and in enforcing the law, courts will not impair its efficacy or cripple its operations by considerations affecting the interests of those who are *particeps criminis*. The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon immoral or illegal acts. If, from the plaintiff's own showing or otherwise, the cause of action appears to arise *ex turpi causa*, or out of a transgression of a positive law of the country, then the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because it will not lend its aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were bringing his action against the plaintiff, the latter would have the advantage of it; for, where both are equally at fault, *potior est conditio defendentis*. *Bartle* v. *Nutt*, 4 Pet. 184, 189, 7 L. ed. 825, 827; *Providence Tool Co.* v. *Norris*, 2 Wall. 45, 54, 17 L. ed. 868, 870; *McCausland* v. *Ralston*, 12 Nev. 195, 206, 28 Am. Rep. 781 *et seq.*, and authorities there cited; *Western U. Teleg. Co.* v. *Union P. R. Co.* 1 McCrary, 418, 427, 3 Fed. Rep. 1; *Buck* v. *Albee*, 26 Vt. 184, 62 Am. Dec. 564; *Hannah* v. *Fife*, 27 Mich. 172, 181; *Den, Wooden*, v. *Shotwell*, 23 N. J. L. 465; *Price* v. *Polluck*, 37 N. J. L. 44; *Belding* v. *Pitkin*, 2 Cai. 147; *Leonard* v. *Poole*, 114 N. Y. 371, 379, 4 L. R. A. 723; *Hope* v. *Linden Park Blood Horse Asso.* 58 N. J. L. 627.

In *Bartle* v. *Nutt* the court said: "The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practised fraud, which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws."

A contract to prevent competition and bid-

ding for public work is contrary to public policy, and cannot be enforced. The rule is universal that agreements which, in their necessary operation upon the action of the parties, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or third parties, are against the principle of sound public policy and are void. *Gulick* v. *Ward*, 10 N. J. L. 102, 18 Am. Dec. 389; *Swan* v. *Chorpenning*, 20 Cal. 182, 185; *Hannah* v. *Fife*, 27 Mich. 172, 180; *Weld* v. *Lancaster*, 56 Me. 453, 457; *Noyes* v. *Day*, 14 Vt. 384; *Gibbs* v. *Smith*, 115 Mass. 592; *Doolin* v. *Ward*, 6 Johns. 194; *Wilbur* v. *How*, 8 Johns. 444; *Thompson* v. *Davies*, 13 Johns. 112; *Kelly* v. *Devlin*, 58 How. Pr. 487; *Atcheson* v. *Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; *Hunter* v. *Pfeiffer*, 108 Ind. 197, 200; *King* v. *Winants*, 71 N. C. 469, 474, 17 Am. Rep. 11; *Durfee* v. *Moran*, 57 Mo. 374, 379; *Laemin* v. *Bradley*, 13 Mo. App. 361; *Engelman* v. *Skrainka*, 14 Mo. App. 438; *Woodruff* v. *Berry*, 40 Ark. 252, 267; *Hyer* v. *Richmond Traction Co.* 42 U. S. App. 522, 80 Fed. Rep. 839, 844, 26 C. C. A. 175.

Do the facts and circumstances of this case bring it within this general rule? Can this case, consistently with the reasoning of the authorities, be excepted from it? Does it infringe in any manner upon any principle of public policy? It is argued by appellee that the bidding was not illegal, because the proof shows that McMullen and Hoffman were jointly interested in the bid, and that the law allows two or more persons to combine together for the purpose of making one bid. This is true where no fradulent purpose is involved. An honest co-operation between two or more persons to accomplish an object which neither could gain if acting alone in his individual capacity is not within the rule, although, in a certain sense and to a limited degree, such co-operation might have a tendency to lessen competition. There may be a competition that saves as well as a competition that kills. The amount of work to be performed, the necessity of obtaining means to properly carry on the contract, the responsibility of the parties, their ability to complete the work, etc., are matters which are liable to make it absolutely necessary for rival contractors to combine their forces and unite together, not only in order to secure the contract, but to enable them, if it is obtained, to complete it without financial embarrassments or other difficulties which are liable to arise in cases of individual responsibility. There is no valid objection to such voluntary combinations if the joint action of the parties is done honestly and in good faith. In all contracts secured in such a manner the courts should never hesitate to protect parties in their agreements with each other, and compel them to comply with the terms thereof. It is only where the facts and circumstances surrounding the case clearly show that illegal means or improper and deceptive influences and methods were used to procure the contract that the maxim *In pari delicto* applies.

In *Atcheson* v. *Mallon*, 43 N. Y. 147, 151, 3 Am. Rep. 678, the court said: "A joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk as well as the profit is joint and openly assumed. The public may obtain, at least, the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders, and weigh the merits of the bid."

In *Gibbs* v. *Smith*, 115 Mass. 592, the court, in drawing the line of distinction in an analogous case, said: "An agreement between two or more persons that one shall bid for the benefit of all upon property about to be sold at public auction, which they desire to purchase together, either because they propose to hold it together, or afterwards to divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character, and will be enforced; but such agreement, if made for the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy, and in fraud of the just rights of the party offering it, and therefore illegal." See also *Laemin* v. *Bradley*, 13 Mo. App. 361; *Cocks* v. *Izard*, 7 Wall. 559, 19 L. ed. 275.

The fraud, if any, in the present case, was in withholding the truth,—in fraudulently representing and holding themselves out to the committee and to the public as rival bidders, when in fact they were not. The learned judge who tried this case, in his opinion upon the exceptions to the defendant's answer, said: "When the parties presented themselves as competitors for the work, they were guilty of a fraud. The tendency of what was thus done was to cause the water committee to believe that the bid of defendant was a favorable one for the city. Moreover, plaintiff's pretended bid had the effect of a representation to the committee that, in plaintiff's opinion, the work could not be profitably done for less than a figure $35,000 higher than that bid by defendant, although, as a matter of fact, plaintiff believed such work could be done, and, except for the collusive agreement with defendant, would have offered to do it, for an amount $75,000 less than that at which the contract was let. Upon all the cases cited or to be found, and in any view of the case consistent with public policy and the principles of equity, there can be no relief in such a case." *McMullan* v. *Hoffman*, 69 Fed. Rep. 509, 518.

Upon the final hearing, he came to the conclusion that his former opinion was erroneous, and held that the contract and agreement of the parties were valid as between themselves. *McMullen* v. *Hoffman*, 75 Fed. Rep. 547.

This case, in principle, cannot, in our opinion, be distinguished from *Atcheson* v. *Mal-*

lon, 43 N. Y. 147, 151, 3 Am. Rep. 678, although the facts here as to the illegal character of the transaction are much stronger than in that case. There the parties simply showed each other their bids, and agreed to divide the profits. Mallon was the lowest bidder, and obtained the contract. The money due on the contract when completed was paid to him. The profits amounted to $400. Mallon refused to divide. Atcheson brought suit to recover his share of the profits. The court refused to enforce the contract. After announcing the general rule which we have stated, and declaring the general principles applicable thereto, the court said: "If Mallon had promised Atcheson a sum of money if he would refrain from making any proposal, and Atcheson, relying upon it, had made none, and then had sought to enforce the agreement, there can be no doubt that the law would have held the promise void. And why? Not out of any consideration for the parties to it, but because its effect was to remove Atcheson from the number of earnest bidders, and thus, by lessening competition, to detriment the public. And the agreement which was made, laying open to Mallon just what was the judgment of Atcheson of a profitable bid, and removing, in effect, an interested rival, tended to affect Mallon's action. While Atcheson, confident that, if Mallon succeeded, it was also his own success, lost the impulse to a real competition with him. It seems beyond cavil that the agreement is obnoxious to the rule above stated, and such agreements courts refuse to enforce."

Nor can this case be distinguished in principle from *Swan* v. *Chorpenning*, 20 Cal. 182, 185. In that case both parties to the agreement were mail contractors. Swan put in a bid for carrying the mail over a certain route, and agreed with Chorpenning to withdraw his bid, and use his influence to induce the government to give to Chorpenning a contract for a longer route, including the one bid upon, in consideration that, if Chorpenning obtained the contract, Swan should have an interest in it, or be paid an equivalent pecuniary compensation. Chorpenning obtained the contract, and, after receiving payment, refused to divide the profits. The court, after quoting *Gulick* v. *Ward*, *supra*, said:

"We see no difference in principle between the question in that case and the one now presented, and the cases clearly fall within the same category. In respect to the consideration, it is impossible to distinguish them; for an agreement not to bid and an agreement to withdraw a bid already put in are certainly obnoxious to the same legal objections."

Now, the agreement in the present case was substantially to the same effect. In consideration of sharing in the profits, McMullen did not put in an honest bid. He put in a bid much higher than he would otherwise have done but for the agreement. His object, evidently, was to deceive the committee, —to convey the idea that he was a rival bidder, when in fact he was not. Such conduct certainly tended to destroy competition, and to preclude the advantages which inevitably resulted from it. Equally strong in its similarity as to the effect of the agreement between the bidders is the case of *Hannah* v. *Fife*. That was an action brought by Fife and Haviland against the plaintiffs in error, as the sureties of one Oscar L. Noble in a contract between said Noble and Fife and Haviland, by which Noble agreed to enter into and perform a contract with the state for the construction of a swamp-land state road, for the building of which said Fife and Haviland had been the lowest bidders, and to give them, as a bonus for being allowed to take their place in the contract, eight sections of swamp lands to be received from the state for the performance of the work. Noble's bid, in the first instance, was in reality less than the bid of Fife and Haviland, but it was not made out in accordance with the plan submitted by the state, and could not be accepted. The bidders obtained a continuance, and, before the bid was let, the agreement in question was made, and Noble got the contract. The court, in the discussion of the case, said: "Now, if these bidders, Noble, on one side, and Fife and Haviland, on the other, had, before or at the time of making their respective bids, entered into a secret agreement, for their mutual profit and to avoid competition with each other, that, for the purpose of getting a contract from the state for building this road at the highest rate or greatest quantity of land allowed by the law, only one of the parties should put in a bid, which in its terms would accord with the plan of the road adopted by the state, and with the notice given, while the other, though not in accordance with that plan or notice, should in all other respects appear to be in accordance with the terms proposed by the state, and better in some respects than the bid of the other, but which, nevertheless, could not be accepted, because not in accordance with the plan (thus securing in advance the letting of the contract to one of the parties . . . without danger of competition from the other, while keeping up the appearance of competition) and that the contract should be performed by one of the parties for the mutual profit of both; or that the party taking the contract and doing the work should give to the other, as his share of profit, eight sections or any other portion of the land to be received from the state,—if such had been the previous arrangement between the parties, it will not be pretended that such an understanding, or any agreement resting upon it or calculated to carry it into effect, could have been sustained. It would have been so manifestly fraudulent, as against the state, and so subversive of the intentions and objects of the legislation, that no court could hesitate for a moment to declare it illegal and void."

There was no evidence in that case except such as could be legally drawn from the facts that there was any such previous agreement. But the court said it was difficult to resist

the conclusion that the facts as proved tended "pretty strongly to show the existence of some such previous understanding," and that the putting in of the bid "by Noble in a mode which, under the notice, could not have been accepted, is not, when considered with reference to the subsequent acts of the parties, easily explained upon any other rational theory than that of previous concert for the purpose already intimated." The court further said: "But whether there was, in fact, any such secret understanding or fraudulent collusion between the bidders or not, is, in my opinion, entirely immaterial to the decision in the present case. It seems to me clear that the tendency of all such contracts between bidders as that here in question, if recognized as valid by the courts, must be to afford encouragement and give facilities to bidders to enter into and give full effect to such secret agreements and combinations, and to enable them to defeat the plain intent and object of the legislature in requiring such contracts to be let to the lowest responsible bidder."

In the present case it is evident that McMullen and Hoffman understood each other; that their intention was to prevent open competition, which the law encourages. In their confederacy they were aiming at the same result,—that of compelling the city to pay a higher price for the work than McMullen believed it was worth.

Breslin v. *Brown*, 24 Ohio St. 565, 570, 15 Am. Rep. 627, is perhaps the strongest case presented in favor of appellee herein as to the right of parties who had intended to bid, and did bid, upon public improvements that were to be let to the lowest bidder, to enter into an agreement to become partners in the work in the event that the contract should be awarded to either, and that the contract, when awarded, should inure to the benefit of the firm. But that case, in its facts, is clearly distinguishable from the case at bar in many of its essential particulars. There separate and independent bids were filed by the respective parties. "The bid of each was based upon his own judgment and filed at his own discretion." It did not appear that either had knowledge of the other's bid, and these facts led the court to the conclusion that the agreement made between the parties, and the result of the bidding, did not have a tendency to stifle competition at the letting of the bid. Here the parties agreed in advance as to what their bids were to be. Each knew what the bid of the other was. The intent, object, and tendency of their cooperation in the contract, as is fully and clearly shown by the testimony, was to deceive the committee, and commit a fraud upon the public.

In *Hunter* v. *Pfeiffer*, *supra*, the appellant and the appellee were about to bid for the construction of a public work, but the appellant was induced to withhold his bid in consideration that he should be taken into partnership, and be permitted to share in the profits of any contract which appellee might secure. The court said: "Upon all such partnerships the law sets the seal of its condemnation. Persons who combine in schemes of the character disclosed can secure no aid from the courts in coercing a division of the profits anticipated or accrued. . . . If the court should lend any countenance to such a contract of partnership as that disclosed in the complaint, in either aspect in which it is presented, the effect would be to afford facilities for bidders to enter into secret agreements and combinations with each other, and thus enable them to defeat the plain purpose of the legislature in requiring such contracts to be let to the lowest and best bidder." At the close of the opinion the court said: "If, in letting a contract such as this, parties, without knowledge of the bids of each other, submit their bids as the law requires, and afterwards enter into a partnership for the construction of the work with the knowledge of the officers letting the same, a question of a different character is presented. Such a transaction bears some similitude to the contract which was upheld in *Breslin* v. *Brown*, 24 Ohio St. 565, 15 Am. Rep. 627, a case which, on account of the liberal view taken of the contract there involved, is not universally indorsed. That case, however, affords no aid to the appellant here."

The cases are too numerous to be specifically reviewed. The dividing line is always sharply drawn with reference to the particular facts of each case, and the conclusion reached that where the parties have acted openly and honestly, and entered into an agreement which neither in its purpose, effect, nor natural tendency is to prevent a fair competition, it can be and should be enforced. But, where there is a secret combination,—call it partnership or any other name.—the effect of which is, or the natural tendency of which is, to abate honest rivalry or prevent fair competition, it is to be and is condemned, as violative of public policy, and held to be absolutely void. All the authorities hold that, where either the intention, the effect, or the necessary tendency of the combination is to stifle or limit competition, it is contrary to public policy, and, when discovered, will be stamped with marks of disapproval in any court of law or of equity. Were any of the subsequent acts of the parties, or the condition of the contract as to its completion, or any other fact or circumstance established at the trial, of such a character as to take this case out of or away from the general rule hereinbefore stated in relation to illegal contracts?

It is claimed that, before the money was paid by the city, it had knowledge of the true relations existing between McMullen and Hoffman, and, with such knowledge, accepted the work, and paid the contract price therefor, and that the city was not in any manner injured by the illegal acts of the plaintiff and defendant herein. But the law is well settled that the question of the validity of the contract does not depend upon the circumstance whether the public has, in fact, suffered any detriment, but whether the contract is in its nature such as might have

been injurious to the public. That which renders the contract illegal is not the injury the parties have actually occasioned, but the purpose they must have contemplated when it was made. Its validity is tested, not by its results, but by its objects, as shown by its terms. In addition to the authorities heretofore cited, see *Gibbs* v. *Smith*, 115 Mass. 592; *Atchcson* v. *Mallon*, 43 N. Y. 147, 149, 3 Am. Rep. 678; *Woodworth* v. *Bennett*, 43 N. Y. 273, 278, 3 Am. Rep. 706; *Weld* v. *Lancaster*, 56 Me. 453, 457; *Richardson* v. *Crandall*, 48 N. Y. 348, 362. It is not therefore necessary, in the determination of this case, to inquire whether the effect of the agreement between the parties was in fact detrimental or beneficial to the city of Portland.

Appellee argues that the case as presented comes within the rule, so frequently announced in the authorities, that a contract or an agreement will be enforced, even if it is incidentally or indirectly connected with an illegal transaction, provided it is supported by an independent consideration, so that the plaintiff will not require the aid of the illegal transaction to make out his case. This principle is undisputed. *Armstrong* v. *American Exch. Nat. Bank*, 133 U. S. 434, 469, 33 L. ed. 747, 760, and authorities there cited. See also *Woodworth* v. *Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Buck* v. *Albee*, 26 Vt. 184, 62 Am. Dec. 564; *Gilliam* v. *Brown*, 43 Miss. 642, 660; *Western U. Teleg. Co.* v. *Union P. R. Co.* 1 McCrary, 558, 562, 3 Fed. Rep. 423; *Swan* v. *Scott*, 11 Serg. & R. 155; *Wright* v. *Pipe Line Co.* 101 Pa. 204, 208, 47 Am. Rep. 701.

This argument, with the authorities cited in its support, will be considered in connection with the further contention of appellee that the case, upon its facts, comes within the general principle that, after the illegal contract has been fully executed, one party, in possession of all the gains and profits resulting from the illicit traffic and transaction, will not be tolerated to interpose the objection that the business which produced the fund was in violation of law. *McBlair* v. *Gibbes*, 17 How. 232, 237, 15 L. ed. 132, 134; *Union R. Co.* v. *Durant*, 95 U. S. 576, 578, 24 L. ed. 391, 393; *Sharp* v. *Taylor*, 2 Phill. Ch. 801, 817; *Gilliam* v. *Brown*, 43 Miss. 642, 664; *Lestapier* v. *Ingraham*, 5 Pa. 71, 81; *Hipple* v. *Rice*, 28 Pa. 406; *Willson* v. *Owen*, 30 Mich. 474; *Richardson* v. *Welch*, 47 Mich. 309; *Wann* v. *Kelly*, 2 McCrary, 623, 630, 5 Fed. Rep. 584; *Tenant* v. *Elliott*, 1 Bos. & P. 3; *Farmer* v. *Russell*, 1 Bos. & P. 296; *Thomson* v. *Thomson*, 7 Ves. Jr. 470; *Owen* v. *Davis*, 1 Bail. L. 315.

There are certain underlying principles—clear and well-defined—which govern and control the propositions announced in these authorities; and, from a careful consideration thereof, it can readily be ascertained whether they have or have not any binding force in their application to the facts of this case.

Armstrong v. *American Exch. Nat. Bank*, 133 U. S. 434, 469, 33 L. ed. 747, 760, which was a suit upon a draft and certificate of deposit, may be taken as a representative case under the first proposition. Armstrong was the receiver of the Fidelity National Bank of Cincinnati, Ohio. The Fidelity National Bank of Cincinnati drew a draft for $100,000 on the Chemical National Bank of New York City, payable to the order of the American Exchange National Bank of Chicago, and put it into the hands of one Wilshire, who delivered it, for value, to C. J. Kershaw & Company, and they indorsed it for deposit to their account in the Chicago bank, which credited its amount to them, and paid their checks against it. The court held that Wilshire did not act as the agent of the Cincinnati bank, and that in a suit by the Chicago bank against the receiver of the Cincinnati bank, which had failed, to recover the amount of the draft, the Chicago bank was a bona fide holder of it for value, and want of consideration could not be shown by the receiver. One defense set up to the suit on the certificate of deposit was that Harper, vice president of the Cincinnati bank, its assistant cashier, and Wilshire, of Wilshire, Eckert, & Co., conspired to defraud that bank by using its funds in speculating in wheat in Chicago, through C. J. Kershaw & Co., so as to make a "corner" in wheat. The court held that the plaintiff could not refuse to honor the checks of C. J. Kershaw & Co. against the deposit, on the ground that C. J. Kershaw & Co. intended to use the money to pay antecedent losses in the gambling wheat transactions; and that, where losses have been made in an illegal transaction, a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used. It was these facts, and rulings of the court, that led up to the announcement of the legal principles under consideration. In the discussion of that case the court said (at p. 466): "When the plaintiff received the deposit from Kershaw & Co., it was bound to honor their checks against it; and it could not refuse to pay them on the ground that Kershaw & Co. intended to make an improper use of the money. If Wilshire, Eckert, & Co. and Kershaw & Co. were engaged in gambling, and the former had deposited money in the Fidelity Bank to be transferred to the plaintiff, in order that Kershaw & Co. might check out the amount from the plaintiff's bank in payment of losses sustained in the gambling transactions, and both banks knew that the money was to be so used, still the Fidelity Bank, having received the deposit, could not refuse to pay it over to the plaintiff, and the plaintiff, having received it, could not refuse to honor the checks of Kershaw & Co. drawn against it."

The *Armstrong Case* is in line with the early English cases of *Tenant* v. *Elliott*, *Farmer* v. *Russell*, *Sharp* v. *Taylor*, and others heretofore cited, to the effect that A, having received money to the use of B on an illegal contract between B and C, shall not be allowed to set up the illegality of the contract as a defense in an action brought by B

for money had and received. The principle of these cases cannot be questioned. But a bare statement of the facts upon which the principles were there applied shows, beyond question, that the facts of the present case are not, and cannot be, brought within the rule there announced. This case belongs to a different class. The distinction between the class of cases is clearly set forth in *Thomson* v. *Thomson*, 7 Ves. Jr. 470. The master of the rolls, after declaring that the agreement there under consideration was illegal, said: "There is an equity against the fund, I admit, if you can get at it by a legal agreement. The defense is very dishonest, but in all illegal contracts it is against good faith as between the individuals to take advantage of that. A man procures smuggled goods, and keeps them, but refuses to pay for them. So, in the underwriter's case, an insurance contrary to the act of Parliament, the brokers had received the money and refused to pay it over; and it could not be recovered. No matter who complains of it, the thing is illegal. You have no claim to this money except through the medium of an illegal agreement, which, according to the determinations, you cannot support. I should have no difficulty in following the fund, provided you could recover against the party himself. If the case could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing his trust. *Tenant* v. *Elliott* is, I think, an authority for that. But in this instance it is paid to the party, for there can be no difference as to the payment to his agent. Then, how are you to get at it except through this agreement? There is nothing collateral, in respect of which, the agreement being out of the question, a collateral demand arises, as in the case of stock-jobbing differences. Here you cannot stir a step but through that illegal agreement; and it is impossible for the court to enforce it."

Brooks v. *Martin*, 2 Wall. 70, 17 L. ed. 732, is relied upon by appellee to show that the contract and agreement between the parties had been fully executed and completed. There the parties were partners in buying up soldiers' claims, contrary to law. When the suit was brought, all the claims of the soldiers illegally purchased by the partnership, with money advanced by the complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had in many cases been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the land so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were, then, in the hands of the defendant, lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It was to have an account of these funds, and a division of these proceeds, that the suit was brought. Upon this statement of the facts the court said: "Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute enacted for the benefit of the soldier is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case."

In support of these views, the court quotes *in extenso* from *Sharp* v. *Taylor*, 2 Phill. Ch. 801, 817, which closed with the statement that "the difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in *Tenant* v. *Elliott* and *Farmer* v. *Russell*, and recognized and approved by Sir William Grant in *Thomson* v. *Thomson*;" thus clearly indicating the class of cases to which the case then under consideration belongs. The distinction between the cases where a recovery can be had and the cases where a recovery cannot be had of money connected with illegal transactions, to be gleaned from all the authorities, is substantially this: That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him in connection with that contract or money due him as profits derived from the contract; but that when the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction, and the title or right of the party to recover is not dependent upon that contract, and his case may be proved without reference to it, then he is entitled to recover.

The doctrine of *Brooks* v. *Martin*, *supra*, and kindred cases is, and always should be, applied in cases where the fraud complained of is between individuals, which does not in any manner affect the public interest. If McMullen and Hoffman had agreed to continue their partnership, by investing the profits received by Hoffman under the illegal contract in the purchase of property, mortgages, bonds, or other securities, neither of them would be permitted, as against the other, to set up the fact that the money so invested was derived as profits from an illegal transaction, in which the rights of the public were involved. Numerous instances

are found in the books which present the distinction existing between the two lines of cases under consideration in a very clear light.

In *King* v. *Winants*, 71 N. C. 469, the court, in reviewing the principles announced in *Brooks* v. *Martin*, 2 Wall. 70, 17 L. ed. 732, said: "Two men enter into a conspiracy to rob on the highway, and they do rob; and, while one is holding the traveler, the other rifles his pocket of $1,000, and then refuses to divide; and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a court of justice hear them? No case can be found where a court has allowed itself to be so abused. Now, if these robbers had taken the $1,000, and invested it in some legitimate business as partners, and had afterwards sought the aid of the court to settle up that legitimate business, the court would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of *Brooks* v. *Martin*, 2 Wall. 70, 17 L. ed. 732, so much relied on by plaintiff."

The learned counsel for appellee, recognizing the force of reasoning of the authorities, admits, for the purpose of his argument, that if, after the award was made to Hoffman, he had refused to enter into the partnership arrangement, McMullen could not have compelled him so to do, or have collected any damages for his refusal, "because the grounds then existing as the basis of appellee's claim would have been that he had rendered service in securing the award, and, necessarily counting upon that service, he would have had to bring in into the court, and its character would have been a subject for investigation. But, when Hoffman entered into the partnership agreement, all that matter, as between them, became a dead letter." If this position could be maintained, it would furnish a very convenient way for escaping the penalty which the law imposes upon all persons who have secured contracts in an illegal and unlawful manner. A contract secured by corrupt means—the bribing of public officers, buying off all rival bidders, thus stifling all competition where contracts are to be let to the lowest bidder—could always be enforced by a simple agreement of partnership by the parties guilty of the fraud. The fraud, under this rule, is a thing of the past,—has become "a dead letter," or is made honest by a single stroke of the pen, creating a new agreement to share and share alike in performing the illegal contract. What would there be left to discourage parties in their illegal combinations to defeat the ends of justice if this rule should be adopted and enforced by the court? The illegality of the contract could always be avoided as between the parties to the partnership agreement. We prefer to tread in the beaten path; to follow the safe road which has always been kept clean, in good condition and order, and which furnishes a safe method of protection to the public who honestly travel thereon, and provides a penalty to all parties who depart therefrom by crooked ways, which naturally lead and always tend to destroy the public interests. It is manifest to every layman and lawyer, as well as to the courts, that such agreements would destroy all competition in the letting of contracts for public works. In the language of the authorities, such agreements are always declared void. Why? Because men with these agreements in their hands, and relying upon them for gain, do not act towards the public and third persons as they would without them, under the stimulus of competing opposition.

This suit is brought for an accounting between the parties of the profits realized on the contract made with the committee for the city of Portland upon its award to Hoffman & Bates upon the bid of Hoffman. The foundation of the case rests upon the legality of that contract. The case could not be proved without first showing the contract, and then proving the amount of money received and expended thereon. If Hoffman had admitted that a specified sum of money was due to McMullen, it may be that McMullen could have maintained an action upon an account stated between them. *Hanks* v. *Baber*, 53 Ill. 292; *Chace* v. *Trafford*, 116 Mass. 532, 17 Am. Rep. 171; 1 Am. & Eng. Enc. Law, 2d ed. p. 437. But it does not appear that any such admission has been made. No promise has been given by Hoffman to McMullen since the completion of the contract upon which a recovery is sought. This suit, as before stated, is for an accounting, and the amount found due in the circuit court was only ascertained, and could only be determined, by an investigation of the transaction between McMullen and Hoffman arising out of the contract with the committee. The relief prayed for required the court to investigate all of the various transactions of the parties from the beginning to the end, and adjust the differences between them. We are called upon to examine all the evidence as to the manner in which they agreed with each other to put in their bids, and decide which was most faithless to the other, and determine which got away with the most of the spoils, and to help them to make a just and equitable division. This is just what the courts in all cases of illegal contracts, agreements, or enterprises have universally refused to do. The act of Hoffman in refusing to divide the profits cannot be too strongly condemned. But it has often been said that courts are not organized to enforce the saying that there is honor among wrongdoers, and the desire to punish the man that fails to observe this rule must not lead the court to a decision that such persons are entitled to the aid of courts to adjust their differences arising out of, and requiring an investigation of, their illegal transactions.

The conclusions reached upon this branch of the case render it unnecessary to consider

the question argued by counsel as to whether or not the partnership between Hoffman and McMullen was dissolved long prior to the completion of the contract, or to examine any of the questions presented in the cross-appeal by McMullen against Hoffman. The views herein expressed are decisive of the whole case.

The judgment and decree of the Circuit Court are reversed.

CALIFORNIA SUPREME COURT.

F. BERKA, *Respt.*,
v.
J. G. WOODWARD, Treasurer of Santa Rosa, *Appt.*

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

1. **An officer cannot recover on an implied contract** with a municipality for materials supplied to it, where the statutes prohibit him from being "directly or indirectly interested in any contract" with the city, and make a violation thereof a misdemeanor.
2. **The allowance by a city council of a claim on an invalid contract** does not give to it a validity which it otherwise did not possess.

(June 17, 1899.)

APPEAL by defendant from a judgment of the Superior Court for Sonoma County in favor of plaintiff in an action brought to compel defendant to pay certain warrants which had been issued by the city of which he was treasurer. *Reversed.*

The facts are stated in the opinion.

Messrs. **O. O. Webber** and **J. R. Leppo**, for appellant:

The contracts, in payment of which the alleged warrants were drawn, are void.

The sale of the lumber and other materials by the plaintiff, and its purchase by the city of Santa Rosa, constituted a contract. When the plaintiff filed his verified claim against the city for the purchase price of the merchandise, he admitted the character of the transaction, for the sole foundation of his claim was that the city had contracted to pay for the goods furnished.

Pacific Undertakers v. *Widber*, 113 Cal. 205.

Both the city charter and the Political Code prohibit him from being interested, directly or indirectly, in any contract made by the city or city council.

If § 71 of the Penal Code is operative and the law of California, and a person guilty of a violation of the section can be punished by imprisonment in the state prison, it is because the acts mentioned are unlawful, and, being unlawful, any contract growing out of them or based upon them is absolutely void.

Bank of United States v. *Owens*, 2 Pet. 538, 7 L. ed. 512; *Coppell* v. *Hall*, 7 Wall. 558, 19 L. ed. 247; *Fowler* v. *Scully*, 72 Pa. 456, 13 Am. Rep. 708; *Seidenbender* v. *Charles*, 4 Serg. & R. 151, 8 Am. Dec. 682; *Brooks* v. *Cooper*, 50 N. J. Eq. 761, 21 L. R. A. 617; *Swanger* v. *Mayberry*, 59 Cal. 93; *Santa Clara Valley Mill & Lumber Co.* v. *Hayes*, 76 Cal. 390; *Gardner* v. *Tatum*, 81 Cal. 370.

It is the duty of this court to dismiss this action if the contract is unlawful, even although the objection be not made by the defendant.

Morrill v. *Nightingale*, 93 Cal. 458; *Visalia Gas & E. L. Co.* v. *Sims*, 104 Cal. 332; *Wyman* v. *Moore*, 103 Cal. 214; *Power* v. *May*, 114 Cal. 210; *Capron* v. *Hitchcock*, 98 Cal. 430; *Alexander* v. *Johnson*, 144 Ind. 82; *Winchester Electric Light Co.* v. *Veal*, 145 Ind. 506; *Woods* v. *Armstrong*, 54 Ala. 150, 25 Am. Rep. 671, note; *Smith* v. *Albany*, 7 Lans. 14, 61 N. Y. 444; *Wickersham* v. *Crittenden*, 93 Cal. 29; *Edwards* v. *Estell*, 48 Cal. 196; *Finch* v. *Riverside & A. R. Co.* 87 Cal. 602; *Shakespear* v. *Smith*, 77 Cal. 640.

Courts will not aid parties in the enforcement of contracts thus interdicted by the law.

Jones v. *Hanna*, 81 Cal. 509; *Davis* v. *Rock Creek Lumber Flume & Min. Co.* 55 Cal. 364, 36 Am. Rep. 40; *Wilbur* v. *Lynde*, 49 Cal. 292; *San Diego* v. *San Diego & L. A. R. Co.* 44 Cal. 112; *Rice* v. *Hayward's Trustees*, 107 Cal. 401; *Fowler* v. *Scully*, 72 Pa. 456, 13 Am. Rep. 707; *Gulick* v. *Ward*, 10 N. J. L. 102, 18 Am. Dec. 389; *Patton* v. *Gilmer*, 42 Ala. 548, 94 Am. Dec. 665, and note; *Bowman* v. *Phillips*, 41 Kan. 364, 3 L. R. A. 631; *Chicago Gaslight & Coke Co.* v. *People's Gaslight & Coke Co.* 121 Ill. 530; *Ormerod* v. *Dearman*, 100 Pa. 561, 45 Am. Rep. 391; *Spence* v. *Harvey*, 22 Cal. 341, 83 Am. Dec. 69; *Buckley* v. *Humason*, 50 Minn. 195, 16 L. R. A. 423; *Goodrich* v. *Tenney*, 144 Ill. 422, 19 L. R. A. 371; *Levy* v. *Spencer*, 18 Colo. 532; *Leonard* v. *Poole*, 114 N. Y. 371, 4 L. R. A. 728.

When the court determines that injury might have resulted, it is enough to invalidate the transaction.

Spence v. *Harvey*, 22 Cal. 342, 83 Am. Dec. 69; 1 Dill. Mun. Corp. § 444, pp. 514–516.

Messrs. **D. R. Gale** and **J. T. Campbell**, for respondent:

An implied contract is one the existence

NOTE.—As to the power of an officer to contract with the public body or municipality which he represents, see *note* to Tippecanoe County Comrs. v. Mitchell (Ind.) 15 L. R. A. 45 L. R. A.

520; Findlay v. Pertz (C. C. App. 6th C.) 29 L. R. A. 188; and Capital Gas Co. v. Young (Cal.) 29 L. R. A. 463.

and terms of which are manifested by conduct.

Civil Code, 1621; *Kennedy* v. *Miller*, 97 Cal. 433.

Contracts are executory and executed in their nature. It is only while a contract remains uncompleted or executory that the privilege of avoiding it may be exercised. Such contracts are not expressly prohibited but are voidable.

Concordia v. *Hagaman*, 1 Kan. App. 35.

In cases where the officer has dealt fairly with the city in furnishing goods the law allows fair compensation though no contract was made, and when the contract has been avoided reasonable compensation follows. *Ibid.*; *Call Publishing Co.* v. *Lincoln*, 29 Neb. 149.

The legislation seems to be directed alone to express, and not to implied, contracts, and no considerations of public policy will justify the refusal of a *quantum meruit*.

Spearman v. *Texarkana*, 58 Ark. 348, 22 L. R. A. 855; *Gardner* v. *Butler*, 30 N. J. Eq. 720; *Pickett* v. *School Dist. No. 1*, 25 Wis. 558, 3 Am. Rep. 105; *Niles* v. *Muzzy*, 33 Mich. 61, 20 Am. Rep. 670; *Macon* v. *Huff*, 60 Ga. 221; *Marsh* v. *Fulton County*, 10 Wall. 676, 19 L. ed. 1040; *Louisiana* v. *Wood*, 102 U. S. 294, 26 L. ed. 153; *San Francisco Gas Co.* v. *San Francisco*, 9 Cal. 453; *Morville* v. *American Tract Soc.* 123 Mass. 129, 25 Am. Rep. 40; *McConoughey* v. *Jackson*, 101 Cal. 265; *Hitchcock* v. *Galveston*, 96 U. S. 341, 24 L. ed. 659.

Although a contract may be void, yet as the borrower has the lender's money, the law presumes a promise to repay on demand. *Swift* v. *Swift*, 46 Cal. 266; *Pimental* v. *San Francisco*, 21 Cal. 362; *Argenti* v. *San Francisco*, 16 Cal. 282; *Marsh* v. *Fulton County*, 10 Wall. 676, 19 L. ed. 1040; *Louisiana* v. *Wood*, 102 U. S. 294, 26 L. ed. 153; *Chapman* v. *Douglas County*, 107 U. S. 356, 27 L. ed. 381; *Ashhurst's Appeal*, 60 Pa. 290; *Miltenberger* v. *Cooke*, 18 Wall. 429, 21 L. ed. 866; *Currie* v. *School Dist. No. 26*, 35 Minn. 163; *Capital Gas Co.* v. *Young*, 109 Cal. 140, 29 L. R. A. 463; *Brown* v. *Pomona Bd. of Edu.* 103 Cal. 531.

The party receiving the benefit, although illegal, is held to accountability, and the law implies an obligation to pay.

Crampton v. *Zabriskie*, 101 U. S. 601, 25 L. ed. 1070; *Parkersburg* v. *Brown*, 106 U. S. 487, 27 L. ed. 238; *Chapman* v. *Douglas County*, 107 U. S. 356, 27 L. ed. 381.

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

This is an appeal from a judgment in mandate ordering the treasurer of the city of Santa Rosa to honor and to pay two warrants issued in favor of plaintiff by the common council of the city. The warrants were in payment of lumber and materials "had and received by the city from Berka." At the times when the material was supplied, at the times when Berka presented his bills and demands for payment, and at the time when the city council allowed and approved his claims, Berka was an officer of the city and a member of its common council. These facts appear by the petition. The defendant interposed a demurrer both general and special. This demurrer was "overruled without leave to answer," and a peremptory writ of mandate was ordered to be issued.

The question of first importance presented upon this appeal is that of the right of an officer of the city to recover upon an implied contract with the municipality. The following provisions of the law, and of the charter of the city of Santa Rosa, have direct bearing upon this consideration: "No councilman to be directly or indirectly interested in any contract made by them, or in any pay for work done under their direction or supervision." Charter Santa Rosa (Stat. 1875–76, p. 255). "All bills, claims, and demands against the city shall be . . . filed by the city clerk, who shall present it to the council, and they shall allow or reject the same in whole or in part." Charter Santa Rosa (Stat. 1875–76, p. 257). "Members of the legislature, state, county, city, and township officers must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members." Pol. Code, § 920. "State, county, township, and city officers must not be purchasers at any sale, nor vendors at any purchase made by them in their official capacity." Pol. Code, § 921. "Every contract made in violation of any of the provisions of the two preceding sections may be avoided at the instance of any party except the officer interested therein." Pol. Code, § 922. "Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip or other evidence of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than $1,000 or by imprisonment in the state prison not more than five years, and is forever disqualified from any office in this state." Penal Code, § 71. "That is not lawful which is (1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or, (3) otherwise contrary to good morals." Civil Code, § 1667. "The consideration of a contract must be lawful within the meaning of § 1667." Civil Code, § 1607. "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void." Civil Code, § 1608.

It would seem that the need of discussion is foreclosed by the mere quotation of our express laws, but respondent contends, and in his contention prevailed in the trial court, that these provisions have no application to an implied contract such as this admittedly is, and that in the case of implied contracts which are not *malum in se*, even though

they may be against public policy, the rule is that, if the consideration has passed,—if the contract upon the one hand has been wholly executed,—the party who has so performed will be allowed a recovery upon *quantum meruit* or *quantum valebat*, as the case may be. The importance of this question, the right of an officer of the city to recover upon an implied contract with his municipality, its gravity and far-reaching consequence, demand something more than a passing consideration.

By subdivision 1 of § 1667 of the Civil Code reference is had to contracts expressly prohibited. These will be discussed hereafter. Within subdivisions 2 and 3 of the same section are embraced the multitude of contracts which, though not expressly prohibited, are refused recognition upon grounds of public policy. These contracts, in contemplation of their subject-matter, may be divided into two distinct classes: The first, where the consideration is base and against good morals,—*malum in se;* the second, where the consideration is in itself lawful, but where the mode is unauthorized, or where, because of some fiduciary relation between the parties, the law will not permit the contract to be made, nor countenance it when made. As to the first, it is said in *Blachford* v. *Preston*, 8 T. R. 95: "A plaintiff cannot recover in a court of justice whose cause of action arises out of a contract made between him and the defendant in fraud, or to the prejudice of third persons." Of the second Lord Mansfield and the court of King's bench, in *Jones* v. *Randall*, 1 Cowp. 39, declared: "Many contracts which are not against morality are still void, as being against the maxims of sound policy." The first class of contracts embraces the infinite number of those made to further crime, or to interfere with the administration of the law, or to obstruct the course of justice, —all contracts affecting the rights and prerogatives of the government, as well as the personal rights of the citizen. In the second class no baseness is inherent in the essence of the contract, but there is either some defect in the mode of creation or the manner of performance, or some incapacity in one or the other of the parties because of nonage, mental disability, or the fiduciary relation which they sustain to each other. Within this second class, as has been said, are the contracts of one who stands in a fiduciary relation to another with that other. Because of the tendency to abuse, the temptation to take undue advantage, these contracts, even when not expressly prohibited by law, are still looked upon with disfavor, and they may be avoided at the instance of the other party in interest; but, where the trustee or other fiduciary agent has fully carried out the terms of the contract, the contract itself being fair, public policy, which is not punitive, is satisfied to leave the right of rescission to the other party. If he shall elect to rescind, he does so upon the equitable condition of restoring what he has received. If, however, he chooses to retain the consideration, he is not bound by the terms and conditions of the contract, but the courts permit an action to establish and to recover the reasonable value of the thing sold or the service rendered. Such, it may be said, is the general rule, but in this state the line has been more closely drawn. Such contracts are against public policy. Being against public policy, the making of them is not to be encouraged. But to permit a profit is thus to encourage them. Therefore, in this state, when a recovery is permitted, it is not for the reasonable or market value, which naturally includes within it the contemplation of a profit, but, where possible, the recovery is limited to the actual cost. *Fox* v. *Hale & N. Silver Min. Co.* 108 Cal. 369.

Where contracts of public officials with their counties or municipalities have not been expressly forbidden by law, the principles which we have been considering have in some cases been applied, and a recovery has been permitted. In these cases it has been said that the demands of public policy have been satisfied by allowing the officer to recover, not according to the terms of his contract, but upon a *quantum meruit* or *quantum valebat*. *Spearman* v. *Texarkana*, 58 Ark. 348, 22 L. R. A. 855; *Pickett* v. *School Dist. No. 1*, 25 Wis. 551, 3 Am. Rep. 105; *Concordia* v. *Hagaman*, 1 Kan. App. 35; *Gardner* v. *Butler*, 30 N. J. Eq. 702; *Call Publishing Co.* v. *Lincoln*, 29 Neb. 149; *Macon* v. *Huff*, 60 Ga. 221; *Currie* v. *School Dist. No. 26*, 35 Minn. 163; *Niles* v. *Muzzy*, 33 Mich. 61, 20 Am. Rep. 670. But in no one of these cases, nor indeed in any case which has come under our observation, have the courts entertained any contract, or any rights growing out of a contract, where either the consideration is base, or the contract is against the express prohibition of the law. Thus, in *Call Publishing Co.* v. *Lincoln*, 29 Neb. 149, the publishing company had sued the city to recover for printing. Bushnell was a stockholder in the plaintiff company, and was chairman of the city council's committee on printing during the time of the publications in question. The court held that the statute of Nebraska prohibiting officers from being interested in any contract with their municipalities referred to express contracts; that the contract under consideration was an implied contract. It therefore concluded that the contract was not one expressly prohibited by law, and proceeded to discuss and decide the question upon the doctrine of public policy. In *Concordia* v. *Hagaman*, 1 Kan. App. 35, the prohibitory statute was "An Act to Restrain State and County Officers from Speculating in Their Offices." The contract there was a contract made by Hagaman when he was a member of the city council, for the printing of the ordinances of the city. The court conceded that no recovery could be had if the contract were one expressly prohibited by law, but determined that the legislature had

ex industria excluded municipal officers, and had limited the operation of the law to state and county officers. That being so, the contract was left to be considered upon the grounds of public policy alone. And in discussing that question the court says: "In considering the question of illegality of the contract, it is proper that a distinction be made between a contract which is illegal because its execution requires the performance of an immoral or unlawful act, or transgresses an express statutory prohibition, and one wherein the act to be performed is lawful, but the agreement is invalid because of the manner it was entered into, or because of incapacity to contract in either of the parties. . . . When the contract looks to the doing of a lawful act, but may be avoided by one of the parties to it because the other party at the time acted in a fiduciary capacity for the first, the rule is applied in order to avoid the possibility of reaping any undue advantage from the contract. When it has been executed without objection, and actual benefits have been received under it, all parties acting in entire good faith, the law is maintained and the ends of justice subserved by disregarding those parts of the express agreement wherein advantage might have been taken, and allowing compensation merely for the reasonable value of the benefits received under it. Considerations of public policy do not require the doing of less than this. The defense of public policy has no element of punishment in it, nor is it allowed out of consideration for the defendant. It is upheld by the consideration which the law ever entertains for the protection of the public, and the settled policy of the courts to give no aid to the enforcement of contracts whose general tendency is injurious to the public. Hence the courts refuse all relief to one who asks compensation for the doing of an act which is conclusively presumed to be hurtful to public interests or morals. When, however, the thing accomplished is proper and beneficial, and not placed under the ban of any penal prohibitory enactment, the reason for the rule fails, and it should not be applied any further than is necessary for the public good."

This, then, is the undoubted rule, that, when a contract is expressly prohibited by law, no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent; for to permit this would be for the law to aid in its own undoing. Says the Supreme Court of the United States in *Bank of United States* v. *Owens*, 2 Pet. 527, 7 L. ed. 508: "No court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they then become auxiliary to the consummation of violations of law? . . . There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal." And again the same august tribunal, in *Coppell* v. *Hall*, 7 Wall. 542, 19 L. ed. 244, says: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Where the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation." And in our own state it has been said (*Swanger* v. *Mayberry*, 59 Cal. 91): "The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by a statute on the ground of public policy." Nor in such cases does it matter whether the contract has been partially or wholly performed, or whether the consideration has passed or not. "The test," says Judge Duncan in *Swan* v. *Scott*, 11 Serg. & R. 164, "whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, a court will not assist him, whatever his claims in justice may be upon the defendant." And this must be so; for, while, as a matter of private justice between individuals, it would be but fair that one, under such an illegal contract, should restore the consideration or should make the payment, the rights of the public are superior to any such private considerations, and the public's right is that the fountains of justice shall remain unpolluted; that no court shall lend its aid to a man who grounds his action upon an immoral or illegal act. Therefore there is no place for equitable considerations, presumptions, or estoppels. *Fowler* v. *Scully*, 72 Pa. 456, 13 Am. Rep. 699. *Ex turpi causa non oritur actio.* Whenever such a contract comes before the court, the action must fail, and the parties will be left in the situation in which they may be found. Some slight attempt will be found in some of the cases to evade the application of this well-settled doctrine upon the ground of the hardship which sometimes results, but in no case, we think, has the existence of the rule been denied, or its justice as a matter commanding public necessity been questioned.

The rule, further, is that, where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void nor expressly prohibit it. *Swanger* v. *Mayberry*, 59 Cal. 93; *Santa Clara Valley Mill & Lumber Co.* v. *Hayes*, 76 Cal. 390; *Gardner* v. *Tatum*, 81 Cal. 370; *Morrill* v. *Nightingale*, 93 Cal. 458; *Wyman* v. *Moore*, 103 Cal. 214;

Visalia Gas & E. L. Co. v. *Sims*, 104 Cal. 332; *Woods* v. *Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Fowler* v. *Scully*, 72 Pa. 456, 13 Am. Rep. 699; *Seidenbender* v. *Charles*, 4 Serg. & R. 151, 8 Am. Dec. 682; *Brooks* v. *Cooper*, 50 N. J. Eq. 761, 21 L. R. A. 617.

Applying these principles to the contract before us, it is most manifest that it is not only against the express prohibition of the law, but that the law makes penal upon the part of a public officer the entering into it. We can yield no assent to the contention that our laws apply only to express contracts. The statute itself is general in its terms. Both in the charter provision above quoted, and in § 920 of the Political Code, these officers are forbidden to be interested in "any contract" made by them. The only difference between an express contract and an implied contract is that in the former all of the terms and conditions are expressed between the parties; in the latter some one or more of the terms and conditions are implied by law from the conduct of the parties. Generally, express contracts with a municipality are made under the system of competitive bidding. Usually this is made compulsory by law. To say that implied contracts were not prohibited would be to destroy the purpose and efficiency of the laws, and leave the people at the mercy of careless or unscrupulous officers. The case of *Smith* v. *Albany*, 61 N. Y. 444, is very similar to the one at bar. The council of the city, of which plaintiff was a member, appropriated $2,500 for defraying expenses of a Fourth of July celebration. Upon the day plaintiff furnished horses and vehicles for use in the celebration, and the fair value of their use was the sum of $139. The New York statute made it unlawful for a member of any common council to become a contractor under any contract authorized by the common council, and authorized such contracts to be declared void at the instance of the city. Here was an implied contract, but it was one prohibited by the statute law as well as by considerations of public policy, and the plaintiff was denied any recovery. Our statutes are general in prohibiting any officer from being interested in such contracts, and, if ever there was an occasion for its strict enforcement, it certainly exists in a case such as this, where the contractor is a member of the common council, whose duty it is to make such contracts on behalf of the city. He cannot be permitted to place himself in any position where his personal interest will conflict with the faithful performance of his duty as trustee, and it matters not how fair upon the face of it the contract may be the law will not suffer him to occupy a position so equivocal and so fraught with temptation. Note the situation here presented. This material was obtained from a member of the city council, and he, as a member of that council, sits in judgment upon the validity and amount of his own claim. If he does not act, still the city is deprived of its right to his services and judgment in determining these very questions.

The fact that the claim was allowed by the council does not give to it a validity which it otherwise did not possess. *Santa Cruz Rock Pav. Co.* v. *Broderick*, 113 Cal. 628. The duty of treasurer is to pay only legal demands against his funds. The law will not imply a promise to pay for services illegally rendered under a contract expressly prohibited by law. *Gardner* v. *Tatum*, 81 Cal. 370.

For the foregoing reasons *the judgment is reversed*, with directions to the trial court to sustain the general demurrer to plaintiff's complaint.

We concur: Temple, J.; McFarland, J.

INDIANA SUPREME COURT.

John LEFFLER, *Appt.*,
v.
STATE of Indiana.

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

1. **A false pretense need not be such that a man of ordinary caution and prudence would give it credit, or that it could not be guarded against by ordinary care and prudence, in order to be indictable.**
2. **A false representation by a man that he is unmarried, on the faith of which money or property is obtained, may constitute an indictable false pretense.**

(June 28, 1890.)

NOTE.—That a person cannot himself be a false token in the case of representing himself to be unmarried, see State v. Renick (Or.) 44 L. R. A. 268.

45 L. R. A.

APPEAL by defendant from a judgment of the Circuit Court for Fayette County convicting him of obtaining money under false pretenses. *Affirmed.*

The facts are stated in the opinion.

Messrs. **R. N. Elliott and I. T. Tuesler** for appellant.

Mr. **George L. Gray**, for appellee:

Whether the pretenses were of such a character as to impose upon the prosecutor is a question of fact to be left to the jury as they must necessarily vary with each particular case.

2 Wharton, Crim. L. § 2133; *Miller* v. *State*, 79 Ind. 198; *Wagoner* v. *State*, 90 Ind. 504; *Shaffer* v. *State*, 100 Ind. 365; 7 Am. & Eng. Enc. Law, p. 707; Gillette's New Ind. Crim. L. 253, 254; 1 Bishop. Crim. L. § 436; *Johnson* v. *State*, 36 Ark. 242; *State* v. *Montgomery*, 56 Iowa, 195; *Bowen* v.

State, 9 Baxt. 45, 40 Am. Rep. 71; *Watson* v. *State*, 16 Lea, 604; *State* v. *Williams*, 12 Mo. App. 415; *State* v. *Mills*, 17 Me. 211; *Smith* v. *People*, 47 N. Y. 303; *People* v. *Pray*, 1 Mich. N. P. 69; *Colbert* v. *State*, 1 Tex. App. 314.

Why should the credulity of the victim be any defense to crime? Are the purpose and intent of the perpetrator any the less criminal because he has been successful in finding an easy prey to the fraud?

It is held a false pretense in law for a person to falsely represent himself to be an officer, holding a warrant for the arrest of another and thereby obtaining money as a consideration of not making the arrest (*Perkins* v. *State*, 67 Ind. 270, 33 Am. Rep. 89); to obtain money, the charges for carriage of goods, by falsely pretending to have carried and delivered the property (7 Am. & Eng. Enc. Law, p. 750, note 3); to obtain money by falsely pretending that more postage is due on a letter than the correct amount (*Reg.* v. *Byrne*, 10 Cox, C. C. 369); to obtain a warrant for money and payment on the same by falsely representing that certain materials had been furnished to a municipal corporation (*People* v. *Genet*, 19 Hun, 91); to obtain money by a person falsely representing himself to be the authorized collector for a directory sold by subscription (*Reg.* v. *Speed*, 46 L. T. N. S. 174); to obtain money by falsely representing that a greater sum is owing by the debtor than actually is owing by him (*Reg.* v. *Taylor*, 15 Cox, C. C. 265); and to obtain money on a false representation of being an unmarried man (2 Bishop, Crim. L. § 422).

Any false representation of an existing fact by which a person obtains the loan of money is within the statute.

7 Am. & Eng. Enc. Law, pp. 752, 753; *Rex* v. *Villeneuve*, 2 East, P. C. 830.

The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves.

McKee v. *State*, 111 Ind. 381; *Miller* v. *State*, 79 Ind. 198; 2 Wharton, Crim. L. §§ 1186, 1187; 2 Bishop, Crim. L. §§ 433, 434; *Smith* v. *State*, 55 Miss. 410; 16 Am. L. Reg. 321–325.

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

Appellant was indicted, tried, and convicted of the offense of obtaining money under false pretenses. The only error assigned is that the court erred in overruling the motion to quash the indictment. It is insisted by appellant that the false pretenses alleged were not such as a person of ordinary caution and prudence would credit, and for that reason the indictment was insufficient. It is alleged that appellant "designedly, knowingly, falsely, and feloniously" pretended and represented "to the said Annie Kidwell that he, said John Leffler, was then and there a single man; that he was divorced from his wife; that there was then and there a judgment for alimony against him in the Rush circuit court of Rush county, Indiana; that there was then and there an unpaid balance of $15 on said judgment against him; that he wanted and needed said $15 from said Annie Kidwell, with which to pay off and liquidate said claim and judgment standing against him as aforesaid." The part of the statute upon which the indictment is based reads as follows: "Whoever, with intent to defraud another, designedly, by . . . any false pretense, . . . obtains from any person any money, or the transfer of any bond, bill, receipt, promissory note, draft, or check or thing of value, . . . shall be imprisoned," etc. Acts 1883, p. 126; Burns's Rev. Stat. 1894, § 2352 (Horner's Rev. Stat. 1897, § 2204). It was said in some of the earlier cases in this state that to support any indictment the false representations must be of such existing facts as would deceive a person of ordinary intelligence and prudence. *State* v. *Magee*, 11 Ind. 154; *Leobold* v. *State*, 33 Ind. 484; *Bonnell* v. *State*, 64 Ind. 498. But the later cases of *Shaffer* v. *State*, 100 Ind. 365; *Wagoner* v. *State*, 90 Ind. 504, and *Miller* v. *State*, 79 Ind. 198, hold that, whether or not the false pretenses are such as are calculated to deceive a person of ordinary caution and prudence, is not a question of law for the court, but a question of fact for the jury under all the circumstances. In *State* v. *Burnett*, 119 Ind. 392, however, it was again held, on a motion to quash the indictment, that the false representations must be of such a character that a man of common understanding is justified in relying upon them. In England, and many of the states, the rule is that any pretense which deceives the person defrauded is sufficient to sustain an indictment, although it would not have deceived a person of ordinary prudence. 2 Russell, Crimes, 9th Am. ed. 619–700; Roscoe, Crim. Ev. 7th Am. ed. 487, 488; 2 Bishop, Crim. L. §§ 433–436; *Reg.* v. *Woolley*, 1 Den. C. C. 559, 4 Cox, C. C. 191, 3 Car. & K. 98; 2 East, P. C. chap. 18, pp. 827–831; *Reg.* v. *Jessop*, Dears. & B. C. C. 442, 7 Cox, C. C. 399; *Reg.* v. *Giles*, Leigh & C. C. C. 502, 10 Cox, C. C. 44; *Johnson* v. *State*, 36 Ark. 242; *State* v. *Fooks*, 65 Iowa, 196 and 452; *State* v. *Montgomery*, 58 Iowa, 195; *People* v. *Pray*, 1 Mich. N. P. 69; *State* v. *Williams*, 12 Mo. App. 415; *Colbert* v. *State*, 1 Tex. App. 314; *Re Greenough*, 31 Vt. 279–290; *Watson* v. *People*, 87 N. Y. 561, 41 Am. Rep. 397; *People, Phelps*, v. *New York County Court of Oyer & Terminer*, 83 N. Y. 436–449; *People* v. *Cole*, 48 N. Y. S. R. 351; *People* v. *Rice*, 128 N. Y. 649; *State* v. *Mills*, 17 Me. 211; *Smith* v. *State*, 55 Miss. 513; *Watson* v. *State*, 16 Lea, 604; *Bowen* v. *State*, 9 Baxt. 45, 40 Am. Rep. 71; *Com.* v. *Henry*, 22 Pa. 256; *Thomas* v. *People*, 113 Ill. 531; *Cowen* v. *People*, 14 Ill. 348; *Bartlett* v. *State*, 28 Ohio St. 669, 670. In discussing this question an eminent author said: "But must the pretense be such as is calculated to mislead men of ordinary prudence? Some of the older cases lay down the doctrine that it must. But in reason, and, it is believed,

according to the better modern authorities, a pretense calculated to mislead a weak mind, if practised on such a mind, is just as obnoxious to the law as one calculated to overcome a strong mind practised on the latter. . . . Practically, it is impossible to estimate a false pretense otherwise than by its effect. It is not an absolute thing, to be handled and weighed as so much material substance; it is a breath issuing from the mouth of a man, and no one can know what it will accomplish except as he sees what in fact it does. Of the millions of men on our earth there is not one who would not be pronounced by the rest to hold some opinion, or to be influenced in some affair, in consequence of considerations not adapted to affect any mind of ordinary judgment and discretion. And no man of business is so wary as never to commit, in a single instance, a mistake such as any jury would say on their oath could not be done by a man of ordinary judgment and discretion. These things being so, plainly a court cannot, with due regard to the facts of human life, direct a jury to weigh a pretense, an argument, an inducement to action in any other scale than that of its effect." 2 Bishop, Crim. L. 7th ed. §§ 433, 436. In *Reg.* v. *Jessop*, Dears. & B. C. C. 442, 7 Cox, C. C. 399, the defendant passed to another for change a bank note, saying that it was for £5, when it really was, as he knew, for only £1, and received the change for a £5 note. He was held to have committed the offense, although the person to whom he passed the note could read. Lord Campbell, Ch. J., said: "We are all of opinion that the conviction was right. In many cases a person giving change would not look at the note; but, being told that it was a £5 note, and asked for change, would believe the statement of the party offering the note, and change it. Then if, giving faith to the false representation, the change is given, the money is obtained by false pretenses." In *Young* v. *King*, 3 T. R. 98, Kenyon, Ch. J., in defining the offense, gave "ordinary caution" as an ingredient; but Ashhurst said: "The legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind;" and Buller, J., said. "The ingredients of this offense are the obtaining money by false pretenses, and with an intent to defraud." In *Queen* v. *Wickham*, 10 Ad. & El. 34, Denman, Ch. J., said to counsel arguing that the fraud must be such as to impose on a man of ordinary caution: "I never could see why that should be. Suppose a man has just art enough to impose upon a very simple person, and defraud him, how is it to be determined whether the degree of fraud is such as shall amount to a misdemeanor? Who is to give the measure?" In *Reg.* v. *Woolley*, 1 Den. C. C. 559, 4 Cox, C. C. 191, 3 Car. & K. 98, the pretense was by a secretary of an Odd Fellows lodge that a member owed it a certain sum, greater than the real debt, and thus got the excess for himself. Held a legal false pretense. Alderson, B., said: "If a man represents as an existing fact that which is not an existing fact, and so gets your money, that is a false pretense; for instance, that a certain church had been built, and that there was a debt still due for the building, when there was no debt due, that would be a false pretense; yet the matter might easily be inquired into and ascertained. Or take the common case, the prisoner says, 'I am sent by Mrs. T. for a pair of shoes,' is not that a false pretense? Yet inquiry can be made, and, after the thing has happened, usually is made, and the falsehood detected." Lord Campbell said: "It seems that the legislature meant to prevent such gross frauds as may easily be perpetrated, though an inquiry might easily be made." "I entirely agree with the observation of Lord Denman in *Queen* v. *Wickham*." Erle, J., said: "It was once thought that the law was only for the protection of the strong and prudent. That notion has ceased to prevail." So, in *Reg.* v. *Giles*, 10 Cox, C. C. 44, Leigh & C. C. C. 502, where the defendant pretended to have power to bring back the prosecutrix's husband over hedges and ditches, Erle, Ch. J., said: "The pretense of power, whether moral, physical, or supernatural, made with the intent to obtain money, is within the mischief of the law." The great weight of the authorities and the better reason sustain the rule that it is not necessary that the pretense be such as will impose upon a man of ordinary caution, or as cannot be guarded against by ordinary care and prudence. The object and purpose of the law is to protect, not only the man of ordinary care and prudence, but also the weak and credulous against the strong, the ignorant, inexperienced, and unsuspecting against the experienced and unscrupulous. *McKee* v. *State*, 111 Ind. 378, 381. In *McKee* v. *State*, 111 Ind. 378, 381, it was urged by the appellant that the representations were so unreasonable, and of such a character, as that no person exercising reasonable caution would be warranted in believing them; in response to which this court said: "The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves. *Smith* v. *State*, 55 Miss. 413." An inexperienced person, a child, or a feeble old man might be induced to part with his property by false pretenses so flimsy and absurd as not to influence a man of ordinary prudence, and the falsity of which would at once be apparent to a man of experience. Still, if the representations were such as to secure the credit of such a person, and deprive him of the possession of his property, no matter how absurd such representations may appear to a person of more experience and of greater sagacity, they would be such representations as are contemplated by the statute. *McKee* v. *State*, 111 Ind. 378, 381; *Bowen* v. *State*, 9 Baxt. 45 and note, 40 Am. Rep. 75–80; *People* v. *Cole*, 43 N. Y. S. R. 351. As was said by Dr. Wharton: "The simple and credulous are as much under the shelter of

the law as are the astute. . . . That gross credulity is no defense is illustrated by the prosecutions sustained against conjurers and fortune tellers. Nothing but gross credulity could be imposed on by such pretenses; yet on behalf of those thus imposed on, prosecutions have been sustained." 2 Whart. Crim. L. 10th ed. §§ 1188, 1192. An indictment has been sustained when money was procured as a loan by a false pretense that the borrower owed a certain debt and required the money to make a payment thereof. 7 Am. & Eng. Enc. Law, p. 753; *State* v. *Montgomery*, 56 Iowa, 195. When money or property is obtained on the faith of a false representation that the defendant is a single man, it has been held that an indictment will lie. 7 Am. & Eng. Enc. Law, p. 748; 2 Russell, Crimes, 9th Am. ed. pp. 646, 647; 2 Bishop, Crim. L. §§ 422, 445; *Reg.* v. *Jennison*, 9 Cox, C. C. 158. Leigh & C. C. C. 157, 31 L. J. M. C. N. S. 146, 8 Jur. N. S. 442, 6 L. T. N. S. 256, 10 Week. Rep. 488. So far as *State* v. *Magee*, 11 Ind. 154; *Leobold* v. *State*, 33 Ind. 484; *Jones* v. *State*, 50 Ind. 473; *Bonnell* v. *State*, 64 Ind. 498; *Miller* v. *State*, 79 Ind. 198; *Wagoner* v. *State*, 90 Ind. 504; *Shaffer* v. *State*, 100 Ind. 365; *State* v. *Burnett*, 119 Ind. 392,—and any other cases in this state hold that, to come within the statute, the false pretense must be such that a man of ordinary caution and prudence would give it credit, or that it could not be guarded against by ordinary care and prudence, they are overruled.

Judgment affirmed.

INDIANAPOLIS UNION RAILWAY COMPANY, *Appt.*, v. Benjamin DOHN.

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

1. **A grant by a railroad company of the exclusive right to stand hacks on an area owned by it** adjacent to a passenger station, for the purpose of soliciting business, is unlawful, as the company, which acquired its grounds through the sovereign right of eminent domain, whether by purchase or by condemnation, cannot grant special privileges and immunities that the state could not; and such action is also against public policy as tending to restrict competition and to enhance prices.

2. **The payment by passengers for transportation includes** payment for the common use of the station facilities, and entitles them to have the railroad company refrain from coercing them into yielding further tribute by giving an exclusive right to a hackman to solicit their business as they leave the station.

(May 23, 1899.)

APPEAL by plaintiff from a judgment of the Circuit Court for Marion County in favor of defendant in a suit brought to enjoin defendant from entering upon appellant's station grounds to solicit customers. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Baker & Daniels** for appellant.

Mr. **Schuyler Haas** for appellee.

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

Suit to enjoin appellee from entering upon the station grounds of appellant to solicit customers for his hack. The question arises upon appellant's exception to the conclusion of law upon the facts specially found. The facts are briefly these: Appellant is a corporation composed of various railway companies, and organized under the act of March 2, 1885 (Acts 1885, p. 30; Burns's Rev. Stat. 1894, §§ 5232–5250; Horner's Rev. Stat. 1897, §§ 3964a–3964s). Appellee is the driver of a public conveyance, commonly called a "hack" engaged in the business of transporting persons, without discrimination, from place to place, in and about Indianapolis. Appellant owns the Union passenger station at Indianapolis. It acquired the ground partly by condemnation and partly by purchase. The station building faces north. The tracks are south of the building, under a train shed. At the north of the building is an open area, bounded on the north by Jackson Place street, on the east by McCrea street, on the south by the station building, and on the west by Illinois street. The distance from Jackson Place street to the station building is 67 feet. Along the north line of the building is a sidewalk 16 feet wide. The residue of the area is paved, and used as a driveway to and from the entrance, which is at the center of the north front. This condition has continued ten years. Appellant, by contract, undertook to give the Frank Bird Transfer Company the exclusive right to stand hacks on the area, and solicit business of persons leaving the station. Employees of the transfer company were accustomed to stand their hacks upon the area at all hours of day and night, and for such length of time as they pleased. Intending passengers were allowed to alight at the entrance of the station building from their private conveyances, or from public ones that had been employed to bring them there. Arriving passengers were permitted to be met at the entrance by their private conveyances, or by public ones previously engaged to meet them. All other vehicles except the transfer company's were excluded from the area. Appellant has had rules in force to this effect for many years. The city, by ordinance, permitted hacks to stand along the west side of McCrea street. An ordinance forbade hackmen to approach the station building nearer than 15 feet to solicit business. Appellee, within three weeks before the commencement of this suit, at least a dozen times, drove his hack upon

NOTE.—For other cases like the above, see *note* to Cole v. Rowen (Mich.) 13 L. R. A. 848, and State v. Reed (Miss.) 43 L. R. A. 134, and other cases cited in *footnote* thereto.

45 L. R. A.

See also 46 L. R. A. 431; 47 L. R. A. 532.

the area outside of the sidewalk, when he had no passenger to be discharged or to be received, and stayed from half an hour to an hour at a time, soliciting business from arriving passengers. Appellant several times told him that he should leave; that he was violating appellant's rules and regulations; and that he was trespassing on private property. Appellee each time refused to leave, stating that he had the right to stand his hack on the area so long as the transfer company was permitted to stand its hacks there, and that he intended to continue to come upon the area so long as the transfer company was given that privilege. From this finding it does not appear that appellee's conduct was boisterous or that he was interfering with appellant in the discharge of its duties to the passengers of the proprietary and associate railway companies, or that he was annoying or interfering with the passengers, or that he was refusing to comply with any rule or regulation of appellant that applied to all hackmen.

Appellant has the undoubted right to make rules and regulations concerning the use of its station and grounds. *Lucas* v. *Herbert*, 148 Ind. 64, 37 L. R. A. 376. The term "rules and regulations," however, implies uniformity in operation, not discrimination, for the pecuniary advantage of the promulgator. The question is not what rules, uniform in application and promulgated by appellant impartially in the interests of the traveling public, and without a money consideration to itself, might be held reasonable, and what unreasonable, but whether appellant may, under the guise of rules, exclude from its station grounds all hackmen but one, and thus protect a contract from which it derives a revenue. A collection of authorities is made in *Lucas* v. *Herbert*, 148 Ind. 64, 37 L. R. A. 376. To them may be added *Re Palmer*, L. R. 6 C. P. 194; *Parkinson* v. *Great Western R. Co.* L. R. 6 C. P. 554; *New York, N. H. & H. R. Co.* v. *Scovill*, 71 Conn. 136, 42 L. R. A. 157; *State* v. *Reed* (Miss.) 43 L. R. A. 134. The majority of the English cases appear to sustain, and the majority of the American to deny, the right of a railway company to grant such an exclusive privilege. See the note of Mr. Freeman in *Kalamazoo Hack & Bus Co.* v. *Sootsma* (Mich.) 22 Am. St. Rep. on pages 699–702 (84 Mich. 194, 10 L. R. A. 819), and the note of Mr. Lewis in *McConnell* v. *Pedigo* (Ky.) 5 Am. R. & Corp. Rep. on pages 715–724 (92 Ky. 465). In some of the cases constitutional and statutory provisions enter into the determination, but, in the main, the question is decided from the points of view of the powers of the corporation and of public policy. By the governing act appellant is authorized "to regulate the use of its depots, stations, structures, appliances, and facilities." Appellant has only the powers that are expressly granted, and those that are necessary to the exercise of express grants. The act is searched in vain for appellant's authority to discriminate. If, under regulations that are uniform and impartial, equality fails by reason of limited facilities, appellant would not be at fault. Appellant acquired its grounds through the sovereign right of eminent domain, whether by purchase or by condemnation; for it could not obtain a broader right by grant than by force. Taking the land by the right of the state, for the purposes of public business, appellant should not be permitted to grant special privileges and immunities that the state could not. The city of Indianapolis is given the right to regulate the use of its streets by hacks. The city would hardly undertake to exclude all but one hack from the stand on McCrea street, in order to make good a rental for the exclusive privilege. The state intrusted appellant with the right to regulate the use of its facilities, not to increase its revenues by creating a monopoly. Appellant is chartered to furnish depot and switching facilities to its proprietary and associate companies, in connection with the transportation of persons and property on their railroads, not to engage in the hack business upon the streets of Indianapolis. True, appellant only rented its grounds to the transfer company. But the only use of the grounds, of advantage to the transfer company, is to base thereon the use of the streets for revenue. If appellant has authority to grant that advantage to another, it may take it to itself. The passengers' payment for transportation includes payment for their common use of the station facilities. If they are not entitled to have appellant use those facilities disinterestedly for their advantage, they are at least entitled to have appellant refrain from coercing them into yielding further tribute; for, under threat of having otherwise to leave the grounds, they pay a fare that necessarily includes appellant's rental. Appellant's action tends to restrict competition and to enhance prices, and is therefore against public policy. *Consumers' Oil Co.* v. *Nunnemaker*, 142 Ind. 560. Appellant sought from a court of equity the extraordinary remedy of injunction. It has failed to show any ground for equitable interposition.

Judgment affirmed.

KANSAS SUPREME COURT.

City of KANSAS CITY, *Plff. in Err.*,
v.
Nellie McDONALD.

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

*1. **An ordinance making it a misdemeanor for any person intentionally to ride or drive any horse,** mule, or other beast faster than an ordinary traveling gait in any of the streets of the city is unreasonable, when sought to be applied to the fire department in driving to a fire, and for that reason will not be enforced.

2. **The fact that a city, having a paid fire department,** procured an accident policy for one of its firemen, under the provisions of chapter 363, Laws 1895, and that the amount of the policy was paid to the widow of said fireman after his death, is no defense to an action brought by her, under § 422 of the Code (Gen. Stat. 1897, chap. 95), against said city for its negligence in causing said death.

3. **In an action against a city for negligently allowing an obstruction,** such as a pile of rocks, to remain in a street unguarded and without lights or other warnings to travelers thereon, by reason of which an accident occurred, it is competent to show that other obstructions not alleged in the petition narrowed the roadway, and also the condition of the street, together with all the surroundings at the time and place of the accident.

4. **A mere exception to the language of counsel** in argument to the jury, not preceded by any ruling of the court, is insufficient to raise a question as to the propriety of the language used.

5. **Rules of a fire department requiring its members to drive in the middle of the street** when going to a fire are made for the safety of the men, teams, and vehicles; and a driver of a hook and ladder truck is charged with the use of no greater care and precaution for his safety by such rule than he would be if such rule did not exist.

6. **Cities are required to keep and maintain their streets in reasonably safe condition** for public travel, and are held to as great a degree of care towards a fireman driving over the same in discharge of his duties as they are to any other traveler.

7. **Persons constructing buildings abutting on a street** have, in the absence of express permission from the city, the right to use temporarily a portion of the same for the deposit of necessary building material. Such use, however, being exceptional and foreign to the purposes for which the thoroughfare was laid out and maintained, the city must exercise vigilance, to the end that no traveler is harmed by such encroachment.

(May 6, 1899.)

ERROR to the Court of Common Pleas for Wyandotte County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. **T. A. Pollock** and **F. D. Hutchings,** for plaintiff in error:

The fact that Andrew McDonald was driving a hook and ladder truck belonging to the fire department was no excuse for his driving at a run through the streets.

It is not a question as to what would be a fit and proper regulation for the city to adopt, but, Will the court step in, and, after the legislating power of the city has acted by passing an ordinance, insert therein an exception which said legislating power has not seen fit to make?

Morse v. *Sweenie*, 15 Ill. App. 486.

It was error to refuse to permit the defendant to prove that there were rules of the fire department requiring the firemen, when going to a fire, to drive in the center of the street.

The fire department had authority to make such reasonable rules and regulations for the government thereof as should seem best for the protection of firemen and others.

Kansas P. R. Co. v. *Salmon*, 14 Kan. 524; *Hannibal & St. J. R. Co.* v. *Fox*, 31 Kan. 586; *Reagan* v. *St. Louis, K. & N. W. R. Co.* 93 Mo. 352; *Abel* v. *Delaware & H. Canal Co.* 103 N. Y. 586, 57 Am. Rep. 773.

The employer having made reasonable rules and regulations for the guidance of his employees, it is contributory negligence for the employees not to comply with these rules and regulations, and such employees cannot recover damages for injuries sustained when violating such rules.

Francis v. *Kansas City, St. J. & C. B. R. Co.* 110 Mo. 387; *Memphis & C. R. Co.* v. *Thomas*, 51 Miss. 637; *Lockwood* v. *Chicago & N. W. R. Co.* 55 Wis. 50; *Lyon* v. *Detroit, L. & L. M. R. Co.* 31 Mich. 429.

Clark was unquestionably a fellow servant of McDonald. The mere fact that he was a foreman does not make him vice principal, so that the principal would be liable.

Conley v. *Portland*, 78 Me. 217.

The city would not be liable when the negligence of one fireman occasioned injury to another, be he fellow fireman or vice principal.

Shanewerk v. *Fort Worth*, 11 Tex. Civ. App. 271; *Gillespie* v. *Lincoln*, 35 Neb. 34, 16 L. R. A. 349; *Dodge* v. *Granger*, 17 R. I. 664, 15 L. R. A. 781; *Wilcox* v. *Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Howard* v. *San Francisco*, 51 Cal. 52.

Could the injury to McDonald, under the circumstances, as shown by the evidence, reasonably have been foreseen as probable to follow the act of the street department in permitting the rock to remain in the street without lights or barriers?

Deisenrieter v. *Kraus-Merkel Malting Co.* 97 Wis. 279.

*Headnotes by SMITH, J.

NOTE.—For injury to driver of a fire truck in going to a fire, see also Garrity v. Detroit Citizens' Street R. Co. (Mich.) 37 L. R. A. 529.

45 L. R. A.

See also 46 L. R. A. 750.

The whole matter should have been sent to the jury.

On petition for rehearing.

The trial court erred in not submitting the question of proximate cause to the jury. *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Atkinson* v. *Goodrich Transp. Co.* 60 Wis. 141, 50 Am. Rep. 352.

Messrs. **Angevine & Cubbison,** for defendant in error:

Ordinances against fast driving have no application to members of a fire department when going to a fire, even where no exceptions are made in the ordinance.

Farley v. *New York*, 152 N. Y. 222; *State* v. *Sheppard*, 64 Minn. 287, 36 L. R. A. 305.

By accepting from the insurance companies a gratuity of $2,000 the widow and children did not release a claim against the city for $10,000, for the negligent death of the husband and father.

Coots v. *Detroit*, 75 Mich. 628, 5 L. R. A. 315.

If neither was a servant of the city, they were not fellow servants of the city.

1 Beach, Pub. Corp. §§ 741-744; 2 Dill. Mun. Corp. 977-980; *Lawson* v. *Seattle*, 6 Wash. 184; *Pettingell* v. *Chelsea*, 161 Mass. 368, 24 L. R. A. 426; *Alexander* v. *Vicksburg*, 68 Miss. 564; *Gillespie* v. *Lincoln*, 35 Neb. 34, 16 L. R. A. 349; *Dodge* v. *Granger*, 17 R. I. 664, 15 L. R. A. 781; *Hayes* v. *Oshkosh*, 33 Wis. 314, 13 Am. Rep. 760; *Wilcox* v. *Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Field* v. *Des Moines*, 39 Iowa, 575, 18 Am. Rep. 46; *Heller* v. *Sedalia*, 53 Mo. 159, 14 Am. Rep. 444; *Fisher* v. *Boston*, 104 Mass. 87, 6 Am. Rep. 196.

The fact that they are officers or servants or fellow servants of someone else is immaterial.

A fireman of a city bears no such relation to it as to prevent his maintaining an action against it to recover for injuries occasioned by defects in the city's streets, whereby such fireman was injured while driving a hook and ladder truck to a fire in response to a fire alarm.

Coots v. *Detroit*, 75 Mich. 628, 5 L. R. A. 315; *Palmer* v. *Portsmouth*, 43 N. H. 265; *Farley* v. *New York*, 152 N. Y. 222; 1 Lawson, Rights, Rem. & Pr. 513; *Kimball* v. *Boston*, 1 Allen, 417.

The evidence shows that Mr. McDonald was a kind, affectionate husband and father, industrious, frugal, saving his earnings for his family, and by his habits and life giving to his children practical lessons of more value to them than his wages. This was a proper matter for the jury to consider in estimating damages, and under the circumstances the verdict was too small rather than too large.

Tiffany, Death by Wrongful Act, § 162; *Tilley* v. *Hudson River R. Co.* 24 N. Y. 471; *McIntyre* v. *New York C. R. Co.* 37 N. Y. 287; *Northern P. R. Co.* v. *Freeman*, 48 U. S. App. 757, 83 Fed. Rep. 82, 27 C. C. A. 457; *Tilley* v. *Hudson River R. Co.* 29 N. Y. 252, 86 Am. Dec. 297; *Howard County Comrs.* v. *Legg*, 93 Ind. 525, 47 Am. Rep. 390; *Stoker* v. *St. Louis, I. M. & S. R. Co.* 91 Mo. 509; *St. Louis, I. M. & S. R. Co.* v. *Maddry*, 57 Ark. 306; *Chicago, R. I. & P. R. Co.* v. *Austin*, 69 Ill. 426.

McDonald was going at the usual gait and under control, and the wheel was 8 feet from the curb when it struck the rock. He had a right to drive there. He had a right to presume that the city would do its duty. Even if he saw the obstructions in the street in the daytime, of which there is no evidence, he had a right to assume that they would be removed at night, or lights put up.

Maultby v. *Leavenworth*, 28 Kan. 745; *Emporia* v. *Schmidling*, 33 Kan. 485; *Langan* v. *Atchison*, 35 Kan. 318, 57 Am. Rep. 165; *Kinsley* v. *Morse*, 40 Kan. 578.

It may be true that persons building or repairing houses have a right to a reasonable use of the streets to deposit building material therein, but it can only be done in case of necessity, and after taking due precaution.

Senkenn v. *Evansville*, 140 Ind. 675.

Usually a permit is required from the city authorities to so use the street, and granting such a permit is notice to the authorities that the street is to be so used.

District of Columbia v. *Woodbury*, 136 U. S. 450, 34 L. ed. 472; *Indianapolis* v. *Doherty*, 71 Ind. 5; *Sweeney* v. *Butte*, 15 Mont. 274; Elliott, Roads & Streets, 468.

The city had no right to permit such use of the street, either by issuing a permit, or by a general ordinance, and is liable for so doing.

Smith v. *Leavenworth*, 15 Kan. 81; *Mikesell* v. *Durkee*, 34 Kan. 509; *Jansen* v. *Atchison*, 16 Kan. 358; *Russell* v. *Columbia*, 74 Mo. 480, 41 Am. Rep. 325.

It is not necessary to show that the city officers had actual notice of the obstructions in the street. If the obstructions had been in the street for such length of time that the city officers should have known it, the city is liable.

Salina v. *Trosper*, 27 Kan. 544; *Abilene* v. *Cowperthwait*, 52 Kan. 326; *Hunt* v. *Dubuque*, 96 Iowa, 314; *Russell* v. *Columbia*, 74 Mo. 480, 41 Am. Rep. 325.

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

Nellie McDonald recovered a judgment in the court of common pleas against the defendant below, for $7,500, by reason of the wrongful acts, neglect, and default of the city in causing the death of her husband. Andrew J. McDonald was a member of the fire department of Kansas City, Kansas, and the driver of a hook and ladder wagon. On the night of August 10, 1896, in responding to an alarm of fire in the south part of the city, while driving at a high rate of speed, the truck upon which he was riding ran against and upon an obstruction in the roadway, consisting of a pile of rocks from 18 inches to 2 feet high and 40 feet long, extending into the street about 12 feet from the west curb. The violence of the collision threw McDonald forward upon the rocks, and he was instantly killed. William Clarke, captain of the truck, was riding with McDonald at the time

of the accident. The obstruction mentioned was in front of some houses then building, and the rock was for use in their erection. There was at the time an ordinance of the city in force providing that persons engaged in the construction of any building might occupy so much of the street in front thereof, necessary for the purpose of depositing material for use in its construction, not over one third of the width of the street to be so occupied. It was alleged in the petition that, by the passage of said ordinance, the city wrongfully and negligently authorized persons to obstruct the street, including South Seventh street at the place where the accident occurred, with earth, sand, gravel, stones, etc., without requiring them to place thereon guards, lights, or other danger signals to warn persons passing of the existence of such obstructions. The defendant city, among other things, pleaded in defense an ordinance as follows: "Any person who shall intentionally ride or drive any horse, mule, or other beast faster than an ordinary traveling gait in any of the streets, avenues, or alleys within the city, or so drive as to endanger the safety of others, or who shall so ride or drive as to be likely to cause other teams to be frightened or run away, shall upon conviction thereof be fined in any sum not exceeding $100."

The court below sustained a demurrer to that paragraph of the answer which pleaded the ordinance as a defense, and this is the first assignment of error. It is contended that the ordinance was proper evidence to show that McDonald, by its violation, was guilty of contributory negligence. We do not think that the ordinance was intended to govern the actions of firemen or regulate the speed of fire engines or trucks. Such an intention is nowhere expressed, and, if it had been, the ordinance would have been unreasonable. Cities do not provide horses of high mettle, trained to propel speedily apparatus for the extinguishment of fires, and then impede them in their progress by a requirement that they shall not be driven faster than an ordinary traveling gait. Various appliances have been devised by which such horses are harnessed with incredible speed, that no time may be lost in reaching the fire with hose and other aids to prevent the destruction of property. It is of first importance that a fire be reached in its incipiency. To accomplish this purpose, the utmost haste is necessary. A compliance with this ordinance by the firemen and the enforced delay required by its terms would convert the fire department into a purely ornamental adjunct to the city government,—proficient only on parade. In *Farley* v. *New York*, 152 N. Y. 222, it is said: "The safety of property and the protection of life may, and often do, depend upon the celerity of movement, and require that the greatest practicable speed should be permitted to the vehicles of the fire department in going to fires. Section 1932 [Laws 1882, chap. 410] was intended to regulate the speed of horses traveling on the streets, and using them for the ordinary purposes of travel, and from the nature of the exigency cannot apply to the speed of vehicles of the fire department on their way to fires." The restriction as to speed, when applied to the fire department, renders the ordinance unreasonable. Unreasonable ordinances will not be upheld by the courts. 1 Dill. Mun. Corp. § 319; *Crawford* v. *Topeka*, 51 Kan. 756, 20 L. R. A. 692; *Anderson* v. *Wellington*, 40 Kan. 173, 2 L. R. A. 110; *State* v. *Sheppard*, 64 Minn. 287, 36 L. R. A. 305.

A general demurrer was also sustained to the fourth paragraph of the answer of the city, which reads: "The defendant further says that under and by virtue of the provisions of chapter 363 of the Laws of 1895, and out of the funds created and provided for by said law, it purchased, on the 7th day of August, 1896, an accident insurance policy for said Andrew McDonald, in plaintiff's petition named, from the Travelers' Insurance Company, by which contract and policy said company agreed to pay, and did pay, to the plaintiff, on account of the death of said Andrew McDonald, by reason of the causes in plaintiff's petition set forth, the sum of $2,000, which sum the plaintiff did receive and still retains." There is nothing in the act of 1895 implying that indemnity is furnished to the city against damages to the widow or next of kin of a fireman killed by its negligence. The accident policy cost the city nothing. The premiums were paid by foreign insurance corporations doing business in the state; a tax being laid by the state of $2 a hundred upon the amount of all premiums on policies written for fire and lightning insurance within the limits of such city for each year. The law authorized the amount of the tax to be invested in the purchase of accident insurance upon the members of the fire department. The tax is collected by the state for the purposes mentioned, and the mayor and council in cities having a paid fire department are constituted its agents, charged with the duty of applying the amount of the tax to further the objects named. The demurrer to said paragraph of the answer was properly sustained. *Coots* v. *Detroit*, 75 Mich. 628, 5 L. R. A. 315.

Evidence was introduced by the plaintiff below showing that at the time of the accident there was a pile of sand, cinders, and earth on the east side of the street, south of, but near, the place where the first obstruction mentioned was situated. Counsel for the city complain that the admission of this testimony tended to convey to the jury an impression that the city was unmindful of the streets, and permitted any and all persons to block them up. It was competent to show the width of the roadway in condition for travel at and near the place of the accident, as it might properly be shown that one side of the street was higher or lower than the other, and the condition in general of the surroundings. There was proof tending to show that the rocks upon which the wagon struck were of light color, similar to that of the block pavement in the street, and hence not distinguishable from the pavement at

night. Clarke, who was riding with McDonald, saw this pile of cinders and sand, and it was not improper for the jury to know of the existence of this obstruction, and to consider whether McDonald also saw it, and, in order to avoid it, was driving further west than he otherwise would have done. The jury found, in answer to a particular question submitted, that the sand and cinder pile was not one of the causes of the accident, so that the defendant below cannot be said to have suffered from the evidence complained of. Again, we cannot say that the evidence admitted in cross-examination of the witness Edmunds, showing that there was a movement on hand to reorganize the fire department, was prejudicial to the city. It would seem to be harmless in itself. We think, however, the counsel for plaintiff below went to greater lengths in his comments on this evidence before the jury than he should have done, making an application of the testimony not justified by the language of the witness. The defendant below, however, merely excepted to the language of the opposing counsel. No objection preceded this exception, and the court had made no ruling. This was insufficient. "An exception is an objection taken to a decision of a court or judge upon a matter of law." Gen. Stat. 1897, chap. 95, § 309; *Marder* v. *Leary*, 137 Ill. 319; *Pike* v. *Chicago*, 155 Ill. 656. In *Marder* v. *Leary*, 137 Ill. 319, the court says: "The remark 'I except to that statement' meant nothing, in a legal sense, in the connection in which it occurred. The court had made no ruling to which it was applicable; and, if it was intended to be an objection, it was ineffectual, because it was not pressed upon the attention of the judge, and his ruling obtained thereon. *Elgin, J. & E. R. Co.* v. *Fletcher*, 128 Ill. 619."

The plaintiff in error urges that the court erred in refusing to permit it to show the rules of the fire department requiring that firemen drive in the middle of the street. If there was such a rule, its object was to insure safety to the men, teams, and vehicles when going at a rapid rate of speed in answer to an alarm of fire. A violation of any precaution affecting safety would have been equally negligent on the part of the driver, whether the exercise of such precaution was demanded by the rules or not. The condition of the street would largely determine the course to be taken, and what part of the street to be avoided, whatever the rule might be. To drive a hook and ladder wagon in the middle of those streets upon which cable-car tracks are in use, with rough stone blocks between the rails, would be exceedingly dangerous to the driver and vehicle, and render collisions with street cars probable. The fact of the existence of a rule as claimed, which McDonald violated, would not demand of him greater care. The condition of the street, as it appeared to him, should determine his course in driving, whether there was a rule on the subject or not. There are cases where a violation of a rule would be a material consideration. If a man were engaged in a dangerous employment, without an experience fitting him to determine the safer of one or two courses which he was called upon to take, then rules for his guidance, fixed by persons skilled in the particular work or business, should be followed. We have examined the instructions tendered by the city and refused by the court, and see no error in their refusal. The court instructed that McDonald was not in any manner responsible for any negligence of Clarke, the captain of the truck. They were not fellow servants. 1 Beach, Pub. Corp. §§ 741-744; 2 Dill. Mun. Corp. 977-980; *Lawson* v. *Seattle*, 6 Wash. 184; *Peters* v. *Lindsborg*, 40 Kan. 654. The last case is authority for the statement that McDonald and Clarke were not servants of the city. That they were fellow servants of someone else is immaterial. But if they were fellow servants of the city, and if Clarke failed to notify McDonald of the existence of rocks in the street, and if he was guilty of negligence in not doing so, and if his failure to give such notice contributed to the death of McDonald, yet the negligence of the city was the primary and proximate cause, without which the accident would not have occurred, and the negligence of Clarke the remote cause. The claim that the death of McDonald was caused by the negligence of a fellow servant, and that the city is not therefore liable, is untenable. We do not see how the failure of Clarke to notify McDonald of the danger can affect the city's liability. The negligence or omission of a stranger to notify McDonald could not excuse the municipality from the consequences of its own negligence. The court below held, and so instructed the jury, that McDonald was a lawful traveler upon the streets, and, as such, the city owed the duty towards him to keep and maintain its streets in a reasonably safe condition for public travel,—in fact, that he was entitled to the same protection as an ordinary traveler upon the highway. This ruling was correct. *Coots* v. *Detroit*, 75 Mich. 628, 5 L. R. A. 315; *Palmer* v. *Portsmouth*, 43 N. H. 265; *Farley* v. *New York*, 152 N. Y. 222. In *Coots* v. *Detroit*, 75 Mich. 628, 5 L. R. A. 315, it is held that a fireman is not held to that degree of care and caution in driving along a public street required of a common traveler proceeding at an ordinary gait.

The defendant below requested the court to submit to the jury 78 particular questions of fact, 35 of which were refused. Many of the questions were immaterial, and some were repetitions of others. While it is the duty of the court to submit to the jury questions pertinent to the issues, we think the court performed that duty in this case.

As to the verdict being excessive, while the jury are restricted to the pecuniary loss suffered by the widow or next of kin, yet they are not confined in estimating the damages,

to any exact mathematical calculation, but are invested with considerable discretion, with which the courts will not interfere unless it has been abused. Considering the age and capacity for earning wages possessed by the deceased, his relations to his family, and his habits of life, we cannot say that the amount of the verdict was unreasonable. The case was carefully tried by the learned judge of the court below, and all legal rights of the defendant protected.

The ordinance permitting a use of a portion of the street for the deposit of building material thereon was not invalid. Dill. Mun. Corp. 4th ed. § 730. In the absence of such ordinance, a license thus to encroach upon the street might be implied, and a temporary occupation be lawful, from the necessities of the case, when buildings fronting on the street were being erected. Yet such use being exceptional, and foreign to the purposes for which the thoroughfare was laid out and maintained, the duty devolved upon the city to exercise vigilance with respect to the rights of a traveler who might be harmed by such obstructions in his way.

Several questions raised in the brief of the plaintiff in error are not discussed in this opinion, but we have examined the same and find nothing substantial in the claim of error. The negligence of the city was clearly shown. It suffered one of its principal thoroughfares to be obstructed in a place likely to occasion injury to persons having a right to travel thereon, and permitted this obstruction to remain unguarded and without lights or warnings to prevent accidents in the night-time, in disregard of a lawful duty imposed upon it.

The judgment of the court below will be affirmed.

All the Justices concur.

Rehearing denied.

MARYLAND COURT OF APPEALS.

STATE of Maryland, *Appt.*,
v.
Henry A. BROADBELT.

(.....Md.....)

1. **The registration with the live-stock sanitary board, of all herds or cattle** of persons selling milk for consumption in cities, towns, and villages, may be required by the legislature in the exercise of the police power, and such statute will not deprive the milk dealers of property without due process of law.
2. **The equal protection of the laws is not denied** to persons who supply milk to cities, towns, and villages for consumption, by a statute compelling them to register their herds or cattle with the live-stock sanitary board, where it applies to all persons of that class, though it does not apply to every person who may occasionally sell milk in the country.
3. **Prohibiting the sale and shipment of milk** to supply cities, towns, or villages, from premises found in an unsanitary condition, until they conform to reasonable sanitary regulations, is a valid exercise of the police power, although it interferes to some extent with property rights.

(June 22, 1899.)

APPEAL by plaintiff from a judgment of the Criminal Court of Baltimore City sustaining a demurrer to an indictment charging defendant with a violation of the act of 1898 requiring registration and inspection of herds of cattle used for supplying milk to cities. *Reversed.*

The facts are stated in the opinion.

Messrs. **Harry M. Clabaugh,** Attorney General, and **Richard M. Venable** for appellant.

Mr. **William Pinkney Whyte,** for appellee:

The discrimination is unlawful. The object of the law is for the benefit of a privileged class, and there is no reasonable ground for such provisions.

Soon Hing v. *Crowley,* 113 U. S. 709, 28 L. ed. 1147.

Class legislation discriminating against some and favoring others is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operation, it affects alike persons similarly situated, is not within the amendments.

Barbier v. *Connolly,* 113 U. S. 27, 28 L. ed. 923; *Shaffer* v. *Union Min. Co.* 55 Md. 74; *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Re Jacobs,* 98 N. Y. 98, 50 Am. Rep. 636; *People* v. *Gillson,* 109 N. Y. 389.

The classification made in the act of 1898, chapter 306, is not a valid classification, and the traverser is subjected to expensive, unjust, and oppressive regulations from which

NOTE.—For ordinances to protect milk supply, see also State v. Dumaquier (La.) 26 L. R. A. 162, and Deems v. Baltimore (Md.) 26 L. R. A. 541.

others occupying a precisely similar position are exempt.

Gulf, C. & S. F. R. Co. v. *Ellis*, 165 U. S. 150, 41 L. ed. 666; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 245, 41 L. ed. 704; *Re Grice*, 79 Fed. Rep. 627; *Western U. Teleg. Co.* v. *Indiana*, 165 U. S. 304, 41 L. ed. 725.

Under an exercise of the police power the enactment must have reference to the comfort, the safety, or the welfare of society, and it must not conflict with the Constitution.

People v. *Gillson*, 109 N. Y. 389; *Long* v. *State*, 74 Md. 565, 12 L. R. A. 425; *Toledo, W. & W. R. Co.* v. *Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; Cooley, Const. Lim. 6th ed. chap. 16.

It is an unwarrantable delegation of power.

Yick Wo v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220; *Baltimore* v. *Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Minnesota* v. *Barber*, 136 U. S. 315, 34 L. ed. 455, 3 Inters. Com. Rep. 185.

"Due process of law" does not necessarily require a judicial proceeding, but it is essential that the party whose property is to be taken shall have notice of the proceeding and shall have an opportunity to be heard, and that notice must be such as is provided by law.

Kuntz v. *Sumption*, 117 Ind. 1, 2 L. R. A. 655; *Vizzard* v. *Taylor*, 97 Ind. 91; *Jackson* v. *State, Dyar*, 104 Ind. 516; *King* v. *Hayes*, 80 Me. 206.

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

The appellee was indicted under the act of 1898 (chap. 306) passed by the general assembly of Maryland, and entitled "An Act to Add Certain New Sections to Article Fifty-eight of the Code of Public General Laws, Title 'Live Stock,' under the New Sub-title 'Dairies,' to Follow § 18," etc. He demurred to the indictment upon the ground that the statute was unconstitutional. His demurrer was sustained by the criminal court of Baltimore city, the indictment was quashed, and the state has appealed. The reasons upon which he bases his claim that the statute is void are that it denies the equal protection of the laws guaranteed by § 1 of the 14th Amendment to the Federal Constitution, and deprives the individual of the due process of law secured by that amendment and by article 23 of the Maryland Declaration of Rights. Both of these or similar grounds of attack have of late years been very frequently resorted to in assailing the validity of state legislation enacted in the exercise of the police power, and numerous judgments have been delivered by the Supreme Court of the United States in cases where this method of assault has been relied on. A review of, or even a reference to, all these cases would not be practicable within the limits of this opinion, but brief citations, later on, from some of them, will serve to illustrate the principles which underlie them all. Those principles must control the final disposition of this prosecution.

By the act of 1888 (chapter 519) a "state live-stock sanitary board" was created. It consists of three members, appointed by the governor, by and with the advice and consent of the senate. It is charged with various duties looking to the prevention and the spread of contagious and infectious diseases among the live stock within the state. Its powers are exercised for the preservation of the public health. The provision of the statute under which the indictment now before us was framed, reads as follows: Sec. 19. It shall be the duty of all dairymen or herdsmen or private individuals supplying milk to cities, towns, or villages, to register their herds or cattle with the live-stock sanitary board; in violation of which the parties offending shall be fined not less than one dollar nor more than twenty for each offense." Section 20, and the rules which it formulates, are in these words:

"Sec. 20. It shall be the duty of the live-stock sanitary board to have inspected at least annually, without notice to the owner or those in charge of any dairy or the parties supplying milk as named in § 19 of this article, the premises wherein cows are kept, and if such premises are found in an unsanitary condition the said board may prohibit the sale and shipment of milk from such premises until such time as such premises shall conform to the following sanitary rules:

"Rule 1. No building or shed shall be used for stabling cows for dairy purposes which is not well lighted and ventilated and which is not provided with sufficient feed troughs or boxes, and suitable floor, laid with proper grades and channels to immediately carry off all drainage; and if a public sewer abuts the premises upon which such building is situated, they shall be connected therewith whenever the inspector considers such sewer connection necessary.

"Rule 2. No water closet, privy, cesspool, or urinal shall be located within any building or shed used for stabling cows for dairy purpose or for the storage of milk or cream; nor shall any fowl, hog, sheep, or goat be kept in any room used for such purposes.

"3. It shall be the duty of each person using any premises for keeping cows for dairy purposes to keep such premises thoroughly clean and in good repairs and well painted or whitewashed at all times.

"4. It shall be the duty of each person using any premises for keeping cows for dairy purposes to cause the building in which cows are kept to be thoroughly cleaned, and to remove all dung from the premises so as to prevent its accumulation in great quantities.

"5. Any person using any premises for keeping cows for dairy purposes shall provide and use a sufficient number of receptacles, made of nonabsorbent materials, for the reception, storage, and delivery of milk, and shall cause them at all times to be cleaned

and purified, and shall cause all milk to be removed without delay from the rooms in which cows are kept.

"6. Every person keeping cows for the production of milk for sale shall cause every such cow to be cleaned every day and to be properly fed and watered with abundance of pure clean water.

"7. Any enclosure where cows are kept shall be graded and drained, so as to keep the surface reasonably dry; no garbage, fecal matter, or similar matter shall be placed or allowed to remain in such enclosure unless sufficient straw or similar good absorbent material be used to keep the enclosure clean at all times, and no open drains shall be allowed to run through it. And any person who shall ship or sell milk contrary to the aforesaid order of said board shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one dollar nor more than twenty dollars for each day during which shipments shall be made after notice of such order."

The indictment charges that the appellee, being a dairyman engaged in supplying milk to cities, towns, and villages within this state, failed, neglected, and refused to register his herd of cattle with the live-stock sanitary board. The demurrer admits these averments to be true.

So far as the 19th section of the act is concerned, it is not perceived that, standing alone, it deprives the appellee of due process of law in any way whatever. This is not a proceeding under the 20th section. The requirement of the 19th section would be of little value if it were not followed by, and did not form a part of, the other provisions of the statute. The entire act is strictly a police regulation, enacted for the purpose of preserving the public health. The strides which our knowledge of bacteriology has made in recent years are generally known, and the ubiquitous microbe has been shown to be a potent agent in the propagation of disease. Tuberculosis, identical, it is said, with consumption in man, is caused by the organism known as "Koch's bacillus," and is readily communicable through milk. Diphtheria is another contagious disease whose specific organism finds in milk favorable conditions of growth, and there is abundant evidence to show that contaminated milk transmits this contagion. Cholera has again and again been traced to the same source, and scarlet fever is generally believed to be communicable by infected milk, and it is said that it may be even caused by an eruption on the udder. Typhoid fever bacilli have been detected in milk supposed to be wholesome. Besides conveying disease, milk occasionally contains certain germs which form poisonous products known as "ptomaines." Milk may carry the bacilli of these, and perhaps other, deadly diseases to infancy, to adolescence, and to age; to the delicate and to the robust alike; and to persons in every class and condition of society. It may receive these germs direct from the cow, if the cow be unhealthy; or it may absorb them from the dairy, the dairy utensils, or the stable, if these be uncleanly. Thorough inspections of cattle and dairies may reduce the frequency of infection. The preservation of the public health by preventing the sale of infected milk, or of milk that may come from infected sources, when milk, by reason of its almost universal use, in one form or another, as an article of food, is especially likely to spread disease, is one of the most imperative duties of the state, and obviously one most incontestably within the scope of the police power. As a means to that end,—the preservation of the public health,—a requirement that every person selling milk for consumption in cities, towns, and villages shall cause his herd or cattle to be registered with the live-stock sanitary board is a reasonable and an appropriate enactment; and the subsequent provisions are necessary parts of the scheme. The 19th section no more deprives the individual of due process of law than did the ordinance in *Easton Comrs.* v. *Covey*, 74 Md. 262, which prohibited the erection of any building without a permit from the commissioners of the town; or an ordinance forbidding the keeping of swine without a permit in writing from the board of health (*Quincy* v. *Kennard*, 151 Mass. 563); or an ordinance requiring the written permission of the mayor of a town before any person was allowed to move a building along the streets (*Wilson* v. *Eureka City*, decided Feb. 20, 1899, 173 U. S. 32, 43 L. ed. 603), or the ordinance requiring a license for the removal of the contents of privies, and subjecting the holders of such license to the orders of the board of health (*Boehm* v. *Baltimore*, 61 Md. 259). The constitutional limitations which declare that no person shall be deprived of his property or liberty without due process of law have never been construed as being "incompatible with the principle—equally vital, because essential to the peace and safety of society—that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. . . . The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law." *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205.

It was earnestly insisted that the act of 1898 deprives the appellee of the equal protection of the law guaranteed by the 14th Amendment. This amendment was called to the attention of the Supreme Court for the first time in 1872, in the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394, and since then it has been repeatedly considered and interpreted. The scope of the amendment, in so far as it relates to the branch of the subject now under discussion, has been briefly, but clearly, stated by the late Judge Cooley: "The guaranty of equal protection is not to be understood, however, as requiring that every person in the land shall possess

the same rights and privileges as every other person. The amendment contemplates classes of persons, and the protection given by the law is to be deemed equal if all persons in the same class are treated alike under like circumstances and conditions, both as to privileges conferred and liabilities imposed. The classification must be based on reasonable grounds; it cannot be a mere arbitrary selection." Cooley, Const. Law, 249. This is abundantly supported by the adjudged cases. *Hayes* v. *Missouri*, 120 U. S. 68, 30 L. ed. 578; *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205, 32 L. ed. 107; *Walston* v. *Nevin*, 128 U. S. 578, 32 L. ed. 544; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810; *Giozza* v. *Tiernan*, 148 U. S. 657, 37 L. ed. 599; *Columbus Southern R. Co.* v. *Wright*, 151 U. S. 470, 38 L. ed. 238; *Marchant* v. *Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751; *St. Louis & S. F. R. Co.* v. *Matthews*, 165 U. S. 1, 41 L. ed. 611. Thus, in *Hayes* v. *Missouri*, 120 U. S. 68, 30 L. ed. 578, it was held that a statute of a state, which provided that in capital cases, in cities having a population of over 100,000 inhabitants, the state shall be allowed fifteen peremptory challenges to jurors, while elsewhere in the same state the prosecution was only allowed eight such challenges, did not deny to a person tried for murder in a city containing over 100,000 inhabitants the equal protection of the laws enjoined by the 14th Amendment, and that there was no error in refusing to restrict the state's peremptory challenges to eight. And so in the very recent case of *Central Loan & T. Co.* v. *Campbell Commission Co.* (decided by the Supreme Court on February 20, 1899) 173 U. S. 84, 43 L. ed. 623, it was held that a statute permitting an attachment against a nonresident debtor without a bond, while requiring a bond for an attachment against a resident debtor, does not constitute a denial to the nonresident of the equal protection of the law, because it was within the power of the legislature to divide debtors into two classes,—nonresident and resident,—and, when so classified, to prescribe different methods of proceeding against them. The classification which the legislature is authorized to make may relate to territorial divisions of a state. Thus, in *Missouri* v. *Lewis*, 101 U. S. 22, 25 L. ed. 989, it was said by Mr. Justice Bradley: "We might go still further, and say with undoubted truth that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the 14th Amendment, be a denial to any person of the equal protection of the laws." The classification may have reference to occupations (*Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780,—where it was held that a state statute limiting the period of employment of workmen in underground mines, or in the smelting, reduction, or refining of ores or metals, to eight hours per day, and making its violation a misdemeanor, was a valid exercise of the police power of the state). Or, again, the classification may relate to individuals. *St. Louis & S. F. R. Co.* v. *Matthews*, 165 U. S. 1, 41 L. ed. 611. But in every instance the classification, to be valid, must be based on reasonable grounds. It must not depend on distinctions which do not furnish any proper basis for the attempted classification. "That," as declared by the Supreme Court in *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis." In the case just cited a statute of Texas imposing an attorney's fee, in addition to costs, upon railway companies omitting to pay certain claims within a certain time, which applied to no other corporations or individuals, was declared unconstitutional, as denying to railway companies the equal protection of the laws. In the course of the court's opinion, Mr. Justice Brewer said: "It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other." "It is," said the same court in a very recent case, "the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. . . . Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality. . . . While cases on either side, and far away from the dividing line, are easy of disposition, the difficulty arises as the statute in question comes near the line of separation." *Atchison, T. & S. F. R. Co.* v. *Matthews* (decided April 17, 1899) 174 U. S. 96, 43 L. ed. 909. Special burdens are often necessary for general benefits, particularly in respect to the preservation of the public health. "Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good.

Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions." *Barbier v. Connolly*, 113 U. S. 31, 28 L. ed. 924. If the legislature of Maryland has, by the statute under consideration, made a class to which the provisions of the act were designed to apply, and if that classification is just and reasonable, and not purely arbitrary, the ruling on the demurrer was wrong. The ultimate object of the statute was, as we have seen, to protect the health of persons living in cities, towns, and villages from the diseases to which impure or contaminated milk might expose them. There is a definite and well-ascertained class of persons described in the statute, and that class comprises dairymen, herdsmen, and other individuals who supply milk to cities, towns, and villages. It was not the purpose of the act to include within its purview all persons who sell milk, but it put into a class all dairymen, herdsmen, and individuals who supply milk to cities, towns, and villages,—those who are engaged in the business of selling milk in populous communities. These persons are singled out from all others who may own cows, or who may occasionally sell milk in the country to some individual, and are grouped into a class, because they are the persons whose carelessness, whose inattention to their herds, or whose uncleanly surroundings may originate or promote the spread of disease in populous localities. No dairyman, herdsman, or individual who supplies milk to cities, towns, or villages is exempted from the operation of the law, but all who are thus engaged are specifically included. There is no uncertainty as to the persons composing the class, and no dispute that the general assembly intended to make exactly that classification.

Is the classification just and reasonable, and free from the imputation of being merely arbitrary? The act in respect to which the classification is proposed is the act of supplying milk to cities, towns, and villages by dairymen, herdsmen, and other individuals. It is founded on the right of the state in the exercise of its police power to classify occupations with relation to their peculiar liability to cause injury to the inhabitants of the designated places from the article of food employed in the business. It is identical in principle with the classification under a Utah statute by which a conclusive presumption of negligence was made to apply to persons driving a herd of cattle over a public highway, while the same presumption did not apply to a person driving less than a herd. *Jones v. Brim*, 165 U. S. 180, 41 L. ed. 677. There is an obvious difference between the occasional sale of milk to an isolated individual and the habitual sale of it to the inhabitants of a city, a town, or a village; and this difference is manifestly sufficient to "furnish a reasonable basis for separate laws and regulations." *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 782. The clear purpose of the legislature was to guard against impurities in milk furnished to residents in populous settlements by requiring persons who supply milk to cities, towns, and villages to keep their cows and premises in a sanitary condition. The danger arising from the nonobservance of the sanitary rules prescribed by the act is increased in proportion to the increased number of the consumers of milk; and a contagious disease introduced by contaminated milk in a thickly settled locality is vastly more serious, because vastly further reaching, than it can possibly be when communicated, by the same means, to an isolated individual. The duty to avoid the introduction of disease in both cases is unquestionably incumbent on the vendor of milk, but there is every reason why a breach of that duty will be far more injurious in the one than in the other instance. Though the statute furnishes no protection to persons not living in cities, towns, or villages, this in no way indicates that its classification is unreasonable, or that it deprives anyone of the equal protection of the laws in the sense that would annul it. *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578. It was designed, like many other health laws, to operate in a restricted territory. There are numerous health laws which do not operate on persons living beyond the limits within which they are applicable; but it by no means follows that they are void merely because they were not made to cover a wider range of country, because a classification may be made with reference to the subdivisions of a state. *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989. It would not have been practicable to have made the statute broad enough to include every vendor of milk, whether he sold to cities, towns, and villages, or only to a single individual; nor was it necessary, in order to reach the evil aimed at, that this should have been done. Laws relating to the inspection of milk do not operate outside of the large cities, and yet it has never been held that they are invalid on that account. The act creates a reasonable class, and bears upon all in that class alike; and it cannot be assailed because it may not, perhaps, be efficacious enough to wholly eradicate the evil it was framed to extirpate. Such a test of its constitutionality would make the validity of a measure depend upon the universality of its application, and not upon the fact that the classification was just and reasonable, and was made with reference to some difference which bore a proper relation to the act in respect to which the classification was proposed.

The 20th section of the act does, in a measure, interfere with property rights, but not to such an extent or in such a way as to impair the validity of the enactment. While it is undoubtedly true that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may most certainly be resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances; and a large discretion "is necessarily vested

in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385. As observed by Chief Justice Shaw in *Com.* v. *Alger*, 7 Cush. 84: "Every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient." "This power, legitimately exercised, can neither be limited by contract nor bartered away by legislation." *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780. The requirements of the 20th section of the act of 1898 are simply such regulations as the general assembly had, in the exercise of the police power, the undoubted authority to prescribe. A dairyman has no right to sell milk that may be contaminated, or that may be given by diseased cows, or may be kept on uncleanly premises, or in unsterilized utensils; and if he undertakes to sell milk at all to cities, towns, and villages, he must submit to such reasonable sanitary regulations respecting his property used in that business as the legislature may deem necessary to prevent that property from being the source or origin of infectious and contagious diseases. No matter how absolute his title he holds his property subject to this liability: that his use of it may be so regulated as that it shall not be injurious to the community. The statute does not deprive him of his property, but it does impose upon him the duty of so using it, when employed in that business, that no injury shall result to others most likely to be affected by a disregard on his part of the reasonable health regulations which it enacts. Almost every police regulation affects, to a greater or less extent, some property right; but there is no such invasion of a property right by this act as other valid statutes have permitted. For example, in the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394, a law of the state of Louisiana, vesting in a slaughter-house company the sole and exclusive privilege of conducting a live-stock landing and slaughter-house business, and requiring that all animals should be landed at the stock landings and slaughtered at the slaughter-houses owned by the company, and nowhere else, was upheld as a valid exercise of police power, though it rendered practically valueless other property that had previously been used by its owners for slaughter-houses. See, too, *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; Parker & W., Public Health, § 251.

For the reasons we have given we are perfectly satisfied the act of 1898 is a valid exercise of the police power, and that it is entirely free from constitutional objections. There was, consequently, error in the ruling which sustained the demurrer. The judgment appealed from will accordingly be reversed, and the case will be remanded for a new trial.

Judgment reversed, and new trial awarded; costs above and below to be paid by the appellee.

J. E. HELLER *et al.*, *Appts.*
v.
NATIONAL MARINE BANK *et al.*

(.....Md.....)

1. **The preferred stock authorized by Code**, art. 23, § 294, differs radically from ordinary preferred stock in that it is expressly constituted "a lien on the franchises and property" of the corporation, with priority over subsequent mortgages or other encumbrances.
2. **That which is essentially in accord** with the statutes does not contravene public policy.
3. **The priority over "any subsequent lien**, mortgage, or other encumbrance" given to preferred shareholders by Code, art. 23, § 294, extends to unsecured claims over which subsequent mortgages would have preference.
4. **A meeting of the stockholders**, called for the issue of preferred stock, is properly called under the provisions of Code, art. 23, § 76, providing for meetings to increase or diminish the capital stock to be called by directors on four weeks' published notice, and is not within § 6 of the same article, which applies to meetings generally.
5. **Insurance collected by receivers for buildings**, machinery, and stock in trade that were burned is not subject to the lien of preferred shareholders given by statute on the franchises and property of the company.
6. **Articles produced by a corporation for sale** are not subject to the lien on the franchises and property of the company given by Code, art. 23, § 294, to holders of preferred stock.
7. **Rents collected by receivers of a corporation** are not included in a lien given to preferred shareholders on the company's franchises and property.

(June 22, 1899.)

APPEAL by intervening claimants from a decree of the Circuit Court of Baltimore City distributing the assets of the Chesapeake Guano Company of Baltimore City, to wind up which a bill had been filed by F. Dorsey Grafflin, to the holders of preferred stock in preference to the claims of creditors of the corporation. *Affirmed in part; reversed in part.*

NOTE.—As to preferred, guaranteed, and interest-bearing stock in general, see *note* to Field v. Lamson & G. Mfg. Co (Mass.) 27 L. R. A. 136.

The facts are stated in the opinion.

Messrs. **Gans & Haman, Vernon Cook,** and **George Whitelock,** for appellants:

The construction is to be on the entire statute, and when one part is susceptible of two constructions, and the language of another part is clear and definite, and is consistent with one of such constructions and opposed to the other, that construction must be adopted which will render all the parts harmonious.

Alexander v. *Worthington,* 5 Md. 471.

If we construe the statute to mean that the lien of preferred stock is only a lien for any preferred dividend that may have been declared, we then by such a construction harmonize the various provisions of the statute.

There are many important differences between the position of a creditor of a corporation and a stockholder.

A preferred stockholder is not a creditor, but a stockholder. The stockholder, and even the preferred stockholder, is, so to speak, a partner in the business of the corporation, and "his chance of gain, by the operations of the corporation, throws on him, as respect creditors, the entire risk of the loss of his share of the capital, which must go to satisfy the creditors in case of misfortune. He cannot be both creditor and debtor, by virtue of his ownership of stock."

Warren v. *King,* 108 U. S. 389, 27 L. ed. 769; *Hamlin* v. *Continental Trust Co.* 47 U. S. App. 422; *Hamlin* v. *Toledo, St. L. & K. C. R. Co.* 78 Fed. Rep. 671, 24 C. C. A. 271, 36 L. R. A. 826; 2 Beach, Corp. § 505; *Chaffee* v. *Rutland R. Co.* 55 Vt. 110; *St. John* v. *Erie R. Co.* 10 Blatchf. 271, 22 Wall. 136, 22 L. ed. 743; *King* v. *Ohio & M. R. Co.* 2 Fed. Rep. 36; *Branch* v. *Jesup,* 106 U. S. 468, 27 L. ed. 279; *New York, L. E. & W. R. Co.* v. *Nickals,* 119 U. S. 296, 30 L. ed. 363; *Field* v. *Lamson & G. Mfg. Co.* 162 Mass. 388, 27 L. R. A. 136; 1 Morawetz, Priv. Corp. § 444, p. 417; 2 Beach, Priv. Corp. § 505, p. 815; 1 Cook, Stock & Stockholders & Corp. Law. § 271.

The essential characteristics of preferred stock may be summarized as follows:

(1) It is essentially capital.

1 Morawetz, Priv. Corp. § 444; 2 Beach, Priv. Corp. § 505.

(2) It is entitled to vote and a voice in the management of the company.

1 Cook, Stock & Stockholders & Corp. Law, § 269; 2 Beach, Priv. Corp. § 505.

(3) It is entitled to share in the profits, even in excess of the fixed dividends, if there be so much profit.

1 Cook, Stock & Stockholders & Corp. Law, § 269; 2 Beach, Priv. Corp. § 501.

(4) It is liable for debts to creditors for unpaid subscriptions.

1 Cook, Stock & Stockholders & Corp. Law, § 270.

(5) Even the payment of dividends on preferred stock must be postponed to payment of debts.

St. John v. *Erie R. Co.* 10 Blatchf. 279; *Warren* v. *King,* 108 U. S. 395, 27 L. ed. 45 L. R. A. 772; *Hamlin* v. *Continental Trust Co.* 47 U. S. App. 422; *Hamlin* v. *Toledo, St. L. & K. C. R. Co.* 78 Fed. Rep. 664, 24 C. C. A. 271, 36 L. R. A. 826; 2 Beach, Priv. Corp. § 505.

(6) Upon dissolution of the corporation, and upon the division of assets, preferred stock as to capital has no priority even over common stockholders.

1 Cook, Stock & Stockholders & Corp. Law, § 278; 2 Beach, Priv. Corp. § 507; *Birch* v. *Cropper,* L. R. 14 App. Cas. 525; *Re London India Rubber Co.* L. R. 5 Eq. 519; *McGregor* v. *Home Ins. Co.* 33 N. J. Eq. 181; *Griffith* v. *Paget,* L. R. 6 Ch. Div. 511. See also Code, P. G. L. art. 23, § 272; Poe's Supp. to Code, art. 23, § 264a.

No case anywhere has ever held that upon a dissolution and division of assets, the preferred stockholders as to the principal of their stock have any preference over common stockholders, much less over creditors.

It has been frequently laid down as a rule that it would be contrary to public policy, essentially unjust, and inequitable to pay preferred stockholders before creditors.

1 Cook, Stock & Stockholders & Corp. Law, § 271; *St. John* v. *Erie R. Co.* 22 Wall. 147, 22 L. ed. 746; *Hamlin* v. *Continental Trust Co.* 47 U. S. App. 422; *Hamlin* v. *Toledo, St. L. & K. C. R. Co.* 78 Fed. Rep. 671, 24 C. C. A. 271, 36 L. R. A. 826; 2 Beach, Priv. Corp. § 502; *Lockhart* v. *Van Alstyne,* 31 Mich. 76, 18 Am. Rep. 156.

As to principal of such stock, a stockholder cannot prove against an insolvent corporation in competition with general creditors.

Allen v. *Herrick,* 15 Gray, 281.

The contract of insurance is a personal one, and a mortgagee or lienee cannot claim the proceeds of an insurance policy collected by the mortgagor or lienor, except perhaps in some cases where there is an agreement by the lienor to insure for the benefit of the lienee, which is not found here.

The City of Norwich, 118 U. S. 468, *Place* v. *Norwich & N. Y. Transp. Co.* 30 L. ed. 134; 1 Joyce, Ins. §§ 23, 3567; *Columbia Ins. Co.* v. *Lawrence,* 10 Pet. 512, 9 L. ed. 514.

The alleged lien created in 1889 would only cover property then owned, not property to be acquired *in futuro.*

First Nat. Bank v. *Lindenstruth,* 79 Md. 136.

Messrs. **T. M. Lanahan** and **Frank Gosnell,** for appellees:

As the meeting was for the benefit of the stockholders only, and the creditors and others were not interested, they cannot be heard now to object to the want of notice as prescribed by law, or to urge upon the court the alleged invalidity of the stock by reason of the fact that notice of the general meeting was not published in two papers.

Morawetz, Priv. Corp. § 635, 2d ed. pp. 635–637; *Beecher* v. *Marquette & P. Rolling Mill Co.* 45 Mich. 103; *Rochester Sav. Bank* v. *Averell,* 96 N. Y. 467; *Wood* v. *Corry Waterworks,* 44 Fed. Rep. 146, 12 L. R. A. 168; *First Nat. Bank* v. *G. V. B. Min. Co.* 89 Fed. Rep. 447; *Manhattan Hardware Co.* v. *Phelan,* 128 Pa. 110; *Miller* v. *Matthews,*

87 Md. 464; *Harrison* v. *Annapolis & E. Ridge R. Co.* 50 Md. 490.

Even where stockholders have sought to oppose the issue of preferred stock as contrary to the statute, or otherwise, they must act promptly, the lapse of twenty-eight months having been decided by the supreme court to be fatal.

Banigan v. *Bard*, 134 U. S. 291, 33 L. ed. 932.

The policy of Maryland is to be determined by our Constitution, statutes, and decisions.

Vidal v. *Philadelphia*, 2 How. 197, 11 L. ed. 233; *Swann* v. *Swann*, 21 Fed. Rep. 301; *United States* v. *Trans-Missouri Freight Asso.* 19 U. S. App. 54, 58 Fed. Rep. 58, 7 C. C. A. 15, 24 L. R. A. 73, 4 Inters. Com. Rep. 443; Potter's Dwarr. Stat. 214, 215; Story, Confl. L. 17.

The statute in controversy is so clear and explicit, and its meaning so obvious, as not to require the aid of authorities in its interpretation.

Gill v. *Cacy*, 49 Md. 243; *Miller* v. *Cumberland Cotton Factory*, 26 Md. 475.

Substance, and not form, is to control the construction of statutes prescribing a mode in which acts are to be performed.

Friend v. *Hamill*, 34 Md. 298; *Young* v. *State*, 7 Gill & J. 253.

A substantial compliance which meets and subserves the purpose and design of the act is all that the law requires.

Marlow v. *McCubbin*, 40 Md. 137.

The evidence shows that all of the appellants were creditors of the corporation at a period commencing prior to the issue of the preferred stock in question, and they had actual notice of the existence of such stock, and should it be held by this court that there is any irregularity in its issue, then the same will be held by a court of chancery to be an equitable lien upon the property and assets of the corporation, and good as against the appellant.

Brown v. *Deford*, 83 Md. 310.

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

The contention in this case is between the holders of what is called "preferred stock" and creditors of an insolvent corporation. The stockholders of the Chesapeake Guano Company, a corporation formed under the general corporation laws of this state, voted some years ago to increase the company's capital by the issue of $60,000 of preferred stock. Without pausing at this point to examine whether the method pursued was the proper one or not, it suffices for the present to say that the authorized shares were all taken. Subsequently the company contracted the debts due to unsecured creditors, and thereafter became insolvent, and its property and assets were placed in the hands of receivers. The funds now for distribution arose from sources that will be named hereafter. As the discussion requires, and the ultimate decision of the controversy involves, for the first time a judicial interpretation of the statutes under the provisions of which this stock was issued, the enactments, though somewhat lengthy, will be set forth in full. They are contained in § 294, art. 23, of the Code. This section is made up of two acts of assembly, passed at different periods. They are Acts 1868, chap. 471, § 219, and Acts 1880, chap. 474. In transcribing them below, the terms of the later act will be put in italics, so that they may be easily distinguished, and more especially so that the radical changes they made in the substance of the thing with which the legislature had dealt under the earlier may be more readily perceived. The following are the words of the Code: "Every corporation incorporated under the laws of this state, which has the power to issue bonds as evidences of indebtedness, and to secure the same by mortgage of the property of such corporation, or which has the power to obtain such money upon mortgage, may, whenever in the judgment of said corporation it is expedient to do so, in place of issuing such bonds and securing the same by a mortgage of the property of said corporation, or instead of obtaining money upon mortgage, issue a preferred stock for any amount for which said corporation may be authorized to issue its bonds, or for any amount which the said corporation may be authorized to obtain upon mortgage of its property, and may dispose of the said stock by sale, on such terms as it may prescribe, or by permitting the same to be subscribed for, as in the judgment of said corporation may be deemed expedient: and every corporation creating such preferred stock as aforesaid may execute an agreement under seal, *to be acknowledged as conveyances of land are required to be acknowledged and recorded in the office of the clerk of the circuit court for the county where the principal office of such corporation shall be situated, or in the office of the clerk of the superior court of Baltimore city, in case such office shall be situated in said city,* guaranteeing to the purchasers of, or subscribers to, such preferred stock, a perpetual dividend of 6 per centum per annum out of the profits of the said corporation, payable yearly or half-yearly, as said corporation shall determine, before any dividend is distributed to any of the stockholders of the said corporation, other than the holders of said preferred stock so created; and the holders thereof shall have all the incidents, rights, privileges, and immunities, and liabilities, to which the capital stock of said corporation, or the holders thereof, may be entitled or subject: provided, however, that no corporation shall exercise any power under this section, unless the creation of such preferred stock shall be authorized by a general meeting of the stockholders of such corporation; *and the said preferred stock shall be and constitute a lien on the franchises and property of such corporation, and have priority over any subsequently created mortgage, or other encumbrance.*" The provision requiring an agreement to be executed and to be placed on record was strictly complied

with. The certificates were issued, and the amount subscribed was fully paid. Thereafter the debts which it is claimed ought to be paid out of the fund now in court for distribution were contracted. The fund arose in this way: The improvements on the company's property,—that is, the buildings and machinery,—together with the stock in trade, were insured by the corporation against loss by fire. After the receivers had been appointed, these improvements and the stock, or some of it, were burned. The receivers collected the insurance. This constitutes part of the fund. The rest is made up of book accounts and rents collected by the receivers. No part of the property, real or personal, except, perhaps, stock in trade, appears to have been sold. The holders of the preferred stock (or of what is called preferred stock) issued under the above-quoted section of the Code, claim that they are, as holders of those shares, and in virtue of the terms of the statute, preferred creditors, and entitled, in consequence, to be paid back out of these funds the amount paid in by them on their shares; while the persons who became creditors of the company after the recording of the agreement already alluded to insist that they are entitled to be paid the debts due to them before any distribution is made to the stockholders. Thus this feature of the controversy is sharply defined.

If this stock is preferred stock, pure and simple, the contention of the creditors is right. The law is perfectly well settled that, as between creditors and ordinary preferred stockholders, the latter, as owners of the property of an insolvent corporation, are, upon a distribution of its assets, entitled to nothing until its creditors are first fully paid. There is a palpable difference between the relation of a stockholder and a creditor to the corporate property. Stock, whether preferred or common, is capital; and, generally speaking, a certificate of stock merely evidences the amount which the holder has contributed to or ventured in the enterprise. Such a certificate, representing nothing more than the extent of his ownership in the capital, cannot well be treated as indicating that he is, by virtue of it alone, also to the same extent a creditor, who may compete with other creditors in the distribution of the fund arising from a conversion of the corporation's assets into money. He cannot, if he is simply an ordinary preferred stockholder, in the nature of things, so far as third persons are concerned, be at one and the same time, and by force of the same certificate, both part owner of the property and creditor of the company for that portion of its capital which stands in his name. His certificate, therefore, in such circumstances, merely measures the *quantum* of his ownership. As his chance of gain throws on the stockholder, as respects creditors, the entire risk of the loss of his contribution to the capital, it is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of repaying the principal of the capital until the debts of the corporation are satisfied. *Warren* v. *King*, 108 U. S. 389, 27 L. ed. 769; Cook, Stock & Stockholders & Corp. Law, § 271; *Hamlin* v. *Continental Trust Co.* 47 U. S. App. 422; *Hamlin* v. *Toledo, St. L. & K. C. R. Co.* 78 Fed. Rep. 664, 24 C. C. A. 271, 36 L. R. A. 826. Whether this characteristic may be modified by statute will be considered later on. To be strictly accurate, we ought to say there is a sense in which a shareholder is a creditor. In that sense every corporation includes its capital stock among its liabilities, but it is a liability which is postponed to every other liability. And as to the matured and unpaid guaranteed dividends due on preferred stock the relation of creditor undoubtedly exists. *Baltimore & O. R. Co.* v. *State*, 36 Md. 541. But, after all, is this particular stock, technically speaking, ordinary preferred stock, and subject, consequently, to the legal incidents and characteristics of that species of property? If you call it preferred stock, and it is what you call it, then the law is perfectly clear that it has no priority over the contesting creditors. If you call it preferred stock, and it is not preferred stock, then, obviously, it is not governed by the principles applicable to preferred stock, but by those relating to the thing that it really is. The mere naming of it does not make it that which it is named, if, in fact, it is something else. Its properties and qualities determine what it is. If the statute calls it what its properties and qualities show that it is not, surely it does not thereby become what it is misnamed, and cease to be what it essentially is. Calling stock preferred stock does not *per se* define the rights in such stock, but these depend on the statute or contract under which it was issued. *Elkins* v. *Camden & A. R. Co.* 36 N. J. Eq. 233. As said by the supreme court of Ohio: "To call a thing by a wrong name does not change its nature. A mortgage creditor, although denominated a 'preferred stockholder,' is a mortgage creditor nevertheless; and interest is not changed into a 'dividend' by calling it a dividend. Nothing is more common, in the construction of statutes and contracts, than for the court to correct such self-evident misnomers by supplying the proper words. To use the language of the court in *Corcoran* v. *Powers*, 6 Ohio St. 19: 'The question in such cases is not, What did the parties call it? but, What do the facts and circumstances require the court to call it?'" *Burt* v. *Rattle*, 31 Ohio St. 116. Courts are not influenced by mere names. They look beyond these and give to the subject dealt with the character—the status—which its properties denote it possesses. The qualities and properties of a thing are its essentials. They define and mark what it is. The name is purely accidental. It is no part of the thing named. If, then, the thing which the statute contemplates possesses the characteristics and qualities of preferred stock, and possesses none other, it is preferred stock; but if, on the other hand, it possesses characteristics and qualities that are entirely foreign to preferred stock, as strictly defined, and that

are descriptive of something else, then the thing is obviously either not ordinary preferred stock, or not preferred stock at all, even though it be called preferred stock, and have, in addition to its own qualities, some of the characteristics that do pertain to preferred stock. Precisely because preferred stock has no lien on the company's property, and cannot be repaid in advance of general creditors, it is necessarily true that a security which is, by express and emphatic legislative enactment, entitled to just such a lien and just such a priority, is not preferred stock, technically speaking, though called by that name, and though having many features incident to preferred stock. The whole ingenious and exceedingly able argument for the appellants proceeded upon the assumption that this is ordinary preferred stock because called preferred stock, and because it possesses the incidents of such stock (but it ignored the fact that it has a quality which preferred stock has not); and the conclusion thence adduced was that, being that kind of stock, it has no preferential lien. Now, the converse is exactly true. If the statute plainly gives a lien and a preference, then this so-called preferred stock is not ordinary preferred stock at all, no matter what it is called, and no matter what incidents it may have in common with preferred stock; and therefore it has not that particular characteristic which, if it were ordinary preferred stock, would defer it to the claims of unsecured creditors. Brushing aside the name, let us see what are the essential qualities of this statutory creation. The act of 1868 (chap. 471, § 219) authorized corporations to issue preferred stock. It was an alternative method of obtaining money. Any corporation which, under its charter, had authority to borrow money, and issue bonds therefor, and secure the payment of the bonds by mortgage, might, instead of resorting to that method, issue preferred stock. In issuing it the companies were empowered to execute an agreement guaranteeing to the purchasers of or subscribers to such preferred stock a perpetual dividend of 6 per cent out of the profits of the corporation before any dividend could be paid to the holders of the common stock. The holders of such preferred stock were given all the incidents, rights, privileges, and immunities, and made subject to all the liabilities, to which the holders of common stock were entitled or subject. This was strictly and technically ordinary preferred stock. It had no priority over creditors or over subsequent mortgages or encumbrances, and it had no lien on the franchises or the property of the corporation. It merely guaranteed a dividend of 6 per cent out of the profits,—that is, the net profits,—and, if there were no profits, there would be no dividend. Its priority was simply a priority over the usual rights and interests of another, but subordinate, class of stockholders. That is the kind of preferred stock authorized by the act of 1868, as a mere glance at its provisions—quoted in the beginning of this opinion, omitting the lines in italics—will demonstrate. In the language of the Supreme Court (*Warren v. King*, 108 U. S. 389, 27 L. ed. 769), "It would be difficult to say that these statutory provisions allowed any preference in shares of capital stock except a preference amongst classes of shares, or any preference of any class of shareholders over creditors. . . . There is nothing in the certificate which clothes them with a single attribute of a creditor." The stock authorized by the act of 1868 was not only called preferred stock, but it had every incident of stock, and none that was not. For twelve years the statute remained unchanged. Shares issued under it were, as we have said, essentially shares of capital, with none of the qualities of an evidence of debt, and shareholders were simply owners of the capital, with none of the rights of creditors of the company. But in 1880 the statute was amended by the addition of the words in italics. By the provision requiring the agreement to be recorded no change was effected in the relation of the preferred to the common shareholder. The former was given no greater right over the latter than he had before the agreement was required to be recorded, and the relation of the preferred shareholder to the company's subsequent creditors was not disturbed, unless the last clause, giving the shareholder a lien, and declaring a preference in his favor, altered the nature of the preferred stock, and made it something that it had not been under the act of 1868. If the clause giving the shareholder a lien and a priority did not create a new species of preferred stock, or a security differing radically from ordinary preferred stock, it is difficult, if not impossible, to assign any reason for the adoption of the act of 1880. The clause specifically declaring that "the said preferred stock shall be and constitute a lien on the franchises and property of such corporation, and have priority over any subsequently created mortgage or other encumbrance," essentially changed the whole nature of the thing antecedently described as preferred stock, and the statutory lien converted it into something wholly different. The statute says "said preferred stock"—not the guaranteed dividend thereon—shall be and constitute a lien on the property and franchises of the company. If you say the lien only extends to the dividend, then you say the stock shall not be a lien, though the legislature said it should be. Preferred stock, under the act of 1868, had no lien whatever. This statutory preferred stock, under the act of 1880 ("the said preferred stock"), has a lien on franchises and on property. Preferred stock, under the act of 1868, had no priority over creditors. This statutory preferred stock, under the act of 1880, has priority over subsequent mortgages and encumbrances. The two are therefore intrinsically different, and the argument that gives to the latter no greater effect or wider range than the former possessed, simply because of the identity in the name applied to both, must totally ignore, and in fact ex-

punge, the clause of the statute expressly creating the lien. If this statutory preferred stock has a lien, then it differs from ordinary preferred stock in that it has the lien. If, because it is called preferred stock, it has no lien, though the statute says it shall have, then the name controls the substance, and the lien expressly given is simultaneously taken away by the name conferred. Either the name or the substance must yield, and certainly the latter cannot be made subordinate to the former.

Giving to the holder of what the act of 1880 designates preferred stock a lien is not without precedent. It can be done, and the ultimate question always is, Has it been done? That it can be done, a few citations will show. In 1 Elliott, Railroads, § 85, the general rule is thus stated: "Unless a preference in repayment of capital invested has been specially contracted for (*Re Bangor & P. Slate & Slab Co.* L. R. 20 Eq. 59; *Re Bridgewater Nav. Co.* L. R. 39 Ch. Div. 1), or is given by statute (*McGregor* v. *Home Ins. Co.* 33 N. J. Eq. 181), the holder of the preferred stock shares equally with common shareholders in a distribution of assets upon dissolution. . . . This results from the rule that he is a stockholder and not a creditor." "But much," the same author proceeds to observe in § 86, "will necessarily depend upon the language used; and where the interest is guaranteed absolutely, and the corporation also agrees to liquidate the principal at a specified time, or the like, so that the so-called stock is in reality an interest-bearing debenture, the relation created thereby will be that of debtor and creditor, and the holder will not be merely a shareholder, as he would be if it were preferred or interest-bearing stock, payable only out of the profits. *Burt* v. *Rattle*, 31 Ohio St. 116; *West Chester & P. R. Co.* v. *Jackson*, 77 Pa. 321; *Totten* v. *Tison*, 54 Ga. 139. Its validity, therefore, would depend upon some other power than the power to issue preferred stock." And in 1 Cook, Stock & Stockholders & Corp. Law, § 271, it is said: "A mortgage to secure preferred stock and dividends thereon has been upheld in a few cases. In other cases that which was called preferred stock was nothing more than income bonds with a voting power." In the case of *Garrett* v. *May*, 19 Md. 191, the late Mr. Reverdy Johnson in his argument spoke of the "income bonds," which were there the subject of controversy, as equivalent to preferred stock. As the interest and principal of the bonds were payable out of income, it meant net income. "The holder," he said, "is thus made only a preferred stockholder." "Occasionally, however," remarks Mr. Cook (1 Cook, Stock & Stockholders & Corp. Law, § 271), "a mortgage is given by the corporation to secure the payment of dividends on preferred stock, and to give it a preference in payment over subsequent debts of the corporation upon insolvency or dissolution. It is difficult to see how such a mortgage would be legal except when it is issued under express statutory authority." In *West Chester & P. R. Co.* v. *Jackson*, 77 Pa. 321, it was said by Judge Woodward, speaking for the court: "A corporation may issue new shares, and give them a preference, as a mode of borrowing money, where it has power to borrow on bond and mortgage, as preferred stock is only a form of mortgage." In *Skiddy* v. *Atlantic, M. & O. R. Co.* 3 Hughes, 355, it was held that, where preferred stock had been issued reciting that the stipulated interest was a lien on all the property of the corporation after the first mortgage, the lien would be upheld by the court as against subsequent mortgages and general creditors, though such lien had not been secured by any mortgage. There ought, then, to be no doubt that this method of creating a lien in favor of a stockholder can be resorted to if the legislature sees fit to authorize it. That it has authorized it by the terms of the act of 1880, hereinbefore transcribed and put in italics, is, it seems to us, perfectly clear. The general assembly has, in plain and unmistakable words, declared that this particular kind of stock—the "said preferred stock"—shall be and constitute a lien on the company's property. No language could be more explicit, and most certainly courts have no authority to reject or to disregard it. Stock issued under this act is, consequently, a lien on the property of the company issuing it, and entitled to the preference which the statute gives it. It is no answer to say that the giving of such a lien is nugatory by reason of a lien being inconsistent with the properties and qualities of stock, because it is quite obvious that after a lapse of twelve years the legislature, by adopting the act of 1880, intended to do just what it did do, even though in doing it the nature of the thing dealt with was changed, and a new and entirely different statutory preferred stock was created. That it had the power to do this cannot be disputed. There was neither physical nor legal impossibility in the way, and no principle of sound and enlightened public policy was invaded. The substance of the thing was changed; the name was retained.

Much was said in the argument, and something is to be found in the books, about such liens in favor of stockholders being void because against public policy; but Sir George Jessel, M. R., in dealing with that indefinite and variable quantity called "public policy," said, in *Printing & N. Registering Co.* v. *Sampson*, L. R. 19 Eq. 465: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider,—that you are not lightly to interfere with this free-

dom of contract. Now, there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offense, or to give money or reward to another to commit an immoral offense, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further." In the case of *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, the Supreme Court had under review the act of Congress of July 2, 1890, enacted "to protect trade and commerce against unlawful restraints and monopolies." It was argued that the impolicy of giving to the act the construction which its language plainly conveyed was so clear that it could not be supposed Congress intended the natural import of the words it had used; but a majority of the court, speaking through Mr. Justice Peckham, said: "The public policy of the government is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts, and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject over which it has constitutional power to legislate, public policy, in such a case, is what the statute enacts." It is impossible to see how the lien given to this peculiar preferred stock can be treated as invalid on the ground that it contravenes public policy, since the explicit words of the statute declare a policy with which the lien that is given is essentially in accord. It must be, said this court in *Re Woods*, 52 Md. 520, a very plain case to justify a court in holding a contract to be against public policy. We are dealing now, not with a contract, but with a statute. None of the cases cited by the appellants' counsel arose upon statutes containing such a provision as is set forth in the act of 1880. They are for that reason distinguishable from this case. They all dealt with ordinary preferred stock, and not with stock issued under a special legislative enactment declaring that stock created thereunder shall be and constitute a lien on the company's property, and shall have priority over subsequent mortgages and encumbrances. If this statutory preferred stock has priority over any subsequently created mortgage or encumbrance, it must have priority over the claims which such subsequently created mortgage would itself have precedence over. It would be a solecism—an incongruity—to say that the stock shall have priority over subsequently created mortgages, and, of course, therefore, over those claims which would be deferred to such mortgage, where there is one, and yet shall have no priority over the same claims where there is no mortgage. Obviously, the statute means a priority over subsequent mortgages and over such claims as such subsequent mortgages would have preference over. 45 L. R. A.

Suppose these claims were secured by a mortgage executed after the issue of the stock, would not the mortgage be postponed, by the express terms of the statute, to the prior lien of the stock? Can claims, when unsecured by a mortgage, take precedence of the stock to which they would be subordinate if they were in the form of a mortgage? If they can, it must be solely because, when unsecured, they are given a priority which is denied them when they are secured; thus reversing the ordinary rule, and placing an unsecured claim in advance of a secured one. The statute cannot be interpreted in a way to produce such a result.

We now come to the inquiry as to whether the stock was properly issued. The statute prohibits the issue of this kind of stock "unless the creation of such preferred stock shall be authorized by a general meeting of the stockholders of" the corporation. It is objected that a general meeting of stockholders was not properly called, because: First, the meeting which did assemble was called by the directors, and not by the stockholders; and, secondly, because notice was given in but one, instead of in two, newspapers. This objection is founded on § 6, art. 23, of the Code, and altogether disregards § 76 of the same article. Section 6 permits stockholders to call a general meeting only when the president and directors refuse to call it after being required by the stockholders to do so. The notice prescribed by § 6 is ten days, and, when the corporation is located in Baltimore city, this notice must be published in two newspapers. Upon turning to § 76, it will be found that provision is made for calling a meeting of the stockholders for the purpose of increasing or diminishing the amount of the capital stock. This notice must be given by the directors, or a majority of them. It must be published in one paper, and a copy must be mailed to each stockholder; and the length of the notice must be four weeks. All the provisions of § 76 were strictly complied with. While § 6 provides generally for calling meetings of stockholders, § 76 provides specially for the case of a meeting called for a particular purpose. The general provision must yield to the particular when the thing to be done is that which the latter has relation to. The proviso requiring the general meeting of stockholders to authorize the issue of preferred stock was contained in the act of 1868, before the amendment of 1880. The issue of preferred stock under the act of 1868 was necessarily an increase of the capital, and the proper method to be pursued in calling a meeting of the stockholders to determine whether such preferred stock should be issued was the one pointed out in § 76. The changes made by the act of 1880 in the characteristics of this stock did not change the mode to be followed in securing the sanction of the stockholders to its issue. As that mode—the one designated in § 76—was strictly followed, the objection founded on the failure to comply with § 6 must fall.

This brings us to the only other question

in the case, and that is whether the sums collected by the receivers from the various sources indicated above can be claimed by the holders of this preferred stock, or must be paid to the unsecured creditors. If the fund collected from the insurance companies is payable to the stockholders, rather than to the unsecured creditors, it must be so payable because the lien on the franchises and property of the company is, by reason of its being a lien on the franchises and property, a lien on the money paid by the insurance companies to the receivers under the policies indemnifying the guano company against loss by fire. But since the decision by Lord Chancellor King in the case of *Lynch* v. *Dalzell*, 4 Bro. P. C. 431, it has never been disputed that a policy of insurance against loss by fire is only a personal contract of indemnity against a possible loss on account of the interest of the insured in the thing mentioned in the policy. Such personal contracts of indemnity do not attach to the realty, or in any manner go with the same as incident, by any conveyance or assignment, unless there is, in addition, some special stipulation to that effect between the insurer and the insured. *Washington F. Ins. Co.* v. *Kelly*, 32 Md. 441, 3 Am. Rep. 149; *Wheeler* v. *Factors & Traders' Ins. Co.* 101 U. S. 442, 25 L. ed. 1057; *Royal Ins. Co.* v. *Stinson*, 103 U. S. 29, 26 L. ed. 477; *Palmer Sav. Bank* v. *Insurance Co. of N. A.* 166 Mass. 189, 32 L. R. A. 615. Consequently, a mortgage, and for the same reason any other lien, creditor, has no right to claim the benefit of the policy underwritten for the mortgagor or owner of the property, unless there is an express agreement permitting it. The insolvency of the mortgagor or debtor cannot operate to expand the lien held by the mortgagee or creditor, or bring within the scope of that lien a fund which, according to settled principles, is not subject to its operation. If the proceeds of such a policy are not covered by the lien which the creditor holds, the subsequent insolvency of the debtor cannot bring them under the lien, because mere insolvency can, of itself, in no instance, amplify a lien whose existence and extent depend wholly upon the terms of the contract creating the lien. There is no pretense that there was any special stipulation between the guano company and the preferred stockholders appropriating to the latter, in the event of a loss by fire, the funds which might be realized under the policies of insurance; and it of course follows that these stockholders have no lien upon those funds, and, having no lien upon them, they have no claim to them, because these stockholders are not general creditors and have no right to appropriate to the payment of their stock any assets other than those which the statute specifically subjects to their lien until the general and other creditors are first fully paid.

With regard to the book accounts collected by the receivers the record discloses very little. Presumably these book accounts represent sums due to the company for merchandise sold by it. It does not appear at what time this merchandise was acquired, but it was probably long after the creation of the preferred stock. However this may be, it cannot be held that the money, when collected, was covered by the lien given by the statute, unless the merchandise sold for that money was itself subject to that lien when sold. It cannot be successfully contended that the lien attached to merchandise which the company was engaged in making for sale without at the same time conceding that every article sold went into the possession of the purchaser charged with the lien. In a manufacturing concern, engaged, as the name implies, in the sale of fertilizers, it could never have been the purpose of the statute to attach the lien to the articles produced for sale, as such a lien would effectually prevent any sale, and would at once, as a consequence, stop the very business which the company was organized to conduct.

Lastly, with respect to the rents. The lien given by the statute attaches to the franchises and property. Were the lien that of a mortgage on land, the specific thing pledged would be land. Rents, unless specifically included, would not be conveyed by a pledge of the land. "They belong to the tenant in possession, whether a mortgagor or a third person claiming under him." *Kountze* v. *Omaha Hotel Co.* 107 U. S. 378, 27 L. ed. 609. In *Freedman's Sav. & T. Co.* v. *Shepherd*, 127 U. S. 494, 32 L. ed. 163, it appeared that one Bradly executed a deed of trust pledging to the savings and trust company certain real estate. The rent accruing from this property was claimed by the trust company and by other creditors of Bradly. In denying the claim of the trust company, the supreme court said: "Bradly's deed pledged the property, not the rents accruing therefrom, as security for the payment of his notes." See also *Gilman* v. *Illinois & M. Teleg. Co.* 91 U. S. 603, 23 L. ed. 405. It is true that, when possession is taken by a receiver in behalf of the mortgagee, the rents may be appropriated to the payment of the mortgage debt (*Teal* v. *Walker*, 111 U. S. 242, 28 L. ed. 415), but this lien, given under the statute to a preferred shareholder, is not the lien of a mortgage, and cannot be expanded so as to include anything more than the legislature designated, namely, franchises and property.

From what has been said it results that, in our opinion, the so-called preferred stock is a lien on the company's franchises and property owned at the time the stock was issued, but that it is not a lien on the funds now in the hands of the receivers, and arising from the sources hereinbefore indicated. In so far as the decree below declared the preferred stock a lien on the franchises and property of the Chesapeake Guano Company it is affirmed, but in so far as it awarded the funds collected from the insurance companies, from the book accounts, and from the

rents of the property to the preferred stockholders it will be reversed.

Decree affirmed in part and reversed in part, and cause remanded, that a new decree conforming to this opinion may be signed; the costs to be equally divided between each side.

Sigmund H. WEIHENMAYER, *Appt.*,
v.
J. Irvin BITNER, Secretary, etc., of Windsor Knitting Mills of Washington County.

(.....Md.....)

1. **Mandamus will lie to compel the officers of a corporation to permit a stockholder to inspect the accounts** of the president and directors where the statute provides that such accounts shall be open at all times to the inspection of stockholders.
2. **The statutory right of a stockholder** of a corporation to inspect its books, documents, and records is not forfeited by the fact that he is a business rival of the corporation and seeks information to be used to its injury and loss.
3. **All reasonable times** are intended by a statute giving stockholders the right to inspect the corporate books at all times.
4. **A judgment will not be reversed** for a general charge directing a verdict erroneous because not indicating the specific ground of the ruling, if no ground appears on which the adverse party could prevail in the action.

(October 28, 1898.)

APPEAL by petitioner from a judgment of the Circuit Court for Washington County in favor of defendant in a mandamus proceeding to compel defendant to permit plaintiff to inspect the books of the Windsor Knitting Mills. *Reversed.*

Plaintiff's prayers were as follows:

1st. The jury are instructed that the

NOTE.—*Right of stockholder to inspect books of corporation.*

I. *At common law.*
II. *Under statutes.*
III. *Extent of the right generally.*
  a. *At common law.*
  b. *Under statutes.*
  c. *Assistance of attorney or expert.*
  d. *Making memoranda and taking copies.*
  e. *Time of inspection.*
  f. *The books and papers inspected.*
  g. *Effect of business convenience or necessity on.*
  h. *To what corporations applicable.*
    1. *Domestic corporations.*
    2. *Foreign corporations.*
    3. *Insolvent corporations.*
IV. *The remedy.*
  a. *By mandamus.*
  b. *By imposition of a penalty.*
  c. *By action for damages.*
  d. *Other remedies.*
V. *Sufficiency of demand and refusal to sustain remedy.*
VI. *Effect of purpose of stockholder on remedy.*
  a. *Generally.*
  b. *For hostile purposes.*
  c. *To obtain grounds for litigation.*
  d. *To obtain knowledge of condition of company.*
VII. *Rule that there must be a specific dispute.*
VIII. *Matters of procedure.*
  a. *In mandamus.*
  b. *In other proceedings.*

I. *At common law.*

A stockholder in a corporation has in the very nature of things and upon principles of equity and good faith and fair dealing the right to know how the affairs of the company are conducted, and whether the capital of which he has contributed a share is being prudently and profitably employed, and to inspect the books of the corporation for the purpose of obtaining such knowledge. State, Martin, v. Bienville Oil Works Co. 28 La. Ann. 204; Cockburn v. Union Bank, 13 La. Ann. 289.

If not restricted by the charter or rules and by-laws of the corporation, a stockholder had at common law the right, at proper and seasonable times, to inspect all the books and records of the corporation. Lewis v. Brainerd, 53 Vt. 510; Ranger v. Champion Cotton-Press Co. 51 Fed. Rep. 611; Lyon v. American Screw Co. 16 R. I. 472; People, Onderdonk, v. Mott, 1 How. Pr. 247; Stone v. Kellogg, 165 Ill. 192. And see *Re* STEINWAY.

Every member of a corporation has the right, as such, to look into the books of the corporation for any matter that concerns himself, though the corporation is not a party to the dispute. Rex v. Newcastle upon Tyne, 2 Strange, 1223.

II. *Under statutes.*

In most of the states, as well as in England, the right of a stockholder to inspect the books of a corporation has also been secured by statute, and in some cases the right has been made the subject of constitutional provision.

Thus, the right of a stockholder in any joint-stock corporation to inspect the books in which transfers of stock are registered and the books containing the names of the stockholders, and to take a copy or memorandum of such names, exists in Pennsylvania, not only at common law without the aid of any statute, but has also been secured by the express language of the Constitution of the state as well as by statute. Com. v. Philadelphia & R. R. Co. 3 Pa. Dist. R. 115.

And La. Const. art. 245, declaring that books exhibiting certain enumerated affairs of a corporation shall be kept for public inspection, is self-acting, and needs no legislative enactment to give it effect. State, Bourdette, v. New Orleans Gaslight Co. 49 La. Ann. 1556.

These provisions, both constitutional and statutory, however, do not supersede the common-law right, but are in affirmance of it or in addition to it.

The common-law jurisdiction to issue a mandamus to compel the submission of the books of a corporation to a stockholder for inspection, however, is limited to that formerly possessed by the court of King's bench in England. *Re* Rappleye, 43 App. Div. 84.

In the United States the prevailing doctrine seems to be that the individual shareholders in a corporation have the same right as the members of an ordinary partnership to examine their company's books, although they have no power to interfere with the management. State, Bourdette, v. New Orleans Gaslight Co. 49 La. Ann. 1556, *dictum*.

Thus, Mo. Rev. Stat. § 2503, providing that books in which transfers of stock are registered, and books containing the names of the stockholders, shall be kept for their inspection dur-

pleadings in this case show that the defendant admits that the plaintiff is a stockholder in the Windsor Knitting Mills, and that he called upon him at his office, as secretary of the directors of the Windsor Knitting Mills of Washington County, on the 10th and also on the 18th of December, 1897, and asked permission to inspect the books containing the accounts of the transactions of the president and directors of the said Windsor Knitting Mills, and that said defendant refused to permit the plaintiff to inspect the books, records, and papers containing said accounts of their transactions, and under the pleadings in the case the plaintiff is entitled to a verdict.

2d. The jury are instructed that from the evidence in this case it appears the plaintiff called upon the defendant, and asked to see the books of the Windsor Knitting Mills containing the transactions of the president and directors; and, there being no evidence to the contrary, their verdict should be for the plaintiff, even though the jury believe that the plaintiff at the same time asked to see all the books of the Windsor Knitting Mills.

3d. The jury are instructed that the plaintiff is entitled to inspect, at such times as he may desire, all the books, records, and papers of every kind and description, and all parts of the same, containing accounts of the transactions of the president and directors of the Windsor Knitting Mills of Washington County, without the intervention or assistance of the defendant, in whose custody the said books and records are kept, and the defendant has no right or power to require the plaintiff to inform him what items in or parts of said books and records he desires to see before permitting him to inspect the same, nor has the defendant any right to prevent the plaintiff from inspecting said books and records, because the plaintiff does not inform

ing business hours for twenty days previous to the election of directors, is declaratory of the common law, and is not therefore a limitation on the stockholder's right of inspection, and cannot be construed to prevent such inspection during any time other than such twenty days. State, Doyle, v. Laughlin, 53 Mo. App. 542.

The right of a stockholder to examine and inspect all the books and records of a corporation at all seasonable times, and to be thereby informed of the condition of the corporation and its property, is a common-law right, and there is nothing in the Missouri statute in relation to corporations that in any way impairs such right, but, on the contrary, it is expressly declared to exist. *Ibid.*

So, N. Y. Laws 1892, chap. 688, § 29, providing that every stock corporation shall keep a stock book which shall be open daily during business hours for the inspection of its stockholders and judgment creditors who may make extracts therefrom, is not exclusive and does not abridge the common-law right of stockholders with reference to the examination of corporate books. RE STEINWAY.

And 1 N. Y. Rev. Stat. Edm. ed. 558, providing for corporate books containing the names of stockholders, and authorizing an examination of the same within thirty days previous to an election of directors, does not deprive a stockholder of a corporation of the right to examine its transfer books for proper purposes and on proper occasions at other times, and a proceeding by mandamus may be invoked for the purpose of enforcing such right. Sage v. Lake Shore & M. S. R. Co. 70 N. Y. 220; People, Hatch, v. Lake Shore & M. S. R. Co. 11 Hun, 1; Brouwer v. Cotheal, 10 Barb. 216.

And a stockholder of a corporation has the right, upon showing a good and sufficient reason, to inspect books of the corporation other than the transfer books, though there is no statutory provision in the state respecting the right of shareholders to examine and inspect the general books of corporations, the only existing enactment on the subject relating to transfer books. *Re* Steinway, 31 App. Div. 70.

So, Ala. Code 1886, § 1677, providing that stockholders of all private corporations have the right of access to inspect and examine all the books, records, and papers of the corporation at reasonable and proper times, was enacted in view of the restrictions and limitations placed by the common law upon the exercise of the right, and the purpose was to protect small and minority stockholders against the power of the majority, and against the mismanagement and faithlessness of agents and officers. Foster v. White, 86 Ala. 467.

It is within the discretion of the court, whenever a case is presented that requires the examination of the books of a corporation by stockholders for the purpose of preserving their rights and interest, to interfere by mandamus to compel the exhibition of the transfer books and books containing the names of its stockholders, though permission to inspect was not asked for within the thirty days previous to an election, during which an absolute right is given to the stockholder to inspect by N. Y. Laws 1882, chap. 409, § 199. People, Stobo, v. Eadie, 63 Hun, 320; Sage v. Lake Shore & M. S. R. Co. 70 N. Y. 220.

And in determining whether a mandamus shall issue to enforce the right of a stockholder of a domestic corporation to inspect its books at a time other than during the thirty days previous to an election of directors, during which the right is absolute, the power of the court should be exercised with great discrimination and care; and while stockholders should be carefully protected from any abuse on the part of the corporation, or unjust denial of their rights, the court will also guard against all attempts by combinations hostile to the corporation or its existing officers to use the right of mandamus to accomplish personal or speculative ends. People, Hatch, v. Lake Shore & M. S. R. Co. 11 Hun, 1.

So, Mo. Rev. Stat. § 7448, providing that no one shall be director in more than one bank at the same time, nor owner of capital stock in a private bank and director in another bank, does not encroach in any way upon the common-law right of a stockholder in a bank to examine its books, though he is also a private banker. State, Doyle, v. Laughlin, 53 Mo. App. 542.

And a provision in the by-laws of a corporation that the transfer books of the company shall be closed for not less than thirty days prior to each annual meeting of the stockholders, means the closing of them against the making of further transfers, and not their closing against the inspection of stockholders, as such a closing would be illegal and in contravention of the statute. State, Wilson, v. St Louis & S. F. R. Co. 29 Mo. App. 301.

So, the Illinois statute, Rev. Stat. chap. 32, § 13, giving to every stockholder of a corporation the right at all reasonable times by himself or by his attorney to examine the records and books of account of the corporation, is founded

him of the purpose for which he desires said inspection.

4th. The jury are instructed that the transactions of the president and directors of the Windsor Knitting Mills include the transactions of all persons who, by their authority, appointment, direction, or employment, make contracts of any or every description, whether relating to purchases, sales, rent of property, transportation of goods, prices, employment of labor, or other matter connected with the business of manufacturing and selling hosiery; and also included all the transactions of agents who are allowed by said president and directors to exercise the power of transacting business for the company, and also all the transactions of unauthorized agents accepted by the president and directors. And the jury are further instructed that the books and papers or other records containing the accounts of all said above-mentioned transactions are by law open to the inspection of the plaintiff; and if the jury believe, from the evidence in the case, that at either or both of the times, when, as admitted, the plaintiff called upon the defendant, he (the plaintiff) requested the defendant to permit him to inspect said books, papers, or records, and said defendant refused to permit the plaintiff to examine the same, then their verdict should be for the plaintiff.

4½. The jury are instructed that the books of the Windsor Knitting Mills are the books containing the accounts of the transactions of the president and directors; and it appearing from the pleadings and evidence in the case that the plaintiff asked the defendant to permit him to see and inspect said books, and that the defendant refused permission to make said inspection, and there being no evidence to the contrary, their verdict should be for the plaintiff.

5th. The jury are instructed that if they

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on the principle that the other holders had a right to be fully informed as to the condition of the corporation, the manner in which its affairs are conducted, and how the capital to which they have contributed is employed and managed. Stone v. Kellogg, 165 Ill. 192, 62 Ill. App. 444.

And the object of the English company clauses act of 1863, § 28, was to put the stockholders of a corporation in such a position that each might see who were entitled to the stock of which he held a part, and what interest they had. Mutter v. Eastern & M. R. Co. L. R. 38 Ch. Div. 92, 36 Week. Rep. 401, 57 L. J. Ch. N. S. 615, 59 L. T. N. S. 117.

III. *Extent of the right generally.*

a. *At common law.*

Where no statutory right to inspect the books of a corporation exists, the granting or refusing a writ of mandamus to compel the officers of such corporation to allow a stockholder to make such inspection is discretionary. People, McDonald, v. United States Mercantile Reporting Co. 20 Abb. N. C. 192; Lyon v. American Screw Co. 16 R. I. 472. And see also People, Stebo, v. Eadie, 63 Hun, 320; Sage v. Lake Shore & M. S. R. Co. 70 N. Y. 220; and People, Hatch, v. Lake Shore & M. S. R. Co. 11 Hun, 1, — *supra*, II.

And the exercise of such discretion will be made to depend upon the necessity or propriety of granting it under the circumstances shown. Lyon v. American Screw Co. 16 R. I. 472.

A stockholder of a corporation is entitled to inspect the corporate books containing the names of the stockholders in the absence of statutes relating to the matter, at proper times and for proper purposes. But where there is nothing in its charter with reference thereto, he should not be permitted to call upon the court to enforce such right unless the circumstances show that he needs such aid for some reasonable and proper purpose. *Ibid.*

So, an application for a mandamus to compel a foreign corporation to exhibit to the relator the transfer books of preferred stock of the company, or other books containing the names and addresses of the holders of such stock, in the absence of statutory provisions therefor, is addressed to the sound discretion of the court, and should be exercised with great discrimination, and will not be granted where it appears that the relator acquired his stock long after a resolution of the board of directors of the corporation authorizing the execution of a mortgage which he opposed, and for the purpose of which opposition his inspection is sought. People, Field, v. Northern P. R. Co. 18 Fed. Rep. 471.

b. *Under statutes.*

Where the statute confers the right upon a stockholder to examine the books of a corporation in absolute terms, if the right can be refused in any case, and if the court has a discretion in the matter, it is a legal discretion, and the right can be denied only when it is clearly apparent that the purpose of asking it is to gratify an idle whim, or to perplex, annoy, or harass the officers having the books in charge. Ellsworth v. Dorwart, 93 Iowa, 108.

Thus, under Ala. Code 1886, § 1677, providing that stockholders of all private corporations have the right of access to, and inspection and examination of, the books, records, and papers of the corporation at reasonable and proper times, the only limitation upon the right of inspection is that it shall be exercised at reasonable and proper times, and not from idle curiosity or for improper or unlawful purposes. Foster v. White, 86 Ala. 467.

And under Ill. Rev. Stat. chap. 32, § 13, providing that it shall be the duty of the directors or trustees of every stock corporation to cause to be kept at its proper office or place of business in the state correct books of account of all its business, and every stockholder in such corporation shall have the right at all reasonable times, by himself or by his attorney, to examine the records and books of account of the corporation, the only limitation upon the right of inspection is that it shall be exercised at reasonable and proper times, and that it shall not be exercised from idle curiosity or for improper or unlawful purposes; in all other respects the statutory right is absolute. Stone v. Kellogg, 165 Ill. 192. See also Holland v. Dickson, L. R. 37 Ch. Div. 669, 57 L. J. Ch. N. S. 502, 58 L. T. N. S. 845, 36 Week. Rep. 320, *infra*, VI. b.

So, statutes giving stockholders the right to inspect certain books of their corporations, and imposing a penalty upon the recording officer for refusal to permit such inspection, although subjecting the offender to a penalty recoverable by the injured party, is not a penal, but a remedial, statute, and should therefore be liberally construed. Lewis v. Brainerd, 53 Vt. 510.

Thus, a clause in the charter of a corporation declaring that all the powers of the corporation

believe from the evidence in the case that at one or both of the times, when, as admitted, the plaintiff called upon the defendant in December, 1897, he (the plaintiff) asked said defendant to permit him to see the books of the company, meaning thereby the books or records containing the transactions of the president and directors, if the jury so find, and said defendant refused the plaintiff permission to see any and all books and records in his possession as secretary of the board of directors, then their verdict should be for the plaintiff.

6th. The jury are instructed that if they believe from the evidence in the case that at the time or times in December, 1897, when, as admitted, the plaintiff called upon the defendant, he requested said defendant to permit him to see and examine the books containing the accounts of the transactions of the president and directors of the Windsor Knitting Mills, and said defendant refused to permit the plaintiff to see and examine said books, then their verdict should be for the plaintiff.

7th. The jury are instructed that if they believe from the evidence that at the time or times in December, 1897, when, as admitted, the plaintiff called upon the defendant, the purpose and desire of the plaintiff was to inspect the books containing the transactions of the president and directors of the Windsor Knitting Mills, and that defendant so understood the plaintiff from the language used, but refused to permit the plaintiff to inspect any and all books in his possession as secretary of said directors, then their verdict should be for the plaintiff; and the jury are instructed that the fact that the plaintiff is conducting a hosiery mill of his own has nothing to do with the case.

8th. The jury are instructed that the plaintiff is entitled to inspect every book containing any transaction directly or indi-

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shall be exercised by a board of directors does not deprive a stockholder of his individual right to know from personal inspection of the books and papers of the company the state of its business affairs, and does not warrant an assumption by the board of directors that it has the right of deciding when, by whom, and for what purpose the books shall be inspected, and that a stockholder has no right to make inspection at pleasure. State, Martin, v. Bienville Oil Works Co. 28 La. Ann. 204.

So, a by-law of a corporation providing that no stockholder or other person shall have the right to inspect the books thereof without special authority from the board of directors, is subordinate to the provisions of the charter and of the Constitution of the state, authorizing stockholders to inspect the books of the corporation. State, Burke, v. Citizens' Bank, 51 La. Ann. 426.

And an offer by a corporation in a mandamus proceeding by a stockholder for the inspection of its books to purchase his stock at the market value or at such sum as the court may order, is impertinent and irrelevant, though it had greatly increased in value since the stockholder purchased it, as he is not bound either to forfeit his legal rights or to sell his shares. State, Wilson, v. St. Louis & S. F. R. Co. 29 Mo. App. 301. And see WEIHENMAYER v. BITNER.

But the purchaser of stock in a corporation, although entitled to examine its books, is not, as matter of law, under obligation to do so for the purpose of ascertaining whether or not he has been defrauded in his purchase of the stock, when he is not aware of any ground of suspicion. Gerner v. Mosher (Neb.) 78 N. W. 384.

c. Assistance of attorney or expert.

A shareholder's right to inspect the books of a corporation includes the right to make the inspection by an agent, solicitor, counsel, or expert. Blair v. Massey, Ir. Rep. 5 Eq. 623; Hyde v. Holmes, 2 Molloy, 372; Blymyer v. Blymyer Iron Works Co. 5 Ohio N. P. 71; State, Martin, v. Bienville Oil Works Co. 28 La. Ann. 204; Deaderick v. Wilson, 8 Baxt. 108.

While the right of a stockholder to inspect the books of a corporation is personal in the sense that only a stockholder possesses and can exercise it, his inspection and examination may be made by an agent or attorney in fact. Foster v. White, 86 Ala. 467.

It is not so strictly personal to him that it cannot be exercised by another for him and in his stead, as by an agent or executor. State, Burke, v. Citizens' Bank, 51 La. Ann. 426.

And the right of a stockholder of a corporation to examine its books at the time he requests it cannot be denied because he is accompanied by his attorney and his stenographer. Ellsworth v. Dorwart, 95 Iowa, 108.

And the treasurer of a corporation is not justified in refusing a stockholder permission to examine the records, books of account, and stock-books of the company, demanded under N. Y. Laws 1892, chap. 688, § 29, providing that the stock books of every corporation shall be open daily during business hours for the inspection of its stockholders, because the stockholder is accompanied by his attorney, and an offer to allow the stockholder to examine the stock-book by himself does not justify such refusal. People, Clason, v. Nassau Ferry Co. 86 Hun, 128.

So, in State, Spinney, v. Sportman's Park & Club Asso. 29 Mo. App. 326, the court said that it was not prepared to say that a stockholder's right of examination is one which must be exercised in all cases without the assistance of such expert aid as in many cases is the only one to render the examination effectual.

The right of inspection of the books of a corporation given by the Stannaries act of 1855, § 22, however, is personal to the shareholder, and does not extend to his solicitor or agents. *Re* West Devon Great Consols Mine, L. R. 27 Ch. Div. 106.

And the court, in a proceeding for a mandamus to compel a corporation to permit a stockholder to examine the books, papers, and affairs of the corporation, which has rendered judgment granting the mandamus but giving no permission for the appointment of experts to aid him, cannot, ten days after the judgment was signed, make an *ex parte* order appointing two experts to aid him, as the case was disposed of finally by the judgment, and there was no suit pending in which the order in question could be granted. State, Mahan, v. Accommodation Bank, 28 La. Ann. 874.

d. Making memoranda and taking copies.

A stockholder examining the books of a corporation may take memoranda or a list of the stockholders. Hyde v. Holmes, 2 Molloy, 372; *Re* Martin, 62 Hun, 557; Deaderick v. Wilson, 8 Baxt. 108.

Where there is a power upon the part of a shareholder to inspect the register of members of the company, that power carries with it, if there is nothing to negative it, the right to

rectly made by the president and directors of the Windsor Knitting Mills, whether contained in the day book, ledger, cash book, journal, order book, minute book, or other book of the company; and if the jury find from the evidence that any one or number of said books, containing transactions (one or more) of said president and directors, and believe that the plaintiff requested defendant to permit him to see and examine said book or books so containing the transaccontrol of the president and directors; and that defendant refused to permit the plaintiff to see and examine the same, then their verdict should be for the plaintiff.

9th. The jury are instructed that the business affairs of the Windsor Knitting Mills are under the entire management and control of the president and directors; and the plaintiff, being a stockholder, is entitled to an inspection of the books and records containing the accounts of all the transactions of said president and directors in the management of the company's affairs; and if the jury believe from the evidence that the plaintiff requested the defendant to permit him to see and examine said books or records, but the defendant refused to allow the plaintiff to inspect said books or records, then their verdict should be for the plaintiff.

10th. The jury are instructed that, if they believe from the evidence that the plaintiff requested defendant to permit him to see and examine the books of the Windsor Knitting Mills, and defendant refused to permit him to examine said books, their verdict should be for the plaintiff.

11th. The jury are instructed that any statement or statements made by the plaintiff of the assets and liabilities of the Windsor Knitting Mills have nothing to do with the right of the plaintiff to inspect the accounts of the transactions of the president and directors, and are not to be considered

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make extracts from the register, or to make notes of its contents, and to make copies of its entries. Boord v. African Consol. Land & Trading Co. [1898] 1 Ch. 596, 77 L. T. N. S. 553.

The right of a stockholder in a corporation to make copies, abstracts, and memoranda of documents, books and papers of the company is as full and complete as the right of inspection thereof. Swift v. State, Richardson, 7 Houst. (Del.) 338.

Thus, a stockholder in a private corporation has the right, under the New York act entitled "Special Provisions Relating to Certain Corporations" at any reasonable time during the usual hours of business within thirty days previous to an election of directors, not only to inspect the books in which the transfers of stock are registered and books containing the names of stockholders, but also to take a copy or memorandum of the names of the stockholders. Cotheal v. Brouwer, 5 N. Y. 562, 10 Barb. 216.

And the right of a shareholder in a corporation under the companies act of 1862, § 32, to require a copy of the register on payment, is in addition to, and not in substitution for, the right of the shareholder to take his own notes and copies if he likes, upon making an inspection thereof. Boord v. African Consol. Land & Trading Co. [1898] 1 Ch. 596, 77 L. T. N. S. 553.

And the right of a debenture stockholder of a stock company to inspect and peruse the register, conferred by the companies clauses act of 1863, § 28, includes the right to make minutes therefrom and take copies thereof. Mutter v. Eastern & M. R. Co. L. R. 38 Ch. Div. 92, 36 Week. Rep. 401, 57 L. J. Ch. N. S. 615, 59 L. T. N. S. 117.

So, a debenture stockholder in a corporation entitled to inspect the register under the companies act of 1862, § 43, providing that every limited company shall keep a register of all mortgages and charges specifically affecting its property, includes the right to take copies of the register, and such right is not affected by the fact that the section does not require the addresses of the encumbrancers to be inserted in their register, and that therefore a stockholder would be unable to communicate with them. Nelson v. Anglo-American Land Mortg. Agency Co. [1897] 1 Ch. 130, 66 L. J. Ch. N. S. 112, 75 L. T. N. S. 482.

The right to take copies of the list of stockholders of a corporation, conferred by Constitution or statute, however, can only be exercised for a reasonable and proper purpose. Com. v. Empire Pass. R. Co. 134 Pa. 237.

And permission will not be given a stockholder in a corporation to have an expert accountant make an examination of the books of the corporation in an action in equity which might be maintained as a bill for an accounting, in which case the testimony could be taken in the ordinary way, and a *subpœna duces tecum* would produce all the books and papers which could be examined by the complainant or his expert in the usual course of the proceeding. Clarke v. Eastern Bldg. & L. Asso. 89 Fed. Rep. 779.

Pennsylvania Const. 1874, art. 17, § 2, providing that a list shall be kept at the office of the company, and that it shall be open to the inspection of stockholders and creditors, does not confer the right to take copies of the list. Com. v. Empire Pass. R. Co. 134 Pa. 237.

As to taking memoranda or copies of books of a corporation in the hands of a receiver, see *Re* Tiebout, 19 N. Y. Week. Dig. 570, *infra*, III. g, 2.

e. *Time of inspection.*

A stockholder in a corporation has not the right to examine the books of the corporation at such times as he might desire; his right is limited to examination at all reasonable times. WEIHENMAYER v. BITNER.

The stockholders in a private corporation have the right to inspect the books of the corporation and take minutes therefrom at all reasonable times only. Deaderick v. Wilson, 8 Baxt. 108; Legendre v. New Orleans Brewing Asso. 45 La. Ann. 669; People, Onderdonk, v. Mott, 1 How. Pr. 247; Lewis v. Brainerd, 53 Vt. 510.

And this seems to be the rule under the statutes as well as at common law. See Stone v. Kellogg, 165 Ill. 192; Foster v. White, 86 Ala. 467, *supra*, III. b; Holland v. Dickson, L. R. 37 Ch. Div. 669, 57 L. J. Ch. N. S. 502, 58 L. T. N. S. 845, 36 Week. Rep. 320, *infra*, VI. b.

And an order for inspection of books of a corporation by a stockholder should be so drawn as not to inconvenience the transaction of the corporate business. Duffy v. Mutual Brewing Co. N. Y. L. J. Oct. 3, 1892, p. 18, as reported in Cook on Stock, Stockholders & Corp. Law, § 516.

Individual shareholders in a corporation cannot appropriate the books thereof for the purpose of inspecting them to an unreasonable extent and to the detriment of the interest of the corporation and the rights of the other share-

by them; and they are also instructed that the fact that plaintiff is conducting the hosiery business for himself has nothing to do with this case.

Defendant's prayers were as follows:

1st. The jury are instructed that the plaintiff has offered no evidence legally sufficient to find a verdict for the petitioner, and the verdict of the jury must be for the defendant.

2d. If the jury believe from the evidence that some time in the month of December, 1897, the petitioner came to the office of J. Irvin Bitner, secretary of the Windsor Knitting Mills, and then and there stated to the said secretary that he wanted to make an examination or investigation of the affairs of the Windsor Knitting Mills, as he thought the books were not properly kept, and the said secretary did then and there refuse to permit said petitioner to take possession of or inspect any books of the Windsor Knitting Mills, which were then in the possession of the said secretary, that said want on the part of the petitioner was too indefinite and general, that said secretary properly refused the want of the petitioner, and the verdict of the jury must be for the defendant.

3d. The jury are instructed that if they believe from the evidence that some time during the month of December, 1897, the petitioner came to the office of J. Irvin Bitner, secretary of the Windsor Knitting Mills, and demanded an inspection of the books of the Windsor Knitting Mills; and further find from the evidence that the said secretary did not refuse such inspection,—then their verdict must be for the defendant.

4th. The jury are instructed that if they believe from the evidence that the petitioner demanded an inspection of the books of the Windsor Knitting Mills in the possession of its secretary, J. Irvin Bitner, without show-

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holders, but the convenience of the corporation and the convenience of the shareholder must to some extent yield to each other, and the rights of the one cannot be exercised unreasonably as against the other. State, Wilson, v. St. Louis & S. F. R. Co. 29 Mo. App. 301.

And where a stockholder in a corporation is given the right to inspect its books at a particular time in accordance with his demand, he cannot claim that he had no assurance that at some future time the right would be denied him, and in the absence of proof upon his part that some right would probably be denied him in the future he cannot thereafter maintain a suit in equity to prevent the secreting of the books and the putting of any obstacle in the way of his examining the same and to compel the delivery of the books for inspection. Boardman v. Marshalltown Grocery Co. 105 Iowa, 445.

And a judgment in a mandamus proceeding requiring permission to a stockholder to inspect books of a corporation for two hours a day for ten days will not be vacated on the ground that the time granted was unreasonable, where the relator offered evidence tending to show that time would be necessary for the examination, and the respondent introduced no evidence on the subject. State, Spinney, v. Sportman's Park & Club Asso. 29 Mo. App. 326.

So, a stockholder in a corporation who demands an inspection of the corporation books, and is given permission and tries to make the examination himself without assistance because the expert whom he had employed was detained by sudden illness in his family, but finds that his examination had not been as thorough as it would have been had he been accompanied by the expert, is entitled to a further examination with an expert. Blymyer v. Blymyer Iron Works Co. 5 Ohio N. P. 71.

For instances of statutes held to give an absolute right to inspect at any time, see Foster v. White, 86 Ala. 467; and People, McDonald, v. United States Mercantile Reporting Co. 20 Abb. N. C. 192,—*infra*, VI. a.

f. The books and papers inspected.

The common-law right to inspect includes all the books and records of the corporation. Lewis v. Brainerd, 53 Vt. 510.

And a stockholder in a corporation has the right of access to the proper sources of knowledge as to how the affairs of the corporation are conducted, and in the absence of restriction by statute, charter, or rules and by-laws passed in conformity therewith, a stockholder in a banking company has the right to inspect the discount book of the bank within proper and reasonable hours. Cockburn v. Union Bank, 13 La. Ann. 289.

So, in State, Immanuel Presby. Church, v. Riedy, 50 La. Ann. 258, it was said that the books and records of a religious society are subject to inspection by those having an interest, but the case turned upon the question of the right to mandamus to compel the delivery of the books to the proper officers entitled thereto.

And in Cockburn v. Union Bank, 13 La. Ann. 289, *supra*, Hatch v. City Bank, 1 Rob. (La.) 470, *infra*, VI. a, was limited and criticised, the court saying that it cannot be considered as decisive authority against the view expressed in the case at bar because it was the opinion of two judges, and not of the majority of the court.

The question as to what books and papers may be inspected under the statutes is one of statutory construction depending upon the language of the statute authorizing inspection.

Thus, the intention of the provision of Md. Code, art. 23, § 5, that the books of account of the transactions of a corporation shall be open at all times to the inspection of the stockholders or members, is that the stockholders shall have a full opportunity of informing themselves of the business of the corporation, and that nothing could be concealed from them, and the stockholder is entitled to an inspection of all books, papers, and accounts of every kind and description whatsoever of the corporation. WEIHENMAYER v. BITNER.

So, under Iowa Code, § 1078, providing that the stock books of a company showing designated facts, or a correct copy thereof showing such facts, shall be subject to the inspection of any person desiring the same, and Iowa Code, § 1078, requiring the treasurer or assistant treasurer of a railroad company to keep a record of the financial condition of the corporation which may be inspected at all reasonable hours by any stockholder, it is the absolute right of any person to examine the stock and transfer books of a corporation whether he shows himself interested or not: and a stockholder has the right at all reasonable hours to inspect the records showing the financial condition of the corporation. Ellsworth v. Dorwart, 95 Iowa, 198.

And the register which a shareholder in a corporation is entitled to inspect under the English companies act of 1862, § 32, includes the entries of names of persons who have been, but have ceased to be, members of the company by reason of the forfeiture of their shares or

ing good and sufficient reasons therefor, then their verdict must be for the defendant; and the jury are further instructed that a belief or speculation on the part of the petitioner that the affairs of said mills were not being properly conducted is not a good and sufficient reason giving the right to the petitioner to make such inspection.

The court refused all the prayers and said: "The jury are instructed that, under the pleadings and evidence in this cause, the plaintiff is not entitled to recover, and their verdict must be for the defendant."

Mr. **W. C. Griffith,** for appellant:

An instruction to the jury, "that under the pleadings and evidence the plaintiff is not entitled to recover," is entirely too general. *Kent* v. *Holliday*, 17 Md. 395; *Western Maryland R. Co.* v. *Carter*, 59 Md. 311; *Fells Point Sav. Inst.* v. *Weedon*, 18 Md. 323; *Reier* v. *Strauss*, 54 Md. 291; *Cook* v. *Durall*, 9 Gill, 461.

The instruction of the court taking the case from the jury was erroneous because an inspection of the record shows there was evidence tending to prove the issue joined in favor of the plaintiff, which should have been submitted to the jury.

Code Pub. Gen. Laws, art. 23, § 5.

When a statute gives to stockholders the right to examine corporate books, mandamus seems to be granted as a matter of right.

Cook, Stock & Stockholders, § 511, note.

If under the rules of law the party is entitled to the writ, it must be issued.

Brooke v. *Widdicombe*, 39 Md. 388.

A stockholder is not to be denied the right to inspect the books because he is hostile to the corporation and may use the information to its injury, nor because the books are kept in a particular way, nor because they contain, besides the information to which he is entitled, other information which he has no right to demand. It is its duty to permit

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otherwise. Reord v. African Consol. Land & Trading Co. [1898] 1 Ch. 596, 77 L. T. N. S. 553.

So, the word "accounts" in Wis. Laws 1872, chap. 144, § 15, giving a stockholder the right to an inspection of the stock-books and general accounts of the corporation, is not limited to the stock accounts or to the stock-books containing the accounts of the company with the stockholders in relation to the stock held by them; but extends to cover books containing the general accounts of the business of the corporation, and is not limited by the fact that the section is found under the heading of capital stock. State, Bergenthal, v. Bergenthal, 72 Wis. 314.

And under the English companies clauses act of 1845, §§ 43, 63, and the companies clauses act of 1863, § 24, the right given holders of stock of inspecting the registers of the company is not confined to an inspection of the names and addresses only of the holders of stock, but extends also to an inspection of the amounts of stock held by the other stockholders. Holland v. Dickson, L. R. 37 Ch. Div. 669, 57 L. J. Ch. N. S. 502, 58 L. T. N. S. 843, 36 Week. Rep. 320.

But N. J. act, § 50, with relation to corporations authorizing the chancellor or the supreme court or any justice thereof to order that the books of a corporation be brought into the state, does not extend to and include the papers and memoranda of the company. Huylar v. Cragin Cattle Co. 42 N. J. Eq. 139, 40 N. J. Eq. 392.

And the right guaranteed to stockholders of a corporation by a provision in its by-laws that the treasurer shall keep or cause to be kept a full and accurate account of all the business of the company in suitable books, which books shall at all times be open to the inspection of any of the stockholders, is the right to inspect the books of account of the business of the company, and does not include the right to inspect the stock ledger, the expression "business of the company" having reference to its manufacturing and commercial transactions. Lyon v. American Screw Co. 16 R. I. 472.

And a deed of settlement of a joint-stock company formed under 7 & 8 Vict. chap. 110, and registered under that act, and afterwards under 19 & 20 Vict. chap. 47, containing a clause that "the books wherein the proceedings of the company are recorded shall be kept at the principal office of the company, and shall be open to the inspection of the shareholders every day of the year except on Sundays and holidays," which provides that separate books shall be kept of the minutes of the proceedings at the general meetings of the shareholders, and of the minutes of the proceedings of the directors, gives shareholders the power to inspect the book of minutes of the proceedings of the general meetings only, and not the book of minutes of the proceedings of the directors. Queen v. Mariquita & N. G. Min. Co. 1 El. & El. 289.

So, a shareholder in a corporation sued by the company for calls under a provision in the charter empowering the directors to make calls under certain regulations, and directing them to enter their proceedings in the books, and declaring it competent for stockholders at any general or special meeting of the company to call for and inspect all books and documents relating to the company, and to require any information from the directors, is not entitled to inspect the minute book of the company and of the directors' meeting,—particularly with respect to the claim upon which he was sued for the purpose of framing his pleading. Birmingham, B. & T. Junction R. Co. v. White, 5 Jur. 869, 4 Ferry & D. 649, 1 Q. B. 282, 2 Railway Cas. 863.

And the general turnpike act, 3 Geo. IV., chap. 126, § 73, which re-enacted a local act directing that the trustees of the turnpike company shall keep a book in which they shall enter their accounts, which book shall be open to the inspection of the trustees or any creditor on the tolls, directing that all turnpike roads shall keep a book of their orders and proceedings which shall be open to the inspection of any of the trustees, supersedes the provisions of the original local turnpike act, directing that the trustees shall keep books in which they shall enter their accounts and their orders and proceedings, and that all persons shall have access to such entries, and thereby limits the power of inspection given in the previous act to the whole public, to trustees and creditors in the respective cases of orders and accounts. King v. Trustees of Northleach & Witney Roads, 5 Barn. & Ad. 978.

The fact that a stockholder requested and prayed for an inspection of more than he was entitled to inspect, however, does not justify the court in denying him the right to make any inspection. Ellsworth v. Dorwart, 95 Iowa, 168.

But Mich. Comp. Laws, § 1915, providing that plank-road companies shall keep a stock-book which shall be open at the office of the corporation during business hours, for the in-

an inspection of such books as it keeps for the purpose of recording the transactions which the statute gives the stockholder a right to know.

1 Beach, Priv. Corp. § 77; *Mitchell* v. *Rubber Reclaiming Co.* (N. J.) 24 Atl. 407; Cook, Stock & Stockholders, §§ 511, 519, footnote 3; 4 Thomp. Corp. §§ 4406, 4412, 4414.

The directors are deemed to be the mind and soul of the corporate entity. What they do the corporation does, and, conversely, what the corporation does, they do. They are the corporation to all purposes, as in Maryland the trustees of a religious society are the body politic.

Maynard v. *Firemen's Fund Ins. Co.* 34 Cal. 48, 91 Am. Dec. 672; Morse, Banks & Banking, 90; 17 Am. & Eng. Enc. Law, pp. 57, 58, 87; 1 Beach, Priv. Corp. § 227; *Burrill* v. *Nahant Bank*, 2 Met. 163, 35 Am. Dec. 395; 1 Morawetz, Priv. Corp. §§ 510, 517, 536; *Genesee County Sav. Bank* v. *Michigan Barge Co.* 52 Mich. 438; *Hoyt* v. *Thompson*, 19 N. Y. 207; *Cleveland & M. R. Co.* v. *Himrod Furnace Co.* 37 Ohio St. 321.

When, therefore, the statute says the president and directors shall keep, etc., it is equivalent to saying the corporation shall keep, because the transactions of the president and directors cover the whole ground of corporate activity.

Cook, Stock & Stockholders, §§ 708, 709, 712.

Whatever language is used, everywhere the purpose is to give the stockholders an inspection of the books of the company. The most liberal interpretation is given to the statutes, because the relation of trustee and *cestui que trust* exists between the directors and stockholders, and courts seek to favor the *cestui que trust* in all cases.

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spection of all persons, furnishes no remedy to a stockholder in such a corporation, where he asked for inspection of all the books, records, and papers of the company, as such a demand is not within the statute. People, Bishop, v. Walker, 9 Mich. 328.

So, a corporation cannot be permitted to defeat the provisions of the Revised Statutes requiring corporations to keep stock-books open to inspection by stockholders, by omitting to keep the book prescribed, and if it does not keep the book which the statute prescribes, it is its duty to permit an inspection of such as it does keep for the purpose of recording the transactions which the statute gives the stockholders the right to know. People, Richmond, v. Pacific Mail S. S. Co. 50 Barb. 280.

And a stockholder of a corporation cannot be deprived of the right to inspect the stock-books of the corporation because they are kept in a particular way or because they contain, along with the information to which he is entitled, other information which he has no right to know. *Ibid.*

Irrelevant parts of books of a corporation on examination by a stockholder may be sealed up. Napier v. Staples, 2 Molloy, 270.

And the books of a foreign corporation organized and doing business in a distant state, and which are probably in daily and frequent use, should not be required to be produced before a referee in the state by an order for inspection, but sworn copies of their contents which relate to the subject-matter mentioned in the order should be produced and delivered within a reasonable time to be designated by the order. Ervin v. Oregon R. & Nav. Co. 22 Hun, 566.

The book which a corporation is required to keep at its office for inspection of stockholders, by N. Y. Laws 1848, chap. 40, § 25, is deemed by the character of the entries which it must contain which relate to stockholders, the shares owned by them respectively, and the amount of stock actually paid in; and the fact that a stockholder requests to inspect the stockbook and record book of the company when the books containing the store entries were known as the certificate book and stock ledger, does not prevent a recovery of the penalty prescribed by that statute, for its violation. Kelsey v. Standler Process Fermentation Co. 20 N. Y. S. R. 503.

g. Effect of business convenience or necessity on.

The fact that if many shareholders should demand the right of inspection separately, there might be some confusion caused in the exercise of it, cannot be considered against the right of a shareholder to an inspection. Com. v. Philadelphia & R. R. Co. 3 Pa. Dist. R. 115.

And under 1 Starr & C. (Ill.) Stat. 616, providing that every stockholder in a stock corporation shall have the right at all reasonable hours by himself or by his attorney to examine the records and books of account of the corporation, business necessity cannot be regarded as a sufficient excuse for noncompliance with the law. Crown Coal & Tow Co. v. Thomas, 60 Ill. App. 234.

So, the duty of the directors and executive officers of a bank under the Missouri statute is to permit the examination of the books of a bank upon proper and reasonable request of the stockholder, and such examination cannot be refused on the ground that the bank occupies such a confidential and trust relation toward its customers and depositors that it would be a breach of duty on the part of the bank to open up its books for inspection. State, Doyle, v. Laughlin, 53 Mo. App. 542.

And a corporation not denying that an inspection of its stock ledger would give a stockholder demanding it information to which he had a right cannot justify its refusal to exhibit it on the ground that it is also a book of accounts between the company and its shareholders, showing their dealings in the stock of the company, and that it is always regarded as confidential between the parties concerned, and that the information might be used for improper purposes. People, Richmond, v. Pacific Mail S. S. Co. 50 Barb. 280.

And the policy of a corporation or the desire of its officers to prevent a disclosure of the private affairs of the stockholders by furnishing their names and the accounts is no answer to a demand by a stockholder of the right to inspect the corporate books. Com. v. Philadelphia & R. R. Co. 3 Pa. Dist. R. 115.

And the shareholders of a corporation are entitled to inspect the books and papers of the company which are their property, though there is a secrecy clause in the articles of association, and though in the course of inspection they will become acquainted with matters which should be kept secret, but it is their duty not to divulge the information so acquired, and the court will restrain them by injunction from so doing, and punish them if they should do so. *Re* Birmingham Bkg. Co. 36 L. J. Ch. N. S. 150, 15 L. T. N. S. 203.

In Rodger Ballast Car Co. v. Perrin (Ill.) 17

1 Greenl. Ev. §§ 120, 121, 474, 483, 485; Cook, Stock & Stockholders, § 727; 4 Thomp. Corp. §§ 4406–4414.

Mr. **J. A. Mason,** for appellee:

The words "accounts of the transactions of the president and directors" certainly must be understood as meaning the ordinary minutes of their proceedings, their resolutions, orders, and records of their actions as a governing body, and not the bank books, day books, ledgers, correspondence, etc., usually kept by any reasonably prudent business person or corporation.

While the appellant is a stockholder in the said mills, he is also at the same place a rival and competitor in a like business as that conducted by the appellee.

Without statutory provision "the stockholder was not entitled, as a matter of right, to a mandamus to allow him to inspect the minutes of the directors' meetings," and courts required strong cases before the writ would be issued for this purpose.

1 Beach, Priv. Corp. § 75; 1 Cook, Stock & Stockholders, § 517; *Queen* v. *Mariquita & N. G. Min. Co.* 1 El. & El. 289; *Alabama & F. R. Co.* v. *Rowley,* 9 Fla. 508; *Lyon* v. *American Screw Co.* 16 R. I. 472.

If the appellant seeks to rely upon a supposed common-law right, the demand is too broad and general.

1 Beach, Priv. Corp. §§ 75–79; 2 Addison, Torts, § 1496c; *People, Bishop,* v. *Walker,* 9 Mich. 328; *Queen* v. *Mariquita & N. G. Min. Co.* 1 El. & El. 289; *King* v. *Merchant Tailors' Co.* 2 Barn. & Ad. 115; *Com.* v. *Empire Pass. R. Co.* 134 Pa. 237; *Queen* v. *Undertakers of Grand Canal,* 1 Ir. L. Rep. 337; *Rex* v. *Newcastle upon Tyne,* 2 Strange, 1223; *State, Rosenfeld,* v. *Einstein,* 46 N. J. L. 481; *People, Hatch,* v. *Lake Shore & M. S. R. Co.* 11 Hun, 1.

Nat. Corp. Rep. 819, however, it was held that an injunction will not lie, under the Illinois act requiring corporations to keep certain books of account and providing that every stockholder shall have the right at all reasonable times by himself or by his attorney to examine the records or books of account of the corporation, to prevent a stockholder from exercising his right to examine such books, or to restrain him from divulging any information obtained therefrom.

And in Pratt v. Meriden Cutlery Co. 35 Conn. 36, it was held that a mandamus will not issue on petition of a stockholder of a corporation to compel it to keep its books at the town in the state where the office of its treasurer was located under Conn. Gen. Stat. p. 173, § 407, providing that the account books of every corporation shall be kept and shall be open to the examination of stockholders at the town within the state where the corporation is located, or at the office of its treasurer within the state where the corporation had a factory and its principal office in that town and a store for the sale of its manufactured goods in New York, the books pertaining to the manufacturing being kept at the home office, but the books containing accounts of sales and the bank account being kept in New York, where the keeping of the latter books in New York was indispensable to its business, where every facility for obtaining information was given the stockholder, and a monthly statement of the New York books was entered in the books at the home office.

See also on this subject, *Re* Pierson, 28 Misc. 726, *infra,* VI. a.

b. To what corporations applicable.

1. Domestic corporations.

It has never been denied that the common-law doctrine of the right of a stockholder to inspect the books of a corporation applies to all domestic stock companies, and it is plain that all the statutory provisions on the subject were especially intended to apply to that class of corporations.

2. Foreign corporations.

In People, Field, v. Northern P. R. Co. 18 Jones & S. 456, it was intimated, but not decided, that the courts of a state have no power, in the absence of statutory provision, to interfere with a foreign corporation or control it by mandamus or compel it to permit stockholders to inspect its books.

And in *Re* Rappleye, 43 App. Div. 84, it was held that a stockholder's right to inspect the books of a foreign corporation depends upon the law of that corporation's being, and can only be enforced by the court of its legal existence, such corporation having no legal entity in the state although its officers, property, and books may be found there.

Under N. Y. Laws 1842, chap. 165, however, it is the absolute duty of a transfer agent in this state of any monied or other corporation existing beyond the jurisdiction of the state, to exhibit at all reasonable times during the usual hours of transacting business to any stockholder of a foreign corporation when required by him, the transfer book of such foreign corporation, and also a list of the stockholders thereof, if he has power to do so. Kennedy v. Chicago, R. I. & P. R. Co. 14 Abb. N. C. 326; People, Del Mar, v. St. Louis & S. F. R. Co. 19 Abb. N. C. 1; Commerford v. Williams, etc., Co. N. Y. L. J. Oct. 7, 1890, cited in 1 Cook, Stock & Stockholders & Corp. Law, p. 680.

And under the New York stock corporation law, as amended by Laws 1897, chap. 384, providing that every foreign stock corporation having an office for the transaction of business in the state, with certain exceptions, shall keep therein a book to be known as a stock-book, open to inspection by stockholders, such book must be kept in the office referred to, and a stockholder has the right to insist upon their making an inspection of the book, and is not required to go elsewhere for that purpose. Recknagel v. Empire Self-Lighting Oil Lamp Co. 24 Misc. 193.

And that a law exists in the state in which a foreign corporation was formed, requiring it to keep a stock register or transfer book at the home office in that state, is no answer to an application for mandamus to compel the exhibition of the transfer book of the corporation to a stockholder in the state, where it appears that the company has a book containing entries of transfers of stock in the state, though it may be known by another name. People, Del Mar, v. St. Louis & S. F. R. Co. 19 Abb. N. C. 1.

Under 1 Starr & C. (Ill.) Stat. p. 616, requiring that the directors and trustees of a stock corporation shall cause to be kept at its principal office or place of business in the state correct books of account of all its business which shall be open to inspection by stockholders at all reasonable times, copies or duplicates may properly be kept in the state in lieu of the original books; but the fact that extra expense would be entailed by keeping two sets of books

No specific request or demand was made. No proper purpose was shown or stated. Hence no refusal on part of appellant of inspection of accounts of transactions of presidents and directors.

King v. *Proprietors of Wilts & B. Canal Navigation*, 3 Ad. & El. 477; *Queen* v. *Undertakers of Grand Canal Co.* 1 Ir. L. Rep. 337; High, Extr. Legal Rem. §§ 13, 310.

Even though there was a proper demand to inspect the accounts of the transactions of the president and directors, and a refusal to permit the inspection if the reasons are purely capricious, curious, suspicious, and speculative, courts will not grant the writ.

Com., Sellers. v. *Phœnix Iron Co.* 105 Pa. 111, 51 Am. Rep. 184; 1 Cook, Stock & Stockholders, § 514, note; 1 Beach, Priv. Corp. § 766; *People, Bishop,* v. *Walker*, 9 Mich. 328; *Lyon* v. *American Screw Co.* 16 R. I. 472; *King* v. *Merchant Tailors' Co.* 2 Barn. & Ad. 115; *Birmingham, B. & T. Junction R. Co.* v. *White*, 1 Ad. & El. N. S. 281; *French* v. *McMillan*, 43 Hun, 188; *State, Rosenfeld* v. *Einstein*, 46 N. J. L. 482; 4 Thomp. Corp. §§ 4419, 4420, 4428; *Pratt* v. *Meriden Cutlery Co.* 35 Conn. 36; *Imperial Gas Co.* v. *Clarke*, 7 Bing. 95.

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

Weinhenmayer filed a petition for the writ of mandamus against Bitner, secretary of the Windsor Knitting Mills, a corporation. The petitioner is a stockholder in the said company, owning twenty-five shares of its stock of the par value of $100 a share. He asserts, in substance, that he has a right to inspect the accounts of the transactions of the president and directors of the corporation, and that Bitner, its secretary, refuses to permit him to make the inspection.

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is immaterial. Crown Coal & Tow Co. v. Thomas, 60 Ill. App. 234.

And refusal of a request of a stockholder in a corporation for opportunity to inspect the books, which request was not unreasonable, is a proper cause under N. J. Stat. Rev. p. 186, § 50, for ordering the books to be brought into the state in order that the stockholders might have an opportunity of inspecting them there. Huylar v. Cragin Cattle Co. 40 N. J. Eq. 392.

So, a statute of another state under which a corporation is formed, which allows it to keep an office outside of that state and to keep books outside of it, and allows business to be transacted elsewhere than in that state, and requires the officers of the company to furnish the books to stockholders for inspection, is not a local statute but is transitory in its nature, and follows the officers into another state, and prescribes their duties there as to producing such books as well as at home, so that officers having charge of the books of the corporation in the latter state may be compelled to produce them for the inspection of stockholders in that state, and stockholders therein may maintain mandamus to enforce their rights of inspection. State, Templin, v. Farmer, 7 Ohio C. C. 429.

And a foreign corporation holding property and doing business within the state is considered and treated as a domestic corporation having the same rights and protection in carrying on its business, and being subject to the same duties and answerable to the same tribunals, as a domestic corporation, and is amenable, therefore, to a state law providing for the right of inspection of the books of a corporation by its stockholders. State, Richardson, v. Swift, 7 Houst. (Del.) 137.

And a stockholder in a corporation is entitled to a mandamus to compel the custodian of corporate documents to allow him to inspect and copy them at proper times and on proper occasions, where he clearly shows a right thereto, though he was not a resident of the state, and the corporation was a foreign corporation, when it had property in the state and the custodian who was an officer of the corporation being domiciled within the state having the books therein. Swift v. State, Richardson, 7 Houst. (Del.) 338; State, Richardson, v. Swift, 7 Houst. (Del.) 137.

And he is entitled to a writ of mandamus for the enforcement of such right against such custodian, he being within the jurisdiction of the court. State, Richardson, v. Swift, 7 Houst. (Del.) 137.

And a corporation has no power to prohibit its officers or agents who are custodians of its books and papers from obeying the mandate of the court to permit inspection and take copies thereof. Swift v. State, Richardson, 7 Houst (Del.) 338.

So, the supreme court of the state of New York has jurisdiction to allow a writ of mandamus on application of a nonresident stockholder in a foreign corporation for a mandamus to enforce his right to inspect such books of a corporation as are within its territorial jurisdiction, and such a proceeding is not subject to an objection that the jurisdiction can be exercised under N. Y. Code, § 1780, in an action only, and not in a special proceeding, as no distinction is made between residents and nonresidents of the state. *Re* Crosby, 28 Misc. 300.

But an application for a writ of mandamus to compel a foreign corporation to exhibit its transfer book to a stockholder when no action is pending betwen them, if authorized, is addressed to the sound discretion of the court, and should be exercised with discrimination and care; and where the stock owned by the applicant was transferred to him long after the resolution of the board of directors of the corporation authorizing the execution of a mortgage which he opposes, and to aid which opposition the inspection is sought, the application will be denied. People, Field, v. Northern P. R. Co. 18 Jones & S. 456.

And a proceeding for mandamus cannot be maintained in the courts of the state of New York to enforce the right of a stockholder to inspect the books and records of a corporation, where the corporation was organized under the laws of another state and the stockholder simply asserts what he deems to be his right as a member of the company, and the application is not made in an action, and has no relation to any cause of action which he has against the corporation. *Re* Rappleye, 59 N. Y. Supp. 338; *Re* Crosby, 59 N. Y. Supp. 340.

In *Re* Crosby, 59 N. Y. Supp. 340, State, Richardson, v. Swift, 7 Houst. (Del.) 137, and State, Templin, v. Farmer, 7 Ohio C. C. 429, *supra*, were distinguished upon the ground that they seem to have proceeded upon views as to the jurisdiction over foreign corporations peculiar to their respective states, but that no such jurisdiction has been conferred upon the courts by the statutes of this state in which a different view of the common-law jurisdiction has always prevailed.

So, a peremptory writ of mandamus can only issue where the facts are undisputed, and it is within the power of the person to whom the writ

He founds his demand of right on the 5th section of the 23d article of the Code. It is in these words: "The president and directors of every corporation shall keep full, fair, and correct accounts of their transactions, which shall be open at all times to the inspection of the stockholders or members." The right thus given to the stockholder is unconditional and unqualified. The stockholder has a right to the information contained in the accounts of the transactions of the corporation, and he has a right to obtain this information by his own personal inspection of them. He is not required to accept anything else in lieu of, or as a substitute for, this personal examination. If this be denied him, an action for damages would be a very inadequate and imperfect remedy. The relief given to him by the law would not render complete justice, unless it secured to him the precise right which had been unlawfully withheld from him. The corporation is charged with an imperative duty to the stockholder. It appears to us that the case has every feature which marks the character of the writ of mandamus. In *George's Creek Coal & I. Co.* v. *Allegany County Comrs.* 59 Md. 255, speaking of this writ, the court said: "Its office, as generally used, is to compel corporations, inferior tribunals, or public officers to perform their functions, or some particular duty imposed upon them, which, in its nature, is imperative, and to the performance of which the party applying for the writ has a clear legal right. The process is extraordinary, and, if the right be doubtful, or the duty discretionary, or of a nature to require the exercise of judgment, or if there be any ordinary adequate legal remedy to which the party applying could have recourse, this writ will not be granted." *Foster* v. *White*, 86 Ala. 467, was very much like the present. The Code of Alabama provided (§ 1677) that the

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would issue to perform the act, and it will not issue to compel the transfer agent of a foreign corporation to exhibit to a stockholder the transfer book and a list of the stockholders, which he declined to do upon the ground that the books had been sent to the home office in another state, and were not, therefore, under his control. People, Hoffman, v. Tedcastle, 12 Misc. 469.

In the above case People, Del Mar, v. St. Louis & S. F. R. Co. 44 Hun, 552, *infra*, VIII. a, was limited and explained, the court saying that that case did not authorize a reference as to a disputed fact, but one where further information was required.

So, N. Y. Laws 1842, chap. 165, 3 Edmund's Gen. Stat. 677, to compel transfer agents of foreign corporations to exhibit a list of the stockholders thereof, is applicable only to the transfer agents in the state of foreign corporations, and it is only upon such transfer agent or his clerk or officers that the forfeiture provided for by that act is imposed, and proceedings for a writ of mandamus to compel the exhibition of the transfer books of a foreign corporation and of a list of the stockholders can properly be taken against such transfer agent only. People, Hatch, v. Lake Shore & M. S. R. Co. 11 Hun, 1.

A statute providing that the stockholders of all private corporations have the right of access to inspection and examination of the books, records, and papers of the corporation at reasonable and proper times applies to national banks. Winter v. Baldwin, 89 Ala. 483.

And U. S. Rev. Stat. §§ 5240, 5241, authorizing the appointment of bank examiners by the comptroller of the currency, and providing that banks shall not be subject to any visitorial powers other than those authorized by Congress or vested in the courts of justice, is not intended to curtail, or even to regulate, the rights of stockholders or their relations toward the bank, so as to exempt the bank from operation of the state statute giving stockholders the right to inspect their books. *Ibid.*

The provisions of N. Y. Act 1842, p. 165, designed to compel transfer agents of foreign corporations to exhibit lists of their stockholders, have no application to domestic corporations. Sage v. Lake Shore & M. S. R. Co. 70 N. Y. 220.

3. *Insolvent corporations.*

The question whether or not an inspection of books will be accorded to a stockholder when

45 L. R. A.

See also 47 L. R. A. 208.

the corporation is insolvent and has gone into the hands of a receiver is one resting in the discretion of the court unhampered by any decisions touching the right to such an inspection, while the corporation was still a going concern in the hands of its officers and directors. Chable v. Nicaragua Canal Constr. Co. 59 Fed. Rep. 846.

The right of an individual stockholder to obtain from the court an inspection of the books of the corporation in the court's custody in the hands of a receiver, in order to inform himself as to past transactions and the present condition, or to enable him to determine what may be most conducive to the protection of his interests as a stockholder in the future, is one entitled to the favorable consideration of a court of equity. *Ibid.*

And a stockholder who in good faith asks for an examination of the books of a corporation in the custody of the court in the hands of a receiver in order to enable him to determine whether or not a proposed plan of reorganization is a desirable one for himself and the other stockholders to enter into, should be accorded such inspection under proper regulations as to time and circumstance, so as not to interfere either with the transaction of the receiver's duties or with such inspection as his fellow members may be entitled to. *Ibid.*

A receiver of a corporation is an officer of the court and a trustee for the stockholders and bondholders; and stockholders are entitled to an inspection of his books, papers, and accounts, relating to the receivership, which should be allowed on all reasonable applications made for that purpose, though he should not be subjected to purely inquisitive or fishing expeditions. Fowler's Petition, 9 Abb. N. C. 269.

And an application by a stockholder of a corporation in the hands of a receiver for mandamus to compel the receiver to exhibit his books, accounts, and contracts for the inspection of a stockholder as distinguished from those of the company prior to his appointment, based on charges made against him in regard to the execution of the trust, should be granted unless some good reason is shown to exist why such inspection should not be made. *Ibid.*

And stockholders should be permitted to examine the books of a bank and take abstracts thereon for the purpose of obtaining information with reference to the condition of the bank, its property, assets, and liabilities after it has been judicially dissolved, and its corporate

stockholders of private corporations should "have the right of access to and inspection and examination of the books, records, and papers of the corporations at reasonable and proper times." It was held by the court that a stockholder could enforce his statutory right by mandamus; and that, if his petition alleges an application at a reasonable and proper time, and its refusal, it is not necessary that it should aver a definite legitimate purpose in making the application, or negative an improper purpose; and that, if any good reason existed why the inspection should not be permitted, it ought to be shown as a matter of defense. We may also refer to 1 Redfield on Railways, 467: "No better general rule can be laid down upon this subject than that where the charter of a corporation, or the general statute in force and applicable to the subject, imposes a specific duty, either in terms or by fair and reasonable construction and implication, and there is no other specific or adequate remedy, the writ of mandamus will be awarded." It is stated in the answer to the petition that Weinhenmayer is engaged in the manufacture and sale of hosiery and knit goods, and is a rival and competitor of the Windsor Knitting Mills in business, and that he desired an examination of the books, documents, and records of the corporation for the purpose of obtaining information to be used by him in the conduct of his own business, to the injury and loss of the said corporation. This purpose is denied by the petitioner in his replication, and no proof whatever was offered to sustain the charge at the trial. But the petitioner's right would not be forfeited by any such cause. The right is given to him as a stockholder by statute, and is absolute, and not made to depend upon any circumstances but the ownership of the stock. It is easy to see that there might be good rea-

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rights, privileges, and franchises adjudged to be forfeited, and that its property and assets be applied to the payment of its debts, and the balance, if any, distributed among its stockholders, and a receiver appointed. People v. Cataract Bank, 5 Misc. 14.

But receivers having nothing to do with the stock and internal management of a corporation need not be made parties defendant in a proceeding for a mandamus to enforce a stockholder's right to inspection of the stock-books of the corporation. Com. v. Philadelphia & R. R. Co. 3 Pa. Dist. R. 115.

And an application by a stockholder of a corporation in the hands of a receiver for an inspection of the books of the corporation, the object of which is to obtain material to be used in convincing other stockholders that a plan of reorganization is one which should not be carried out, will be refused where it appears that he did not become a stockholder until nearly six months after the appointment of the receiver, and that therefore he occupies a position of a mere speculator. Chable v. Nicaragua Canal Constr. Co. 59 Fed. Rep. 846.

And the provision of the companies act of 1862, § 22, that the register of an incorporated company is to be open to inspection on payment therefor by any member of the company or by any other person during business hours for not less than two hours each day, does not apply to the case of a company in liquidation, where the register has passed into the hands of a liquidator. *Re* Kent Coalfields Syndicate, 67 L. J. Q. B. N. S. 500, [1898] 1 Q. B. 754, 78 L. T. N. S. 443.

And a clause in the articles of association in a company directing that the books of account thereby directed to be kept should be open to the inspection of the shareholders during the hours of business, subject to any reasonable restrictions as to the time and manner of inspecting the same that might be imposed by the company in general meeting, is not applicable after the company has gone into voluntary liquidation. *Re* Yorkshire Fibre Co. L. R. 9 Eq. 650, 18 Week. Rep. 541.

The authority of the court in an application by a stockholder of a corporation in the hands of a receiver for a mandamus to enforce his right to make extracts from the corporation books does not rest upon the technical right of stockholders or creditors as between themselves and the corporation under the statutes relating to corporations, but upon grounds of justice and equity in administering the trust in the hands of the receiver, and the matter is therefore one for the exercise of the discretion of the court. *Re* Tiebout, 19 N. Y. Week. Dig. 570.

IV. *The remedy.*

a. *By mandamus.*

The usual and customary method of enforcing a stockholder's right to inspect the books of the corporation is by mandamus addressed to the custodian of the books.

And that mandamus is the proper remedy of a stockholder who is denied the right to inspect the books of a corporation is held in State, Wilson, v. St. Louis & S. F. R. Co. 29 Mo. App. 301; Cockburn v. Union Bank, 13 La. Ann. 289; State, Richardson, v. Swift, 7 Houst. (Del.) 137; Stettauer v. New York & S. Constr. Co. 42 N. J. Eq. 46; *Re* Crosby, 28 Misc. 300; People, Harriman, v. Paton, 20 Abb. N. C. 195; People, Hatch, v. Lake Shore & M. S. R. Co. 11 Hun, 1; People, Richmond, v. Pacific Mail S. S. Co. 50 Barb. 280; People, Muir, v. Throop, 12 Wend. 183; State, Bergenthal, v. Bergenthal, 72 Wis. 314; Ranger v. Champion Cotton-Press Co. 51 Fed. Rep. 61; Legendre v. New Orleans Brewing Asso. 45 La. Ann. 669. And see RE STEINWAY and WEINHENMAYER v. BITNER.

And mandamus to enforce the right of a stockholder to inspect the books of a corporation will not be withheld simply because his interest is small. RE STEINWAY.

The remedy of a stockholder in a corporation who has been denied the right to an inspection of its books to compel such inspection under Ohio Rev. Stat. § 3254, providing that the books and records of a corporation shall at all reasonable times be open to the inspection of every shareholder, is by mandatory injunction, and not by mandamus. Blymyer v. Blymyer Iron Works Co. 5 Ohio N. P. 71.

Attention is called, also, to the fact appearing incidentally in many of the cases in the preceding subdivisions of this note with reference to the right of inspection, that the questions determined arose in mandamus proceedings.

b. *By imposition of a penalty.*

A penalty is imposed in some of the states, notably in New York, upon corporations and the officers having custody of their books, for violation of statutory provisions requiring them to keep certain specified books open at designated times and places to the inspection of stockhold-

sons for refusing an application,—for instance, if it were made for some evil, improper, or unlawful purpose. And, if such purpose were alleged and proved, the writ would be denied.

At the trial the petitioner submitted twelve prayers to the court, and the defendant submitted four. The court rejected all the prayers on both sides, and gave an instruction of his own. The petitioner took an exception to the refusal of his prayers and to the instruction given by the court. The petitioner's first prayer insists that the pleadings admit that he was a stockholder, and that he made application to Bitner, the secretary, for permission to inspect the books containing the accounts of the transactions of the corporation, and that Bitner refused to permit him to make the inspection, and that on these grounds he was entitled to the verdict. We think that these facts are admitted in the first, second, and third paragraphs of the answer, and that the prayer ought to have been granted. The third paragraph of the answer states that the petitioner asked for all books, papers, and accounts of every kind and description whatsoever of the corporation, and that he (the respondent) refused to permit the examination. It was the intention of the provision of the Code which has been mentioned (art. 23, § 5) that the stockholders should have a full opportunity of informing themselves of the business of the corporation, and that nothing should be concealed from them. The section meant that all the transactions should be fully, fairly, and correctly stated, and that these statements should at all times be open to the inspection of the stockholders. The statute recognized the fact that

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ers This penalty is recoverable by action, and is payable in some instances to the complaining stockholder, and in some in part to the stockholder and in part into the public treasury.

c. *By action for damages.*

A stockholder at common law could maintain an action against the recording officer of the corporation having the custody of its books and records for wilfully refusing to allow him to inspect the same at seasonable and proper times, and recover damages therefor, either actual or nominal as the case might be. Lewis v. Brainerd, 53 Vt. 510.

A denial by the company of the right of a stockholder of a corporation to inspect its books in a proper case exposes it to an action either of mandamus whereby the custodian of the books is ordered by the court to permit the desired access to them, or to an action for damages against the corporate officers who prevented the examination. Legendre v. New Orleans Brewing Asso. 45 La. Ann. 669.

d. *Other remedies.*

While the ordinary and nominal mode of asserting the right of a stockholder to inspect the books of a corporation is by mandamus, it is within the discretion of the court, in an action between the stockholder and the corporation, to order the corporate authorities to permit an inspection of the books of the corporation by the shareholder at any stage of the suit; but it will not make such an order upon the filing of the bill or before the parties had appeared and pleaded, except under the most pressing necessity. Ranger v. Champion Cotton-Press Co. 51 Fed. Rep. 61.

But while the supreme court might, independently of statute, by virtue of its supervisory powers, have the right to order an inspection of the books of account of a corporation by a stockholder upon a proper showing, particularly in the absence of any statutory restriction of such power, a stockholder will not be permitted to invoke the aid of the court before exhausting the remedy given to him by N. Y. stock corporation law, § 52, making it the duty of the treasurer of the company upon proper demand to furnish him a statement of the affairs of the corporation under oath, embracing a particular account of all its assets and liabilities, where it appears that this would include all the information which he desires. People, Clason, v. Nassau Ferry Co. 86 Hun, 128.

So, the right of a stockholder in a stock company to inspect the registers of the company given by the companies clauses act of 1845, §§ 45, 63, and of the companies clauses act of 1863, § 28, may be enforced by an injunction restraining interference by the company with a stockholder in the exercise at all reasonable times of his statutory right, and he will not be compelled to apply for a mandamus calling upon the directors to allow inspection. Holland v. Dickson, L. R. 37 Ch. Div. 669, 57 L. J. Ch. N. S. 502, 58 L. T. N. S. 845, 36 Week. Rep. 320.

As to relief by injunction, see also Blymyer v. Blymyer Iron Works Co. 5 Ohio N. P. 7, *supra*, IV. a.

The mere fact of a petition, however, is not enough to justify an order of inspection of books of a corporation under the Stannaries act of 1855, § 22, but if grounds are shown the petition may properly be ordered to stand over to allow the petitioner to enforce his right, as a shareholder, to inspection. *Re* West Devon Great Consols Mine, L. R. 27 Ch. Div. 106.

And stockholders in a corporation cannot maintain a bill against the corporation for equitable interposition to compel a discovery in aid of an accounting in the absence of a showing that the matters as to which a discovery is asked could not be ascertained by an inspection and examination of the books, papers, and records of the corporation, and that the right to such inspection and examination could not be enforced by proceedings at law. Wolfe v. Underwood, 96 Ala. 329.

And equity has no jurisdiction to compel the submission of the books of a corporation to a stockholder and an expert accountant employed by him, where no fraud is alleged and the corporation has ceased to do business, although its term of existence has not expired, and it has not been dissolved, and has paid its debts and divided its remaining assets among its stockholders, mandamus being the proper remedy. Stettauer v. New York & S. Constr. Co. 42 N. J. Eq. 46.

V. *Sufficiency of demand and refusal to sustain remedy.*

While in the absence of any statutory provision a corporator may, at common law, have a mandamus to compel the custodian of corporate records and documents to allow him an inspection of them, to entitle himself to the aid of the court he must show that he has made a proper demand upon the custodian at a proper time and place and for a proper reason, and has been refused, and it cannot be granted to enable him to gratify idle curiosity. People, Bishop, v. Walker, 9 Mich. 328.

the stockholders were the owners of the property of the corporation, and not the president and directors. The petitioner's second prayer undertakes to instruct the jury on the evidence. If the case was rested on this footing, the jury ought to have been allowed to find the truth of the facts alleged. Moreover, the jury were not required in this prayer to find that Bitner refused to permit the petitioner to inspect the books containing the transactions. It was properly rejected. The third prayer stated that the petitioner was entitled to inspect the books, etc., at such times as he might desire. He had a right to examine them at all reasonable times; but he might peradventure wish to inspect them at midnight, or on Sunday, or on some other day when business was suspended by reason of its being a public holiday, or at some other unreasonable time. The other portions of the prayer were correct, and, if the right of inspection had been restricted to all reasonable times, the prayer ought to have been granted. But without this restriction it was properly refused. The other prayers of the plaintiff were correct. But it surely was unnecessary to duplicate and reduplicate the same proposition so many times. If the first prayer had been granted, the other prayers would have been unnecessary.

The defendant's prayers are not strictly before us; but, as the case must be tried again, we will give our opinion on them. The third prayer leaves to the jury a fact which had been admitted in the pleadings, and the pleadings were brought to the attention of the court by the petitioner's first prayer. It was properly refused, as were all the other prayers of the defendant.

A shareholder in a corporation is entitled to mandamus to compel the custodian of corporate documents to allow him an inspection and copies of them at reasonable times for a specific and proper purpose upon showing a refusal on the part of the custodian to allow such inspection, and not otherwise. Com., Sellers, v. Phœnix Iron Co. 105 Pa. 111, 51 Am. Rep. 184.

And a mandamus to compel the custodian of corporate records to permit a stockholder to inspect them, asked for on the ground that the stockholder wished to ascertain his rights, duties, privileges, and liabilities and for his protection, will be refused where the demand for the inspection was not shown to have been made at the office of the company, and no excuse was given for not making it there. People, Bishop, v. Walker, 9 Mich. 328.

And a demand by the attorney for the relator, and not by the relator himself, is not such a demand as will require the issuance of a mandamus requiring the custodian of corporate books to permit the attorney to inspect them. People, McDonald, v. United States Mercantile Reporting Co. 20 Abb. N. C. 194.

But an error of an officer in a subordinate position in refusing to permit books to be examined by a stockholder is not *per se* such an error as will expose the company to payment of damages. To fix the liability it must appear that such officer was expressly authorized to do the act, or that it was done bona fide in pursuance of a general authority in relation to the subject of it, or that the act was adopted or ratified by the corporation. Legendre v. New Orleans Brewing Asso. 45 La. Ann. 669.

And where a shareholder in a corporation the charter of which provided that it should be managed by a committee and authorized them to appoint a clerk for carrying out the purposes of the act of incorporation, and required them to enter in books of account their disbursements, receipts, and transactions, and keep the books open at all seasonable times for the inspection of proprietors, applied to the clerk appointed under such act for inspection of the books which were in his charge, and he said he would refer the demand to the committee, and the proprietor attended the committee and repeated his request, and the chairman said they would take time to consider it, and ten days afterwards he again applied to the clerk who refused the inspection, there was no sufficient refusal by the committee to warrant the issue of a mandamus to compel it to permit him to inspect them. King v. Proprietors of Wilts & B. Canal Navigation, 3 Ad. & El. 477, 29 L. T. N. S. 922.

The respondent in a proceeding by mandamus by a stockholder for the privilege of inspecting the books of a corporation, however, cannot urge that no proper demand was made or that the suit was premature, where the relator made personal application at the office of the company for examination of the books, and was told by the official in charge that the president of the company had given instructions that no inspection of the books by shareholders was to be allowed, and this was followed by a formal demand in writing by counsel for the relator upon the secretary of the company for permission for him to examine the books, which demand was not acceded to. State, Bourdette, v. New Orleans Gaslight Co. 49 La. Ann. 1556.

And the fact that the by-laws of a corporation direct that the certificate book, transfer book, and such other books and papers as the board should direct should be in charge of the secretary, and that no application was made to him for examination of these books, will not justify a refusal to issue a writ of mandamus to compel the production of the books for inspection, where request to inspect was made of the treasurer, and in refusing it he made no allusion to his inability, if that existed, to comply with the demand, and no reference to the fact that any other person was the proper officer to receive and act upon the demand, and it does not appear that the books were not under his control. *Re* Martin, 62 Hun, 557.

And an offer by the vice president of a foreign corporation in charge of its office in the state to give a stockholder demanding the right to inspect its stock-book a letter to a person in another city in whose hands the book then was, or to have the stock-book at the principal office on a subsequent day, is not a compliance with the New York stock corporation law as amended by Laws 1897, chap. 384, providing that every foreign stock corporation having an office for the transaction of business in the state, with certain exceptions, shall keep therein a book to be known as a stock-book open to inspection by stockholders, and is not a defense in an action to recover the penalty prescribed for violation thereof. Recknagel v. Empire Self-Lighting Oil Lamp Co. 24 Misc. 193.

And where a shareholder in a corporation whose shares were fully paid presents a petition for a compulsory winding-up order, and the managing director of the corporation files an affidavit stating the liabilities and assets of the company as shown by the company's books, and the solicitor of the petitioner gives notice in writing to the solicitor of the company that he

The prayers on which we have not specially commented are all decided by the views which we have expressed on the construction of the 5th section of the 23d article of the Code. We deem it unnecessary to set them out in detail, but all the prayers will be published in full by the reporter.

The instruction given by the court is in these words: "The jury are instructed that under the pleadings and evidence in this cause the plaintiff is not entitled to recover, and their verdict must be for the defendant." It has been held a great many times that an instruction in this form was erroneous, because it was too general. It presents no specific point or question. But, nevertheless, it would have been useless to reverse the judgment for this reason, if we had come to the conclusion that there was no ground on which the petitioner could obtain a judgment on a second trial. In *Neuhold* v. *J. M. Bradstreet & Son*, 57 Md. 38, 40 Am. Rep. 426, the trial court had granted an instruction in terms identical with the one given in this case. The instruction is found in the opinion of this court on page 49. On page 55 the court speaks as follows: "The instruction given by the court at the instance of the defendant was defective, inasmuch as it left the matter uncertain whether the defect or failure of the plaintiffs' case was to be found in the pleadings or in the evidence. There was no case, however, for the jury, and the instruction should have been that, upon the pleadings in the cause, there was no sufficient evidence of any special damage to entitle the plaintiffs to recover." The judgment was affirmed.

Reversed, and new trial.

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will attend at the company's office on the following morning to inspect the books referred to, and is refused permission to inspect them on his so attending, the refusal to allow the solicitor to inspect is a refusal to allow the shareholder to inspect within the meaning of the statute. *Re* Credit Co. L. R. 11 Ch. Div. 256, 48 L. J. Ch. N. S. 221, 27 Week. Rep. 380.

So, the complaint in an action by a stockholder against an officer of a corporation having the custody of its books for the recovery of the penalty for refusing to permit their inspection under Vt. Gen. Stat. chap. 86, §§ 7, 8, 13, is fatally defective where it does not allege a request to exhibit the books and records of the corporation at its office. Lewis v. Brainerd, 53 Vt. 510.

And a complaint in an action by a stockholder against a corporation for the penalty imposed upon a company failing to keep the books and make the entries required, and to exhibit the same for the inspection of stockholders, creditors, etc., is defective where it does not aver that the officer of whom the demand for inspection was made had notice that the person demanding it was a stockholder. Williams v. College Corner & R. G. R. Co. 45 Ind. 170.

But that a relator in a petition for mandamus to enforce the right of a stockholder to inspect the books of a corporation had fruitlessly applied at the office of the company in the state to see its books, and met with reply that an inspection would be permitted at an office in another state, and an allegation that large sums of money had been lost by mismanagement of the corporation affairs, is a sufficient showing by the relator of personal injury to himself, resulting from the keeping of the books in another state, to justify mandamus to compel the keeping of the books in the principal office in the state under the Illinois statute. Crown Coal & Tow Co. v. Thomas, 60 Ill. App. 234.

And a complaint in an action by a stockholder to recover a penalty from the general manager of a domestic corporation for refusing an inspection of the company's books as required by N. Y. Laws 1890, chap. 564, § 29, alleging that the plaintiff, by his duly authorized representative, requested the defendant to exhibit to him the books of said company, which request was refused, is sufficiently broad to permit of proof that a demand was made to have the books exhibited to the plaintiff in person, although the same may have been made through his representative, and therefore the scope of the term "personal representative" as used in the statute need not be passed upon. Levy v. Cohen, 45 N. Y. S. R. 278.

In the above case People, McDonald, v. United States Report. Co. 20 Abb. N. C. 193, *supra*, was distinguished upon the ground that that case merely held that a demand made by the attorney of record in an action by a stockholder for an inspection by him (the attorney), in the absence of any specific authorization to make the demand, was insufficient, as a basis for an application for a mandamus.

To incur the penalty provided for by Vt. Gen. Stat. chap. 86, § 8, for the refusal of the custodian of corporate books to permit their inspection by a stockholder, there must have been a wilful neglect or refusal to exhibit and show the records or by-laws of the corporation. Lewis v. Brainerd, 53 Vt. 510.

And a corporation and the officer in charge of its office is not subject to the penalty prescribed by the New York statute for failure to keep a stock-book for the inspection of stockholders at its office or principal place of business, where application for inspection was made by a stockholder on Saturday and he was requested to wait until the morning of the next business day to see the book, on the ground that the person who had them in charge and had the key and combination of the safe in which they were locked was temporarily absent. Kelsey v. Pfaudler Process Fermentation Co. 41 Hun, 20.

But the penalty imposed by N. Y. Laws 1848, chap. 40, § 23, for violation of the provision thereof that certain books shall be kept at the office of the company during the usual business hours of the day, on every day except Sunday and the Fourth of July, and shall be open to the inspection of the stockholders, is incurred where a stockholder went with his attorney to the office of the company on Saturday and demanded permission to examine the stock-book and record book, and was informed that the books were in the safe and that the secretary who had the combination was out of town and the books could not be shown until his return on the Monday following, where it appears that nearly two months before such person ceased to be secretary and another succeeded him in that position who had the combination of the safe and charge of the books of the company, and was then within reach and might have permitted the inspection demanded. Kelsey v. Pfaudler Process Fermentation Co. 20 N. Y. S. R. 533.

So, an officer of a corporation having charge of its stock-books, who refuses to permit a stockholder to take a copy or memorandum of the names of stockholders therefrom, subjects

NEW YORK COURT OF APPEALS.

Re Petition of Henry W. T. STEINWAY, for Inspection of Books and Records of Steinway & Sons.

(159 N. Y. 250.)

1. **The right to a peremptory writ of mandamus depends upon the conceded facts,** the same as if the relator had demurred to the allegations of the defendant, when he proceeds to argument upon his petition and the opposing affidavits without the issuance of any alternative writ.
2. **A stockholder has the right at common law** to inspect the books of his corporation at a proper time and place and for a proper purpose.
3. **The writ of mandamus to enforce the right of a shareholder to inspect the books of his corporation** may issue in the sound discretion of the court, with suitable safeguards to protect the interests of all concerned.
4. **The common-law right of a shareholder to inspect the books of his corporation** is not affected by the stock corporation law (Laws 1892, chap. 688, §§ 29, 52), providing for the inspection of the stock book and for the furnishing of a statement of assets and liabilities upon the request of stockholders owning a fixed percentage of the capital stock.

(June 6, 1899.)

APPEAL by respondent from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of a Special Term for New York County denying petitioner's motion for a writ of

himself of the penalty imposed for refusal to permit inspection of stock-books by N. Y. Rev. Stat. pt. 1, title 4, chap. 18, though he submits the books to the inspection of the stockholder. Cotheal v. Brouwer, 5 N. Y. 562.

But a demand by a stockholder of a foreign corporation for the right to inspect the stock-book of the company, and not the transfer book, does not bring him within the provisions of N. Y. Laws 1842, chap. 165, making it the duty of a transfer agent in the state of any monied or other corporation existing beyond the jurisdiction to exhibit at all reasonable times during the usual business hours to any stockholder of such corporation, when required by him, the transfer book thereof and a list of the stockholders. Kennedy v. Chicago, R. I. & P. R. Co. 14 Abb. N. C. 326.

So. in King v. Trustees of Northbleach & Witney Roads, 5 Barn. & Ad. 978, it was doubted, though not decided, whether it is sufficient to show that a party entitled to inspect corporate books demanded liberty to do so, and that his claim was disputed, but inspection offered him as a favor, and that he refused to accept it otherwise than as a right.

A failure or refusal on the part of the recording officer of a corporation to permit a stockholder to inspect its books in violation of Vt. Gen. Stat. chap. 86, §§ 7, 8, 13, constitutes but one act, and but one penalty is incurred, and it is not necessary for the stockholder to renew his request for inspection every twenty-four hours under the provision that the stockholder is entitled to recover $10 for every twenty-four hours during which the officer so refused, as the neglect or refusal to comply with the stockholder's demand is presumed to continue until willingness on the part of the custodian to exhibit them is made known, or until such presumption is rebutted by a change of circumstances. Lewis v. Brainerd, 53 Vt. 510.

Whether a request by a corporation to a stockholder demanding the right to inspect its books to wait from Saturday until Monday following for such inspection was a reasonable request, is a question of fact for the jury, and not one of law for the court. Kelsey v. Pfaudler Process Fermentation Co. 20 N. Y. S. R. 533.

VI. *Effect of purpose of stockholder on remedy.*

a. *Generally.*

Ordinarily a mandamus will be awarded whenever an inspection by a stockholder of the books of a corporation is necessary for any reason to protect the interests of the stockholders present or prospective, and is not sought from idle curiosity or for any improper or unlawful purpose. Foster v. White, 86 Ala. 467, *dictum*.

And a shareholder in a corporation with a laudable object to accomplish, or a real and actual interest upon which to predicate his request for information disclosed by the books of a bank, is entitled by the fundamental law of the state to the right to inspect them. State, Burke, v. Citizens' Bank, 51 La. Ann. 426.

At common law, however, the right of a stockholder to inspect the books of a corporation is not so absolute that mandamus will issue without regard to facts and circumstances. The reasonableness of the request should be considered. A refusal is justifiable where curiosity is the motive or where the object is manifestly in opposition to the interests of the company. Legendre v. New Orleans Brewing Asso. 45 La. Ann. 669; Stone v. Kellogg, 165 Ill. 192; People, Bishop, v. Walker, 9 Mich. 328.

And a shareholder applying for a mandamus to enforce his right to inspect the books of a corporation should show that when he demanded the inspection he stated the object for which he wanted it. King v. Proprietors of Wilts & B. Canal Navigation, 3 Ad. & El. 477, 29 L. T. N. S. 922.

While the books of a corporation are evidence of the acts and proceedings of the body, and with respect to the corporators are public, and each individual has the right to inspect them and use them as evidence of his rights, a mandamus will not be issued to compel the keeper of such books to allow an inspection or the taking of copies unless a clear right is shown and some just or useful purpose is to be effected. Hatch v. City Bank, 1 Rob. (La.) 470.

And even under the statutes it has been frequently held that there can be no inspection from mere idle curiosity or for improper or unlawful purposes. See Foster v. White, 86 Ala. 467; Ellsworth v. Dorwart, 95 Iowa, 108; Stone v. Kellogg, 165 Ill. 192, *supra*, III. b; Com. v. Empire Pass. R. Co. 134 Pa. 237, *supra*, III. d; Phœnix Iron Co. v. Com., Sellers, 113 Pa. 563, and King v. Merchant Tailors' Co. 2 Barn. & Ad. 115,—*supra*, VII.

But a stockholder in a bank need not state in an application for a mandamus under the Missouri statute to secure the right to examine the corporation books, the purposes for which he seeks to exercise the right of inspection. State, Doyle, v. Laughlin, 53 Mo. App. 542.

Under that statute (Rev. Stat. § 720), giving the relator a right to the inspection of books

mandamus to compel the officers of the defendant corporation to permit petitioner to inspect the books and records of the corporation. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Edward C. James** and **George W. Cotterill**, for appellant:

The allegations of the petition having been fully met and denied by the answering affidavits, and a peremptory writ having been insisted upon (which was denied by the special term, but granted by the appellate division, 31 App. Div. 70), the law of mandamus holds that the answering affidavits must be taken as true and conclusive, and they therefore constitute a bar to this proceeding.

People, Lefever, v. *Ulster County Supers.* 34 N. Y. 268; *People* v. *Rome, W. & O. R. Co.* 103 N. Y. 95; *Commercial Bank* v. *New York Canal Comrs.* 10 Wend. 25; *People, Mott,* v. *Greene County Supers.* 64 N. Y. 600; 14 Am. & Eng. Enc. Law, pp. 213, 214; *People, Mygatt,* v. *Chenango County Supers.* 11 N. Y. 563; *People, Lynch,* v. *New York,* 25 Wend. 680; *People, Yates,* v. *New York Canal Board,* 13 Barb. 432; *People, Perry,* v. *Thompson,* 25 Barb. 73; *Hacbler* v. *New York Produce Exchange,* 149 N. Y. 418.

A peremptory writ of mandamus is only authorized in the first instance, where the applicant's right to a mandamus depends only upon questions of law.

People v. *Rome, W. & O. R. Co.* 103 N. Y. 95; *People, Kelsey,* v. *New York Post-Graduate Medical School & Hospital,* 29 App. Div. 249; *People, Peck,* v. *Salina Town Board,* 27

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of a corporation of which he is a stockholder, the motive which may prompt him in demanding his right is not a proper subject for judicial investigation. State, Wilson, v. St. Louis & S. F. R. Co. 29 Mo. App. 301.

And under the Missouri statute concerning business corporations, § 932, providing that each stockholder may at all proper times have access to the books of the company to examine the same under such regulations as may be prescribed by the by-laws, it is not incumbent upon a relator to disclose the purpose for which he seeks to exercise the right to inspect, and the fact that the information sought might be used for improper purposes is immaterial. State, Spinney, v. Sportman's Park & Club Asso. 29 Mo. App. 326.

And the purpose for which a stockholder acquired stock in a corporation is immaterial in a proceeding brought by him for the inspection of the books of the company, where his legal ownership is admitted, and evidence to the effect that he was a mere accountant and not a bona fide transferee, is inadmissible. *Ibid.*

So, the Alabama statutes secure to the stockholder the general right to examine the books of a corporation at any and all reasonable times, and when his right is claimed and refused he is entitled to a mandamus on the averment that he is a stockholder of the corporation, that he has demanded the right of inspection, that the time was reasonable and proper, and that the right was denied him. Foster v. White, 86 Ala. 467, *dictum.*

And a shareholder in a corporation wishing to inspect its books is not required, under the Alabama statute, to show any reason or occasion rendering an examination opportune and proper, or a definite or legitimate purpose. The custodian of the books and papers cannot question or inquire into his motives and purpose. *Ibid.*

And the right of a stockholder to examine the books of a corporation under the Illinois act providing that every stockholder in a corporation shall have the right at all reasonable times, by himself or by his attorney, to examine the records or books of account of the corporation, is absolute, and the motive for desiring such examination cannot be inquired into. Rodger Ballast Car Co. v. Perrin (Ill.) 17 Nat. Corp. Rep. 819.

So, in New York the method prompting the request for an inspection of the stock-book of a corporation is immaterial in a proceeding by mandamus to compel the secretary of the corporation to produce the stock-book for inspection. People, Gunst, v. Goldstein, 37 App. Div. 550.

And under N. Y. Laws 1848, chap. 40, § 45, 45 L. R. A.

providing that the transfer books of a corporation shall during the usual business hours of a day, on every day except Sunday and the Fourth of July, be open for the inspection of stockholders and creditors and their personal representative at the office or principal place of business of such company in the county where its business operations shall be located, stockholders, creditors, and their personal representative have an absolute right during the usual business hours of every day except Sunday and the Fourth of July, to inspect the stock-books, and where a stockholder applies in person to inspect the stock-book, and such application is refused, the court has no discretion in the matter, and upon proper papers a writ of mandamus requiring the officers to allow him to inspect the books will be granted as a matter of absolute right. People, McDonald, v. United States Mercantile Reporting Co. 20 Abb. N. C. 192.

And under N. Y. Laws 1842, chap. 165, providing that the transfer agent in this state of any monied or other corporation existing beyond the jurisdiction shall at all reasonable times during the usual hours of transacting business exhibit to any stockholder of such foreign corporation when required by him the transfer books thereof and also a list of the stockholders, the duty is absolute, and the transfer agent has no right to inquire into the motives and purposes of a stockholder in requiring it. People, Harriman, v. Paton, 20 Abb. N. C. 195.

It would seem, however, even under such statutes, at least in Alabama and Illinois, that the purpose must be a lawful one. See holding in Foster v. White, 86 Ala. 467, and Stone v. Kellogg, 165 Ill. 192, *supra,* II. b.

And in New York the former rule, that the statutory right of inspection is absolute, and that the motive with which it is sought is immaterial, seems to have been somewhat modified.

Thus, in *Re* Crosby, 28 Misc. 300, it was held that the purpose with which a mandamus to enforce the right of a stockholder to inspect the books of his corporation is sought, will not be closely scrutinized by the court unless it is very reprehensible.

And in *Re* Pierson, 28 Misc. 726, it was held that a writ of mandamus is an extraordinary remedy to be invoked only upon special occasions, and the courts will not grant it in a proceeding to enforce the right of a stockholder to inspect the books of a corporation until they have taken into careful consideration all the facts and circumstances of the case, and condition and character of the books, the reasons for refusal by the corporation, the specific purpose of the stockholder in demanding inspection, and

App. Div. 476; *People, Sickles,* v. *Becker,* 3 N. Y. S. R. 202; *People, New York Tenth Nat. Bank,* v. *Green,* 3 Hun, 208; *Ex parte Rogers,* 7 Cow. 526; *People, Bentley,* v. *Hudson Highway Comrs.* 7 Wend. 474; *People, Cagger,* v. *Schuyler Supers.* 2 Abb. Pr. N. S. 78; *People, Bagley,* v. *Green,* 1 Hun, 1; *People, Hoyt,* v. *Ballston Spa. Trustees,* 19 App. Div. 569; *People, Buffalo,* v. *New York C. & H. R. R. Co.* 156 N. Y. 570.

The method prescribed by the statute creating this corporation, and by the general statutes and rules and practice of the courts, for the examination of corporate books by a stockholder, is exclusive, and is inconsistent with the right claimed in this case to examine the books of account.

The particular account delivered fully complied with the statute.

French v. *McMillan,* 43 Hun, 188.

A stockholder has no common-law right to have an inspection of books by mandamus or otherwise.

Merrill, Mandamus, 15, 16, § 21; *People, Field,* v. *Northern P. R. Co.* 18 Jones & S. 459; *People, Hatch,* v. *Lake Shore & M. S. R. Co.* 11 Hun, 1; *Central Cross-town R. Co.* v. *Twenty-third Street R. Co.* 53 How. Pr. 45; *Hoyt* v. *American Exch. Bank,* 1 Duer, 652; *Cassard* v. *Hinman,* 6 Duer, 695; *King* v. *Merchant Tailors' Co.* 2 Barn. & Ad. 115.

The law allows no general right to a stockholder to inspect the books of the corporation. Inspection can only be ordered in aid of a suit brought or defended.

People, Clason, v. *Nassau Ferry Co.* 86 Hun, 128.

The court has no more supervisory power

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the general reasonableness of the request, and the effect on the orderly transaction of the corporate business in case it is granted. And that a person is not at liberty to demand an examination of all corporate books and records by an accountant selected by him when and as often as he pleases, and if refused to apply for a writ of mandamus to enforce such right, merely because he shows himself to be a holder of the stock in the corporation.

And see also RE STEINWAY, which must be regarded as fixing the existing rule on the subject in New York.

So, under some of these provisions motive has been directly held to be material.

Thus, the public inspection referred to in La. Const. art. 245, providing that certain books of corporations shall be kept for public inspection, applies to inspections by a shareholder or other person with a laudable object to accomplish, or a real and actual interest upon which to predicate his request for information, and not the inspection of the idle, the impertinent, or the curious, who have no interest to subserve, or advance, or protect. State, Bourdette, v. New Orleans Gaslight Co. 49 La. Ann. 1556.

So, a stockholder applying for a mandamus to compel the directors of an incorporated company to allow him to inspect their accounts under the companies clauses act, 8 Vict. chap. 16, §§ 115, 119, requiring companies for six weeks to give inspection to their shareholders of their books, must state what his object is, and what the scope of his demand is, that the company and the court may see that his demand is a reasonable one. Queen v. London & St. K. Docks Co. 44 L. J. Q. B. N. S. 4.

And under the Stannaries act of 1855, § 22, an application for an order of inspection of the books of a corporation must be made on sufficient ground on affidavit or otherwise, and the vice warden has a judicial discretion as to making or refusing the order. *Re* West Devon Great Consols Mine, L. R. 27 Ch. Div. 106.

And a proprietor in the Grand Canal Company applying for a mandamus to compel directors thereof to allow him to inspect the books and proceedings of the company under 11 & 12 Geo. III., chap. 31, § 15, providing that every person having in his own name and right any share in the stock thereof, or his or her representatives, may have access at all reasonable times to inspect the books of such company, must show that in his application to the directors he stated the object for which he required the information he desired to obtain, and that the application is a reasonable one and its refusal unreasonable. Queen v. Undertakers of Grand Canal, 1 Ir. Law Rep. 337.

45 L. R. A.

b. For hostile purposes.

While a stockholder and director in a joint-stock company has the right at any reasonable and proper time to examine and inspect the books and papers of the corporation whenever it is necessary to do so for the protection of his interest as a stockholder, or the performance of his duties as a director, such examination cannot be rightfully had for a purpose hostile to the corporation. Hemingway v. Hemingway, 58 Conn. 443; Legendre v. New Orleans Brewing Asso. 45 La. Ann. 669. And see Ellsworth v. Dorwart, 95 Iowa, 108, *supra,* III. b.

If the charge upon which a stockholder rests his claim for inspection of the books of the corporation is free from odium, the general rule is that he is entitled to have the right protected, whatever may be his motive in asking the aid of the court for that purpose. Mitchell v. Rubber Reclaiming Co. (N. J.) 24 Atl. 407.

But mandamus will not issue to compel permission to inspect corporate books where there is fair reason to believe that the applicant for inspection intends to make an improper use of the information obtained. State, Rosenfeld, v. Einstein, 46 N. J. L. 479.

And a stockholder and director in a joint-stock company, who is engaged with others in organizing and active in the management of a rival company, is not entitled to inspect and examine a letter file of the original company for the benefit of the other company, and the secretary of the original company is not liable for an assault in forcibly taking it from him, using no more force than was necessary for that purpose. Hemingway v. Hemingway, 58 Conn. 443.

And the insistence of a treasurer of a corporation upon a stipulation by the secretary and stockholder desiring an inspection of books of the corporation in his hands, against use of them for the purpose of entering estimates therein about which they were disputing, is proper where the testimony in the proceeding for a mandamus to compel permission to inspect such books does not show that the relator had any occasion for getting possession of the books unless it was for the purpose of entering such estimates. State, Rosenfeld, v. Einstein, 46 N. J. L. 479.

But while a mandamus will not issue to compel permission to a stockholder to examine the books of a corporation where it is clearly established that his purpose was mischievous, the burden of proving that such a purpose existed devolves upon the party asserting it, and the proofs should be clear and convincing before the party asking permission should be denied it, where his interests are alleged and his rights

over a corporation than it has over a partnership.

If any inference could lead to such a doctrine in England it has been exploded, and the true rule is laid down in the case of *King* v. *Merchant Tailors' Co.* 2 Barn. & Ad. 115.

People, Field, v. *Northern P. R. Co.* 18 Jones & S. 459.

Text writers have endeavored to lay down in general terms a loose doctrine based on cases of discovery in chancery, of common-law suits for damages, and for penalties under the statute and mandamus generally, all intermingled without discrimination, but no authority is cited by them showing a general right to examine the books of a corporation.

High, Extr. Legal Rem. § 308.

Assuming that the jurisdiction in cases of this kind is discretionary, that discretion is not arbitrary, but is governed by legal rules, and was not properly exercised by the appellate division in this case.

People, Gaslight Co., v. *Syracuse,* 78 N. Y. 56; *People, Millard,* v. *Chapin,* 104 N. Y. 96; *People, Bagley,* v. *Green,* 1 Hun, 4.

The petition fails to answer the commonplace requirements that pertain to mandamus. It shows no proper demand for inspection.

Beach, Priv. Corp. 154; High, Extr. Legal Rem. 2d ed. 240; *People, McDonald,* v. *United States Mercantile Reporting Co.* 20 Abb. N. C. 194.

Messrs. **Sullivan & Cromwell, Wheel-**

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in other respects satisfactorily presented. Mitchell v. Rubber Reclaiming Co. (N. J.) 24 Atl. 407.

And that stockholders had been misled by designing persons into making an application for an inspection of the books of the corporation, is no answer or defense to such application. *Re* Birmingham Bkg. Co. 36 L. J. Ch. N. S. 150, 15 L. T. N. S. 203.

Under statutes conferring the right upon the stockholder without qualification, however, the rule is different. In such case the doctrine of the principal case applies.

Thus, it is not a sufficient answer to a petition for a mandamus to enforce the right of a stockholder to inspect the books of a corporation to impugn the motives of the petitioner, and state that the object and purpose were to injure the corporation, where allegations in the petition that the purpose of the petitioner was to seek such relief as the law might afford to protect his interests in the company were admitted by demurrer. Stone v. Kellogg, 165 Ill. 192.

The allegations of a relator in a proceeding to obtain a mandamus setting forth just and proper reasons for his desire as stockholder to examine the records and accounts of his company is not one upon which an issue of fact can be raised by answers imputing to him base and unworthy motives. Stone v. Kellogg, 62 Ill. App. 444. Affirmed in 165 Ill. 192.

In the above case Com., Sellers, v. Phœnix Iron Co. 105 Pa. 111, 51 Am. Rep. 184; and Com. v. Empire Pass. R. Co. 134 Pa. 237, *infra*, VI. c, were disapproved so far as they supported the doctrine that a suspicious stockholder is not entitled to mandamus to permit him to examine the books of the corporation.

So, a reason or purpose on the part of a stockholder for inspecting the records of the corporation need not be alleged or proved in an action for the recovery of the penalty imposed upon the custodian of corporate records for refusal to permit an inspection by a stockholder, provided for by Vt. Gen. Stat. chap. 86, §§ 7, 8, 13, as a lawful reason or purpose for examining them will be presumed in the absence of proof to the contrary. Lewis v. Brainerd, 53 Vt. 510.

And a corporation must look to the register of stockholders for the purpose of the liabilities imposed upon them, and the fact that a stockholder bought his stock nominally in his own interest, but has really taken it in the interest of some other person, presents no defense to a demand by him for the right to inspect the books of the company under the companies clauses act of 1863, § 28; Mutter v. Eastern & M. R. Co. L. R. 38 Ch. Div. 92, 36 Week. Rep. 401, 57 L. J. Ch. N. S. 615, 59 L. T. N. S. 117.

And that a stockholder in a stock company took his stock at the instance of a rival company and for the purpose of serving the interests of the rival company does not, under the companies clauses act of 1863, § 28, deprive him of the right to inspect the books of the company. *Ibid.*

So, under companies clauses act 1845, §§ 45, 63, and the companies clauses act of 1863, § 28, providing that the books of a stock company shall be accessible to him without any other qualification than at all reasonable times, the right of inspection may be exercised without assigning any reason for requiring or desiring inspection. Holland v. Dickson, L. R. 37 Ch. Div. 669, 57 L. J. Ch. N. S. 502, 58 L. T. N. S. 845, 36 Week. Rep. 320.

In the above case King v. Proprietors of Wilts & B. Canal Navigation, 29 L. T. N. S. 922, 3 Ad. & El. 477, *infra*, was distinguished upon the ground that there the question was one of fact whether or not there had been a refusal, and it was decided that there had been none.

So, the board of directors of a bank has no right to pass a resolution excluding one who was a member of the board and a stockholder of the bank from an inspection of its books, although the members believed him to be hostile to the interests of the institution. People, Muir, v. Throop, 12 Wend. 183.

And that a director of a corporation is suspicious that its affairs are not properly or judiciously managed furnishes no ground for the denial of his right to examine its records and books of account. Stone v. Kellogg, 62 Ill. App. 444. Affirmed in 165 Ill. 192.

And that the object of a demand by a stockholder for inspection of the books of the corporation is to obtain material to be used in convincing other stockholders that a proposed plan of reorganization which meets the approval of a majority of the stockholders is one that should not be carried out, is not a sufficient answer to an application for an order directing such inspection. Chable v. Nicaragua Canal Constr. Co. 59 Fed. Rep. 846.

So, the fact that a stockholder in a corporation did not feel kindly toward the president, and had commenced suits against him, does not warrant a denial of his right to inspect the books of the company. Ellsworth v. Dorwart, 95 Iowa, 108.

And that the secretary of a corporation permitted an inspection of books of the corporation other than the stock-book, and that he furnished the relator with an accurate statement of the condition of the company, and that the relator stopped the proper delivery of the company's mail, and collected the company's money without turning it over, are no defense to a proceeding by mandamus to compel the secre-

er H. Peckham, and Edward B. Hill, for respondent:

The court had full power to grant the writ.

People, Hatch, v. *Lake Shore & M. S. R. Co.* 11 Hun, 1, Affirmed as *Sage* v. *Lake Shore & M. S. R. Co.* 70 N. Y. 222; *People, Stobo,* v. *Eadie,* 63 Hun, 320, Affirmed without opinion, 133 N. Y. 573; *People, Del Mar,* v. *St. Louis & S. F. R. Co.* 44 Hun, 552; *People, Clason,* v. *Nassau Ferry Co.* 86 Hun, 128.

The text-books and authorities outside this state are unanimous in holding that a corporator has a right to inspect the general books of the corporation, and that mandamus is the proper remedy.

High, Extr. Legal Rem. § 308; Morawetz, Priv. Corp. § 473–476; Beach, Priv. Corp. § 75; Thomp. Corp. §§ 4406 *et seq.*; *King* v. *Merchant Tailors' Co.* 2 Barn. & Ad. 115; *Re Burton & S. Co.* 31 L. J. Q. B. N. S. 62; *Cockburn* v. *Union Bank,* 13 La. Ann. 289; *People, Bishop,* v. *Walker,* 9 Mich. 328; *State, Rosenfeld,* v. *Einstein,* 46 N. J. L. 479; *Com., Sellers,* v. *Phœnix Iron Co.* 105 Pa. 111, 51 Am. Rep. 184.

The right of a stockholder to inspect the books of a private corporation is a general right, to be allowed and enforced, unless some sufficient particular reason appears for denying it in the case at hand.

King v. *Babb,* 3 T. R. 579; *Rex* v. *Newcastle upon Tyne,* 2 Strange, 1223; Thomp. Corp. § 4432; *Stettauer* v. *New York & S. Construction Co.* 42 N. J. Eq. 46.

In the United States the prevailing doc-

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tary to permit the inspection of the stock-book. People, Gunst, v. Goldstein, 37 App. Div. 550.

And the fact that a stockholder in a corporation desiring an inspection of its books is the brother-in-law of the president of a rival corporation, and a statement by one of his attorneys that the only way in which the controversy between him and the corporation could be settled was by the purchase of the stockholder's stock, is not sufficient to constitute a defense in a proceeding to enforce his right of inspection on the ground that he was acting in the interests of the rival corporation, and that his motive was to force a sale of his stock. Blymyer v. Blymyer Iron Works Co. 5 Ohio N. P. 71.

In the above case the question whether the motive of a stockholder in asking an inspection of corporate books can be inquired into in a proceeding to enforce his right was suggested, but the court expressly refused to decide it, resting the decision of the case upon other grounds.

So, a rule for a mandamus by a shareholder to obtain an inspection of a waterworks' company's books and documents will not be discharged because the shareholder was the solicitor of another waterworks company, which had obtained a decree against the defendant company, and it was under consideration whether or not the defendant company should appeal, and such shareholder applied for the inspection without stating his object, and it appears that it was stated on affidavit on the application, and not contradicted, that the prosecutor made his application for inspection in the interests of his clients, and not for any purpose or any interest of the defendant, or of any member of its company as such, and that his object was to canvas the shareholders and endeavor to persuade them to oppose the appeal. King v. Proprietors of Wilts & B. Canal Navigation, 29 L. T. N. S. 922, 3 Ad. & El. 477.

And an answer in a petition for a mandamus to enforce the right of a stockholder to inspect the stock-book of the corporation to enable him to consult with other shareholders to obtain proxies to use at the election of officers, denying the motives alleged by the petitioner, and alleging that the petitioner desired to aid a third person in proceedings against the receiver of the company, and that there was not time for consultation by the stockholders prior to the next election, and that the petitioner had not exhibited a desire to act with intelligence, is irrelevant and immaterial, and tenders no issue which could be tried by a jury, or which, if tried, and found for the defendants, could militate against the claim of the petitioners to the right of inspection. Com. v. Philadelphia & R. R. Co. 3 Pa. Dist. R. 115.

Where the custodian of the books and records of a corporation denies the right of a stockholder to inspect them on the ground that the examination was sought for the purpose of discovering some ground of attack upon the corporation and its management, he assumes the burden of proof of such motive. Stone v. Kellogg, 165 Ill. 192.

See further, as to the effect of the purpose of the desired inspection where the statutory right is absolute, *supra,* VI. a.

c. *To obtain grounds for litigation.*

The general rule would seem to be that a stockholder in any joint-stock company or private corporation incorporated for manufacturing or trading purposes has such an interest in it and its affairs as will entitle him to an inspection and copies of its books, papers, and accounts on reasonable and proper occasions when they become material to him as evidence in a suit with another. State, Richardson, v. Swift, 7 Houst. (Del.) 137.

And a mandamus may go against a corporation at the instance of a member to inspect and see whether he can raise a particular case in his favor by examining the books, but it must be a case with reference to some definite, distinct dispute as to which it appears that it might be to his advantage to see the minutes of the corporation. Re Burton & S. Co. 31 L. J. Q. B. N. S. 62.

And a shareholder in a corporation alleging that a majority of the stock is held by officers of the corporation who control its business and manage its affairs to advance their private interest and deny him all access to, or opportunity for inspection of, corporate books and papers, and that he is about to file a bill in equity to restrain such illegal management, is entitled to a mandamus to compel the officers to permit him to inspect the books and papers containing information on the subject of such management. Com., Sellers, v. Phœnix Iron Co. 105 Pa. 111, 51 Am. Rep. 184.

And a stockholder to a considerable amount in what appears to be a prosperous and highly profitable trading corporation, in which for nine years, although large profits had admittedly accrued, no dividends had been declared and the profits in no way accounted for, who was denied all access to the books and papers for information, and the reading of the minutes of a regular stockholders' meeting was suppressed because of his presence, is clearly entitled to a mandamus to compel the delivery of the books for his inspection, to enable him to prepare a stockholder's bill in equity for the redress of such grievances. Phœnix Iron Co. v. Com., Sellers, 113 Pa. 563.

trine appears to be that the individual shareholders in a corporation have the same right as the members of an ordinary partnership to examine their company's books.

Morawetz, Priv. Corp. § 473; Beach, Priv. Corp. § 75; Thomp. Corp. §§ 4406–4435; Cook, Stock & Stockholders, 3d ed. § 511; *Cockburn* v. *Union Bank*, 13 La. Ann. 289; *State, Martin*, v. *Bienville Oil Works Co.* 28 La. Ann. 204; *Com., Sellers*, v. *Phœnix Iron Co.* 105 Pa. 111, 51 Am. Rep. 184; *Phœnix Iron Co.* v. *Com., Sellers*, 113 Pa. 563; *Huylar* v. *Cragin Cattle Co.* 40 N. J. Eq. 392; *People, Onderdonk*, v. *Mott*, 1 How. Pr. 247; *Williams* v. *Prince of Wales Life, etc., Assur. Co.* 23 Beav. 338.

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

Steinway & Sons, once a copartnership, became a corporation in 1876, under the general manufacturing act of 1848, and the relator has been a stockholder therein ever since. He now holds 1,440 shares of its stock, of the par value of $144,000, out of a total of 20,000 shares, of the value of $2,000,000, but with an actual value much in excess of that sum. He has not been an officer of the corporation since 1881, and he has had no means of knowing much about the management of its affairs since 1892, when he was given an opportunity to examine the books. Since then he has been substantially ignorant as to all the details of the management, and has had no access to the books or records. Learning of certain practices that he considered improper, on April 12, 1894, and March 27, 1895, he made protests in writing to the company, but no attention was paid to them. On the 6th of April, 1896,

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And a mandamus to enforce the right of stockholders to inspect the books of a corporation will not be refused on the ground that the inspection is desired in an effort on the part of some of the stockholders of the company to destroy it, where it appears that there were two companies, a new one and an old one, the new one consisting of a number of the stockholders of the old, and that both claimed title to the same property, and that the object of the inspection was to look into the question of title with a view of knowing whether they should go into the new company to protect what rights they had in the old. State, Templin, v. Farmer, 7 Ohio C. C. 429.

So, the court at the instance of a corporation who makes a claim to be elected to an office in the corporation, founded upon a supposed invariable custom to elect the person who at the time of a vacancy fills the position which he then occupied, will grant a mandamus to allow him to inspect the minutes of the corporation as to former elections, to assist him in stating his case, where the company admits the general practice, but says it is not invariable, though the court entertains great doubt whether such alleged custom if proved would control the charter which prescribes that there is to be a free election. *Re* Burton & S. Co. 31 L. J. Q. B. N. S. 62.

And a stockholder bringing an action against the Bank of England for not paying dividends upon certain stock in which the bank admitted that the stock had up to a certain day stood on the bank-books in the plaintiff's name, but alleged that the plaintiff had on that day transferred it, is entitled upon making affidavit that she had never signed or authorized any transfer, and that if such alleged transfer existed it was a forgery, to an absolute rule allowing her to inspect the particular entry in the transfer-book, purporting to transfer her stock. Foster v. Bank of England, 15 L. J. Q. B. N. S. 212, 8 Q. B. 689, 10 Jur. 565.

But that a stockholder in a corporation desires to file a bill in equity to set aside a lease by the corporation to another corporation of all its property and franchise for a long term, and wishes to obtain a list of the stockholders so that he may confer with them in order to procure them to join in the litigation and share the expenses, is not a proper purpose which will entitle him to a writ of mandamus to enforce his right to inspect the books of the company. Com. v. Empire Pass. R. Co. 134 Pa. 237.

As to design to confer with stockholders generally and for the purpose of the business and conduct of the corporation, see *infra*, VI. d. 45 L. R. A.

So, a shareholder in a joint-stock company is not entitled to an inspection of the company's books for the purpose of proving a plea of justification in an action against him by the company for libel in imputing insolvency to the company. Metropolitan Saloon Omnibus Co. v. Hawkins, 4 Hurlst. & N. 146, 5 Jur. N. S. 201.

And entries of the proceedings and transactions of a corporation in a book kept by the clerk are not rendered admissible in evidence on behalf of the company against one of the shareholders suing it, by a clause in its charter providing that the clerk should keep in a book provided by the company an account of all acts, proceedings, and transactions of the company, and that every shareholder should have liberty to inspect the same and take copies of the entries. Hill v. Manchester & S. Waterworks Co. 5 Barn. & Ad. 866, 2 Nev. & M. 573.

So, the New Jersey Statute, Rev. p. 188, conferring upon the court power to compel the production of the books of a corporation, confers the power in the special case of the corporation of the state unlawfully keeping its books out of the state, and does not confer any power over corporations which the court did not possess before the passage of the act, except that which is specifically given, and does not confer power to compel the production of books for the purpose of obtaining evidence to be used in a cause and ascertain whether there is any ground of complaint in reference to the conduct of the directors against whom no charge is made. Stettauer v. New York & S. Constr. Co. 42 N. J. Eq. 46.

And a stockholder who is sued by his corporation upon instruments made by him in its favor for the payment of money, and who sets up that he purchased stock relying upon false financial statements made by the officers of the company, is not entitled to a writ of mandamus to enable him to examine the books and documents of the company for the purpose, if possible, of verifying his allegations of defense, where it does not appear that he purchased the stock from the company or paid for it by means of the obligations in question. Investment Co. v. Eldridge, 2 Pa. Dist. R. 394.

In that case it was said that the right of a stockholder to inspect the books of a corporation seems rather to be intended to enable a bona fide and genuine holder of stock to protect his interest, than to furnish the means whereby a dissatisfied stockholder can relieve himself from liability, either to pay for his stock, or to discharge obligations which he has given for money loaned to him.

So, the court will not order the plaintiff in

he made a written request for leave to examine the books, but, receiving no reply, on the 15th of that month he wrote requesting information, proper in character, upon certain subjects; and to this communication he received an answer from the secretary, dated April 23, 1896, written in behalf of the board of trustees, virtually refusing the information ased for, on the ground that the relator intended to use it in "hostility to the interest of the stockholders." On the 5th of April, 1897, he endeavored to ascertain certain material facts at the annual meeting, but without success; and thereupon he requested the officers and directors to afford his accountants and attorneys access to the books of account, vouchers, and records of the company for the years 1892 to 1896, inclusive, for the purpose of examining the same. Receiving no reply, on the 8th of May, 1897, he served a written request upon the treasurer for a statement in writing, under oath, of the affairs of the company, embracing a particular account of all its assets and liabilities for each of the several fiscal years from 1892 to 1896, inclusive; and in response to this he received a general statement placing the assets at more than $3,000,000, but distributed into only fourteen items, eight of which were over $100,000 each. The liabilities included but eight items, three of which were the capital stock, the surplus, and the profit of 1896. This was the first information as to the company's affairs which the petitioner had been able to obtain in five years, except that he once saw the balance sheet and inven-

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an action by a railroad company against a proprietor for calls on his shares, to permit the defendant to inspect and make extracts from the books of the company where such inspection is not distinctly authorized by the railway act,—especially if it appears to be the defendant's object to discover what defense he may set up. Birmingham, B. & T. Junction R. Co. v. White, 5 Jur. 890, 4 Perry & D. 649, 1 Q. B. 282, 2 Railway Cas. 863.

But an order of a judge at chambers giving liberty to a defendant in an action by a company against an alleged shareholder for calls under a winding-up order to inspect the register of shares, the allotment and the agenda book of the company, will be upheld on appeal when made after plea, as the granting of such an order is purely in the discretion of the judge, and the court will not review the exercise of such discretion unless it clearly sees that the order was wrong. Lancashire Cottonspinning Co. v. Greatorex, 14 L. T. N. S. 290.

So, a mandamus will not issue to a trade corporation at the instance of one of its members to compel it to produce its accounts for the purpose of declaring a dividend of the profits, as that is a mere private purpose. King v. Bank of England, 2 Barn. & Ald. 620.

And a stockholder in a banking company which is in the course of voluntarily winding up for the purpose of reconstruction, who is offered a designated percentage for her holding in the old company, and gives notice to arbitrate as a dissentient, cannot claim the right to examine the books of the company in order to see whether it would be better for her to accept the offer or go on with the arbitration. *Re* Glamorganshire Bkg. Co. L. R. 28 Ch. Div. 620, 54 L. J. Ch. N. S. 765, 51 L. T. N. S. 623, 33 Week. Rep. 209.

In the above case The Birmingham Bkg. Case, 36 L. J. Ch. N. S. 150, 15 L. T. N. S. 203, *supra*, VI. b, was distinguished on the ground that there the corporation and its business had come to an end, while here the current accounts which the customers had with the old bank were carried on into the new bank, and the applicant desired to look into those accounts and see their condition.

d. *To obtain knowledge of condition of company.*

The question whether a desire for knowledge as to the condition of the company warrants the enforcement of the stockholder's right to inspect seems to depend upon the purposes for which he wishes to use the knowledge.

Thus, a mandamus to enforce the right of a stockholder to inspect the stock-book of a corporation will not issue where there is nothing in the charter or in the statutes relating to the matter, on a showing that the stock had of late paid little or no dividends and depreciated very much in market value, in the absence of anything to show that this was due to any mismanagement, or that the books would disclose a value above its market value, and it appears that no question was made of the right of the stockholders to fully inform themselves from the books of the company as to its financial condition. Lyon v. American Screw Co. 16 R. I. 472.

So, an application for a mandamus directed to the masters and wardens of a corporation to require them to allow members to inspect and take copies of all records, books, and muniments in their possession belonging to the company or relating to its affairs will be dismissed with costs when based merely upon the ground that the applicants believed the affairs of the company were improperly conducted and the officers unduly chosen, some particular instance of misgovernment being stated which did not affect the parties themselves or any matter then in dispute. King v. Merchant Tailors' Co. 2 Barn. & Ad. 115.

And an action cannot be maintained by a stockholder against a corporation upon the ground that the secretary upon informal request did not surrender the books to him for inspection whereby he would have ascertained that the affairs of the corporation were not properly conducted so as to foresee the inevitable depreciation of the stock and prevent loss to himself by selling the same. Legendre v. New Orleans Brewing Asso. 45 La. Ann. 669.

And the stockholder in a gas company is not entitled to a mandamus to enforce his right to inspect the books of the company because the company reduced the price of gas from $1.10 to 50 cents per thousand, and no dividend had been declared on the stock for some time, and that he had been paid only a small per cent on the consolidated bonds since its consolidation with another company, upon his allegation that this condition of affairs was caused by the directors involving the company in a gas war, and that he believed it was selling gas below cost, and that without an examination of the books he could not tell from what source it derived its money to pay fixed charges, whether from capital or income, where he does not furnish any proof that gas could not be profitably sold at the reduced price. *Re* Pierson, 28 Misc. 726.

In the above case RE STEINWAY was distinguished upon the ground that in that case the petitioner owned stock at par value to a large amount with an actual value much in excess thereof, and that the dividends had dwindled down from 20 to 5 per cent, and that he had

tory of January, 1893. Since 1891 the dividends declared by the company have dwindled in amount. In 1896 the dividend was only 5 per cent but never before since 1883 had less than 10 per cent, and sometimes as much as 18 and 20 per cent, been divided in dividends. The relator claimed in his petition for a writ of mandamus to permit inspection of the books, that the officers of the corporation were engaged in an attempt to form an English stock company for the control of its business, with the design of selling their shares of the capital stock, or exchanging them for a much greater amount of shares in the English company, and that efforts had been made by the stockholders and officers to induce him to sell his stock at $250 a share; but, as he insisted, it was impossible for him to fix upon any price without an opportunity to investigate the condition of the company. He specified various acts which he alleged to be improper on the part of the officers, such as the payment of exorbitant rentals, carrying on a banking business, allowing unusual rates of interest, inventorying the assets too low, and paying the trustees salaries, with no equivalent in services. The opposing affidavits contain a large amount of matter relating to aggravating conduct on the part of the relator in the past, and alleging improper motives and ulterior aims on his part. Many general allegations of the petition were denied *in hæc verba*, without stating the real facts. The president and other officers of the corporation denied the allegations of improper con-

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for several years been endeavoring to ascertain certain material facts as to the company's condition and acts, while in this case the petitioner's holdings had not depreciated, but had advanced.

But that a stockholder was seeking information to determine the present value of his holdings and to guide his future action with reference to the stock of the company is a sufficient motive to warrant his seeking inspection of the books of the company within La. Const. art. 245, requiring books of corporations exhibiting certain enumerated affairs to be kept for public inspection. State, Bourdette, v. New Orleans Gaslight Co. 49 La. Ann. 1556.

And the facts that a stockholder had pledged all his holdings to secure a loan, and that the loan would shortly become due, and that he had not the means to pay it, and that he has no means of ascertaining the value of the stock and bonds, except by an examination of the company's books and papers, are sufficient to warrant the issue of a mandamus to enforce his right to inspect the books of the corporation, where it appears that the company had never declared or paid any dividends whatsoever. *Re* Crosby, 28 Misc. 300.

And an inspection of the register of shareholders of a corporation for the purpose of canvassing the proprietors before determining whether a litigation in which the company was concerned should go on or not is a legitimate object, though the canvass is made in the interest of the opponent in the action. King v. Proprietors of Wilts & B. Canal Navigation, 29 L. T. N. S. 922, 3 Ad. & El. 477.

And that a stockholder desires to inspect the books of the corporation to enable him to consult with other shareholders and obtain proxies to be used at the election of managers or officers, is a legal purpose warranting the issue of a mandamus to enforce his right of inspection. Com. v. Philadelphia & R. R. Co. 3 Pa. Dist. R. 115.

So, where a notice has been given by the directors of a corporation that a vote will be taken at a designated time upon the question of a reduction of the capital stock and upon other matters, it is requisite for stockholders to know the condition of the affairs and business operations of the company so as to be enabled from such knowledge to act for the best interests of themselves and other stockholders; and where in such case the directors conceal from the stockholder the books of the corporation, and refuse him permission to examine them, he is entitled to relief by mandamus. State, Martin, v. Bienville Oil Works Co. 28 La. Ann. 204.

But see Com. v. Philadelphia & R. R. Co. 3 Pa. Dist. R. 115, *supra*, VI. b.

But that a stockholder wishes to inspect the stock list for the purpose of conferring with his fellow stockholders will not warrant the issue of a mandamus to enforce the stockholder's right of inspection in the absence of anything in the charter or statutes relating to the matter, where the by-laws provide for annual and special meetings which would afford opportunity for conference, and it does not appear that the stockholder has been deprived of such conference or that there was any considerable dissatisfaction among the other stockholders. Lyon v. American Screw Co. 16 R. I. 472.

A stockholder will not be denied permission to inspect the books of a corporation for the purpose of investigating whether a dividend was fairly earned and properly declared on the ground that he was for five months out of the six in which the dividend was declared president and director of the company, and that therefore it was his duty to know its condition, and he must be presumed to know it. Mitchell v. Rubber Reclaiming Co. (N. J.) 24 Atl. 407.

And an allegation in a petition for mandamus to compel the giving of permission to a stockholder to inspect the books of the corporation, alleging that a dividend was not fairly earned and that it was declared for the purpose of enabling the recipients to pay for stock which was at the same time ordered to be issued, is sufficient to warrant the issue of the mandamus where it does not appear that the asking was for the purpose of discovering whether the company was prosperous, or otherwise, or its business managed in a skilful and intelligent manner or not, or whether it could be more economically conducted, and there is nothing to indicate that the petitioner was prompted by idle curiosity or that he was seeking to promote some selfish or independent end. *Ibid.*

VII. *Rule that there must be a specific dispute.*

At common law the stockholders of a corporation had the right to examine at reasonable times the records and books of the corporation. But as the writ of mandamus would not issue as a matter of course, to enforce a mere naked right or to gratify mere idle curiosity, it was necessary for the petitioner to show some specific interest at stake rendering the inspection necessary, or some beneficial purpose for which the examination was desired. Stone v. Kellogg, 165 Ill. 192; King v. Merchant Tailors' Co. 2 Barn. & Ad. 115.

A shareholder in a corporation asking a mandamus to compel the custodian of corporate records to permit him to inspect them must have had some interest at stake which rendered the inspection necessary. People, Bishop, v. Walker, 9 Mich. 328.

duct on their part, and claimed that the relator wished to force them to buy him out at an extravagant price. As no alternative writ was issued, and the relator proceeded to argument upon his petition and the opposing affidavits, his right to a peremptory writ depends upon the conceded facts, the same as if he had demurred to the allegations of the defendants. *People, Buffalo,* v. *New York C. & H. R. R. Co.* 156 N. Y. 570; *Haebler* v. *New York Produce Exchange,* 149 N. Y. 414; *People, Corrigan,* v. *Brooklyn,* 149 N. Y. 215; *People* v. *Rome, W. & O. R. Co.* 103 N. Y. 95; Code Civ. Proc. § 2070. While many of the facts alleged in the petition were denied, enough were left undenied to present a case for the exercise of judgment and discretion on the part of the supreme court, provided it has power, in any case not expressly covered by statute, to authorize the inspection, wholly or in part, of the books of a manufacturing corporation, upon the application of a stockholder. The special term denied the application of the relator for a peremptory writ of mandamus commanding the officers of the corporation to exhibit certain of its books and papers to him, but upon appeal to the appellate division the order of the special term was reversed by a divided vote, and the prayer of the petition granted, with certain regulations as to the time, place, and manner of exhibiting the books and papers. The appellate division allowed an appeal to this court, and certified the following question for decision: "Has the supreme court the power, upon the petition of a stockholder,

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The right of a stockholder in a corporation to inspect its books is not to be exercised to gratify curiosity or for speculative purposes, but in good faith and for a specific honest purpose, and where there is a particular matter in dispute involving and affecting his rights as a stockholder. Phœnix Iron Co. v. Com., Sellers, 113 Pa. 563.

And a mandamus will be granted in such case only to such extent as may be necessary for the particular occasion. King v. Merchant Tailors' Co. 2 Barn. & Ad. 115.

In the above case Rex v. Newcastle-upon-Tyne, 2 Strange, 1223, *supra*, I., was limited and explained, the court saying that the statement therein, "that every member of the corporation had, as such, a right to look in the books for any matter that concerned himself," must be taken with reference to the cases then before the court.

This rule does not appear to have been applied generally where the right to inspect is statutory, and could not well be where the statutory right is regarded as absolute.

But the theory has been advanced that even the statutory right does not attach unless a controversy existed affecting his interests.

Thus, the Iowa statute does not confer the right on a stockholder to examine the original papers and vouchers of a corporation, and to entitle him to such right he should plead and prove that some property right is involved, or that some controversy exists, or that some specific or valuable interest is in question, to settle which an inspection of such books becomes necessary. Ellsworth v. Dorwart, 95 Iowa, 108.

And see also Lyon v. American Screw Co. 16 R. I. 472, *supra*, III.

VIII. *Matters of procedure.*

a. *In mandamus.*

The rules of procedure with reference to mandamus to enforce a stockholder's right to inspect the books of a corporation would seem to be the same as those applying to that remedy generally, except as modified by the relations of the parties whose rights are in question.

Thus, a mandamus to compel the production of the books of a corporation for inspection by a stockholder is properly directed to the person having the custody, possession, and control thereof, and where a woman is the nominal secretary and her husband does all the business in her name, having the possession and control of the books, and authority to permit an examination and inspection if he sees fit, it is properly directed to him. State, Bergenthal, v. Bergenthal, 72 Wis. 314.

And a writ of mandamus to enforce the right of a stockholder to inspect the books of a bank or other corporation must issue against the cashier of the bank or other officer having the custody of the books, and does not run against the corporation as such unless to compel the discharge of some corporate duty, and the bank in its corporate capacity is not a proper party defendant in the proceeding. Winter v. Baldwin, 89 Ala. 483.

And a mandamus to compel the submission of the discount book of a bank to a stockholder and director for inspection, which inspection had been refused by the cashier with the approval of the board of directors, is properly directed to the cashier, where he had charge of the book, and need not be directed to the board. People, Muir, v. Throop, 12 Wend. 183.

And a peremptory mandamus requiring the cashier of a bank to submit the discount book of the bank to a stockholder and director for inspection will be granted in the first instance where a rule to show cause had been obtained and cause was shown which was not satisfactory, but in such case the respondent will be permitted to make up a record *pro forma* for the purpose of suing out a writ of error. *Ibid.*

And a foreign corporation need not be made a party to a proceeding by a stockholder against a custodian of its books for an inspection thereof, where the books were within the state and the custodian was domiciled within it. Swift v. State, Richardson, 7 Houst. (Del.) 338.

And where it appears in a petition for mandamus to compel permission to inspect the books of a corporation by a stockholder that in compliance with the provisions of the by-laws of the corporation one party was duly appointed as its transfer agent, and that another party was appointed either as transfer agent or registrar of transfers of the stock and was acting as such, the relator is entitled to a peremptory writ directed to both such parties. People, Harriman, v. Paton, 20 Abb. N. C. 195.

But in People, Muir, v. Throop, 12 Wend. 123, it was said that while a mandamus to compel the submission of the discount book of a bank to a stockholder and director for inspection is properly directed to the cashier, though his refusal to permit an inspection was approved by the board of directors, it is not thought to be improper to direct it also to the directors.

And the rule that a writ of mandamus to compel the production of books of a corporation for inspection by a stockholder should run against the person having actual charge of the books, and not against the corporation, relates to cases in which the actual custodian of the books has refused to permit another to examine

to compel by mandamus the corporation to exhibit its books for his inspection?" The relator does not claim that the power in question has been conferred upon the court by statute, but he insists that it is a part of its inherent power. This position involves an inquiry into the origin and extent of the authority of the supreme court, and its power of visitation, or of examining into the affairs of corporations according to the common law.

The origin of the supreme court was through a statute passed by the legislature of the colony of New York on the 6th day of May, 1691, whereby, among other things, it was enacted "that there shall be held and kept a Supreame Court of Judicature, which shall be Duely and Constantly kept att the Citty of New Yorke and not Elsewhere, att the severall & Respective times hereafter mentioned. And that there be five Justices at Least appointed & Commissionated to hold the same court, two whereof together with one Chief Justice to be a Quorum. Which Supreame Court are hereby fully Impowered and Authorized to have Cognizance of all pleas, Civill, Criminall, and Mixt, as fully and amply to all Intents & purposes whatsoever, as the Courts of Kings Bench, Comon Pleas, & Exchequer within their Majestyes Kingdome of England, have or ought to have, . . ." This statute was to remain in force for only two years, but it was renewed, recognized, and continued by colonial act or royal ordinance substantially in the words quoted until the adoption of our first Constitution. 1 Col. Laws, pp. 226–229, 303–

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them, and not to cases in which the corporation itself by its directors refuses to keep its books at the office in the state in defiance of law. Crown Coal & Tow Co. v. Thomas, 60 Ill. App. 234.

One who is a stockholder in two corporations which are to all intents and purposes one and have the same officers may join both in a proceeding by mandamus to enforce his right of inspection of their books. *Re* Crosby, 28 Misc. 300.

And a proceeding by mandamus by a stockholder against the vice president and transfer agent of a corporation in which judgment was rendered in favor of such vice president and agent, is not a bar to a subsequent proceeding brought by the same relator against the corporation itself. State, Wilson, v. St. Louis & S. F. R. Co. 29 Mo. App. 301.

Reasons why the right of a stockholder to inspect the books of a corporation should not be granted are matters of defense, where it appears that he is a stockholder and has demanded the right at reasonable and proper times, and that it was denied him. Foster v. White, 86 Ala. 467, *dictum*.

And reasons why an inspection of the books of a corporation by a stockholder should not be permitted, and reasons why a company should be made a party to a proceeding for mandamus to compel the production of books for inspection, should be made to appear by the return of the writ, and not by motion to quash. State, Bergenthal, v. Bergenthal, 72 Wis. 314.

And a denial by the respondent in a proceeding for a mandamus to enforce the right of a stockholder to inspect the books and records of a corporation that the relator had at any time been refused the right to examine any of the records or accounts of the company which he was entitled to examine either as a stockholder or director, is insufficient as it assumes that he had no right to examine any of the records or accounts which he asked permission to inspect. Stone v. Kellogg, 62 Ill. App. 444, Affirmed in 165 Ill. 192.

And a reply by a director of a company to a petition for a mandamus to compel the production of the books of the company for inspection by a stockholder, that he was advised by counsel, and charged the fact to be that the applicant was not the owner or holder of capital stock of the company, but admitting that he held stock, and averring that he was not entitled to possession thereof, is not such a denial of the fact of ownership stated in the petition as to require a trial of the issue. *Re* Martin, 62 Hun, 557.

So, an allegation in an answer to a petition for mandamus to compel permission to a stockholder to inspect the books of a corporation, that the respondents had no knowledge or information sufficient to form a belief that the relators are or were or either of them was, at the time, the owner of the shares of stock as alleged, is not a sufficient denial of a positive allegation of ownership in the petition to prevent the issuance of a peremptory writ of mandamus in the first instance. People, Harriman, v. Paton, 20 Abb. N. C. 195.

And resisting affidavits in a proceeding for mandamus to compel the allowance of the inspection of the books of a corporation in which the petitioner positively alleges that the relator is the owner of over fifteen shares of capital stock, and shows a proper demand for permission to examine such books, which is refused, alleging that the respondent was advised by his counsel and charges the fact to be that the relator is not the holder or owner of over fifteen shares of such capital stock or the owner of any shares, but admitting that he is the holder of a certificate of twenty shares to the possession of which he is not entitled, is evasive, and does not controvert the positive allegation of the petition as to ownership so as to prevent the issuance of a peremptory mandamus. Martin v. Johnston, 25 Abb. N. C. 350.

So, an allegation in an affidavit of the attorney for the relator in a proceeding for mandamus to compel the secretary of a corporation to produce its stock-book for inspection, that he demanded that the respondent allow the relator to inspect the stock-book and make extracts therefrom, is not answered by a denial that the attorney demanded that they be allowed the inspection. People, Gunst, v. Goldstein, 37 App. Div. 550.

And an allegation in the affidavits of the attorney for the relator in such a proceeding, that a demand was made for the production of the books, and that the secretary in the presence of a designated person refused to produce them, is not answered by a denial that he refused in the presence of such person. *Ibid.*

And a denial by the respondent in such a proceeding, that on a day mentioned, and daily since that time, the relator had frequently demanded that the respondent produce the stock book for his inspection, is not a denial of an allegation therein that on the day named, and daily since that time, the relator had frequently demanded the production of the book for his inspection. *Ibid.*

And an allegation in such a proceeding that on a designated day the respondent locked up all the other books, and that repeatedly and daily thereafter the respondent demanded to be allowed to look at the same and was refused, is not answered by a denial that the respondent

306, 358, 380; 2 Col. Laws, 462, 639, 948; 3 Col. Laws, 546, 780, 1007; 4 Col. Laws, 1088; 5 Col. Laws, 73. As has been well said by a recent writer: "This act founded the supreme court. . . . Not only did this act erect the tribunal which still continues the great law court of the state, but it vested in it a jurisdiction which change of government and constant reforms and revolutions in procedure have been powerless to abridge in any material respect; for, while its jurisdiction has been enlarged by its union with the court of chancery, its ancient jurisdiction still remains unimpaired. The supreme court of the province was the instrument by which the great body of the jurisprudence of the English common law was applied to New York." Fowler's Organization of the Supreme Court, 19 Alb. L. J. 211. The court of chancery was created, or, as some insist, continued, by the same act, and was subsequently kept in force in the same way. Hoffman, Ch. Pr. 14; Graham, Jur. 140. Aside from the colonial statutes, which created and continued such courts only for fixed terms, royal ordinances were resorted to when the legislature failed to act, upon the theory that such action was authorized by the charter of the colony. The most notable were those passed by the governor and council on the 15th of May, 1699, and the 3d of April, 1704; which are referred to by the revisers in a note to 1 Rev. Laws, p. 213, and published in full in appendix No. 5 at the end of the second volume of the Revised Laws. These ordinances, which were questioned but never

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locked up all the books of account and stock-books of the corporation, and that he repeatedly and daily thereafter, upon the relator's demand, refused to allow him to look at the same, that being a denial that the respondent locked up the stock-book only. *Ibid.*

And an allegation in such a proceeding, that in reply to a demand for permission to inspect the respondent had stated that he had removed the stock-books from the office of the company, and that between designated dates they had at all times been out of that office, and that the secretary then and there refused to allow the relator to see them, is not answered by a denial that during the times mentioned the respondent refused the relator permission to inspect, as it does not show that he then and there refused it, or that during the interval the stock-book had at all times been out of the office of the company. *Ibid.*

So, it is no answer to an application for a mandamus by a parishioner to compel church wardens to allow him to inspect their accounts under 17 Geo. II. chap. 38, that in a subsequent clause of the statute a penalty is imposed for improperly refusing such inspection, as the penalty is not given by way of compensation to the party aggrieved, but is imposed for the relief of the poor and to punish the offender. King v. Clear, 4 Barn. & C. 899.

And a relator in a proceeding for mandamus for the inspection of books of a corporation, who is tendered the inspection he desired with offer of payment of costs up to that time, is rightly taxed with costs of the suit made after that time, unless it be found that some damages should be awarded because of the denial of his right previous to the filing of the tender. Boardman v. Marshalltown Grocery Co. 105 Iowa, 445.

The court upon the hearing of a motion for a writ of peremptory mandamus to compel the transfer agents of a foreign corporation to allow stockholders to inspect the transfer books and list of stockholders, may, without regard to the provision of the Code, order a reference to take proofs on matters concerning which fuller information is desired before proceeding. People, Del Mar, v. St. Louis & S. F. R. Co. 44 Hun, 552, 19 Abb. N. C. 1.

b. *In other proceedings.*

The mode of procedure in statutory proceedings is usually prescribed by the statute authorizing them, and in actions for damages for denial of inspection the only questions peculiar to this class of cases seem to be those with reference to the measure of damages.

Thus, the penalty authorized by Vt. Gen. Stat. chap. 86, §§ 7, 8, 13, for the refusal of the custodian of corporate books and records to permit a stockholder to inspect them, is a satisfaction to the stockholder for the injury caused him by a refusal of his right to inspect the corporate records, and no special injury or damage need be alleged or proved in an action for such penalty. Lewis v. Brainerd, 53 Vt. 510.

And the penalty imposed by N. Y. Laws 1848, chap. 40, § 25, for violation of the statute requiring books of a corporation to be kept at the office of the company open for inspection by stockholders, is imposed for violation of a duty, and its recovery is not dependent upon a pecuniary loss as the consequence, and an injury to the stockholder from such violation is not essential to his recovery. Kelsey v. Pfaudler Process Fermentation Co. 20 N. Y. S. R. 533.

And evidence of previous efforts on the part of a stockholder to obtain an inspection of the stock-book of a foreign corporation is admissible in an action to recover a penalty for failure or refusal to permit the inspection of such books as provided for by the New York stock corporation law, as tending to show the good faith of the stockholder and as having a bearing upon the validity of the excuse which is given in the explanation of the refusal to permit the inspection. Recknagel v. Empire Self-Lighting Oil Lamp Co. 24 Misc. 193.

In the above case Kelsey v. Pfaudler Process Fermentation Co. 20 N. Y. S. R. 533, *supra*, V., was distinguished upon the ground that there the person who had the key to the safe where the stock-book was locked was out of town, and that no one else could open the safe, while in the present case the stock-book was not at the proper office when the demand for an inspection was made.

So, the rights of a stockholder who demands the right to inspect the books of a corporation on Saturday and is told to wait until Monday following to recover the penalty prescribed by N. Y. Laws 1848, chap. 40, § 25, for violation of the provision thereof, that certain books should be kept open to the inspection of stockholders, is not waived by his act in going upon Monday and examining the books. Kelsey v. Pfaudler Process Fermentation Co. 20 N. Y. S. R. 533.

And the right of a shareholder in a corporation to inspect and take copies of the register of members of the company cannot be objected to by the company upon the ground that he was not a member, and that his shares had been forfeited, and that he had not tendered the shilling necessary under the companies act of 1862, § 32, to entitle a nonmember to inspect, where he was treated by the company as a person who was entitled to inspect and to have a list of the

overthrown, are substantially the same as the original act of 1691. Chalm. Col. Op. 249; 5 Col. Doc. 952; 1 E. D. Smith, Introduction, p. 50. The supreme court, as thus continued by Lord Bellamont's ordinance of 1699, and the court of chancery, as continued by ordinance on the 20th of August, 1701, and the 7th of November, 1704, were the same tribunals and possessed the same powers as those organized by the colonial legislature. Appendix No. 7, 2 Rev. Laws, p. 13. They were still in existence and exercising their powers when the convention met to organize a state government. "Such parts of the common law of England and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, 1775," were made and continued the law of this state by its first Constitution. Const. 1777, § 35. While that instrument neither created nor continued the supreme court or the court of chancery, except as stated above, it treated both as existing tribunals; for it alluded to the chancellor and the justices of the supreme court, regulated their terms of office, and conferred upon them the power of appointing clerks for their respective courts. They thus explicitly recognized them as continuing in power under the state government as they had previously existed under the colonial government. Id. §§ 33-37, 41. The second Constitution contained similar provisions as to what constituted the law of the state, except that it omitted "the statute law of England and Great Britain," and abrogated such parts of both common and statute law "as are repugnant to this Constitution." Const. 1821, art. 5, §§ 1-7; Id. art. 7, § 13. The third Constitution abolished the court of chancery, and enacted that there should "be a supreme court having general jurisdiction in law and equity." Const. 1846, art. 6, § 3; Id. art. 14, § 8. It repeated the provisions as to what should be the law of the state. Id. art. 1, § 17. The revised Constitution now in force continues the supreme court, "with general jurisdiction in law and equity," and provides that "such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the Congress of the said colony, and of the convention of the state of New York, in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same." Const. 1895, art. 1, § 16; Id. art. 6, § 1; *Koch* v. *New York*, 152 N. Y. 72, 76; *Re Knowack*, 158 N. Y. 482, 487. It is provided by § 217 of the Code of Civil Procedure that "the general jurisdiction in law and equity, which the supreme court of the state possesses, under the provisions of the Constitution, includes all the jurisdiction which was possessed and exercised by the supreme court

present members furnished him. Boord v. African Consol. Land & Trading Co. [1898] 1 Ch. 596, 77 L. T. N. S. 553.

Where no actual damages resulting from the denial of a stockholder's statutory right to inspect the books of the corporation are shown, punitive damages cannot be assessed, however malicious the conduct of the corporation or its officers may have been. Boardman v. Marshalltown Grocery Co. 103 Iowa, 445.

And while a stockholder who is denied the right to inspect the books of his corporation is entitled to nominal damages by reason of the infraction of the statutory right, a judgment not allowing such nominal damages will not be reversed where he was subsequently tendered the inspection he desired with offer of payment of costs up to that time. *Ibid.*

And time used and expenses incurred in an attempt of a stockholder to secure the right to inspect the books of a corporation cannot be recovered or taxed as items of damage in a case brought to secure that right, where no actual damages resulting from the denial of the stockholder's statutory right are shown, and it does not appear that the denial of the right itself caused damage. *Ibid.*

And a stockholder suing for damages for refusal to permit him to examine the books of the corporation under the New York stock corporation law prescribing that the stock-books shall be open during business hours for the inspection of stockholders and judgment creditors, and providing for a forfeiture or penalty for refusal to permit such inspection, cannot recover the costs and counsel fees of mandamus proceedings by which he compels the corporation and its officers to allow an inspection of the books. 45 L. R. A.

Clason v. Nassau Ferry Co. 20 Misc. 315, 50 N. Y. Supp. 160, 4 N. Y. Anno. Cas. 166.

So, while in a proper case an accountant or expert may be appointed by the court to assist a party in interest in the examination of the books of a corporation, no part of the compensation to be paid to such expert should be assessed against the corporation in the action with reference to which the inspection was made. State, Burke, v. Citizens' Bank, 51 La. Ann. 426.

And a stockholder who demands of the corporation to see the corporate books, making the demand in such broad terms that the corporation is justified in refusing it, because he is only entitled to a portion of such relief, and who afterwards obtains an order granting him such relief to that extent, is not entitled to recover counsel fees, where it is impossible to separate the services rendered in the proceeding in the attempt to force that part of the relief which was denied from those which were rendered in respect to the relief granted. Clason v. Nassau Ferry Co. 50 N. Y. Supp. 160.

An order to inspect books of a corporation will not be granted to a stockholder where he has not given the notice required by the rules of court for that purpose. *Re* Credit Co. L. R. 11 Ch. Div. 256, 48 L. J. Ch. N. S. 221, 27 Week. Rep. 380.

An application by a stockholder of a corporation for a discovery and inspection of books and papers in the possession of the company, though made under the provisions of N. Y. Code Civ. Proc. § 388, and not under the Revised Statutes, will not be denied on the ground that it should have been made by petition instead of by motion. Johnson v. Consolidated Silver Min. Co. 2 Abb. Pr. N. S. 413. F. H. B.

of the colony of New York, at any time, and by the court of chancery in England on the 4th day of July, 1776; with the exceptions, additions, and limitations created and imposed by the Constitution and laws of the state. Subject to those exceptions and limitations, the supreme court of the state has all the powers and authority of each of those courts, and exercises the same in like manner." See also 2 Rev. Stat. p. 173, § 36; Id. p. 196, § 1; Laws 1847, chap. 280, § 16. Thus, we have the powers of the court of King's bench and the court of chancery, as they existed when the first Constitution was adopted, blended and continued in the supreme court of the state, except as modified by Constitution or statute.

The right of a corporator, who has an interest, in common with the other corporators, to inspect the books and papers of the corporation, for a proper purpose and under reasonable circumstances, was recognized by the courts of King's bench and chancery from an early day, and enforced by motion or mandamus, but always with caution, so as to prevent abuse. *Rex* v. *Newcastle-upon-Tyne*, 2 Strange, 1223, and note; *Gery* v. *Hopkins*, 7 Mod. 129, case 175; *Richards* v. *Pattinson*, Barnes, N. C. 235; *Young* v. *Lynch*, 1 W. Bl. 27; *Rex* v. *Shelley*, 3 T. R. 141; *King* v. *Babb*, 3 T. R. 579, 580; *King* v. *Merchant Tailors' Co.* 2 Barn. & Ad. 115; *Re Burton*, 31 L. J. Q. B. N. S. 62; *Re West Devon Great Consols Mine*, L. R. 27 Ch. Div. 106. Lord Kenyon, in rendering judgment in *King* v. *Babb*, assumed "that in certain cases the members of a corporation may be permitted to inspect all papers relating to the corporation." In *Gery* v. *Hopkins* the court, on granting the order to produce, said: "There is great reason for it, for they are books of a public company and kept for public transactions, in which the public are concerned, and the books are the title of the buyers of stocks, by act of Parliament." In *Rex* v. *Newcastle-upon-Tyne* the reporter states that the court said: "Every member of the corporation had, as such, a right to look into the books for any matter that concerned himself, though it was in a dispute with others."

The following cases arose in this state, but the most of them are not strictly in point, as they rest mainly upon statutory authority, which does not extend to the case in hand: *People, Hatch,* v. *Lake Shore & M. S. R. Co.* 11 Hun, 1. Affirmed, *sub nom. Re Sage*, in 70 N. Y. 222; *People, Stobo,* v. *Eadie*, 63 Hun, 320, 133 N. Y. 573; *Cotheal* v. *Brouwer*, 5 N. Y. 562; *People, Onderdonk,* v. *Mott*, 1 How. Pr. 247; *People, Harriman,* v. *Paton*, 20 Abb. N. C. 172 and 195; *People, Richmond,* v. *Pacific Mail S. S. Co.* 50 Barb. 280; *People, Field,* v. *Northern P. R. Co.* 18 Jones & S. 456; *People, Clason,* v. *Nassau Ferry Co.* 86 Hun, 128; *Central Cross-Town R. Co.* v. *Twenty-Third Street R. Co.* 53 How. Pr. 45; *People, Muir,* v. *Throop*, 12 Wend. 183.

The courts of other states compel the officers of corporations to allow stockholders to examine the books upon due application for a proper purpose. In *Lewis* v. *Brainerd*, 53 Vt. 520, the court said: "The shareholders in a corporation hold the franchise and are the owners of the corporate property; and as such owners they have the right, at common law, to examine and inspect all the books and records of the corporation at all seasonable times, and to be thereby informed of the condition of the corporation and its property." In *Huylar* v. *Cragin Cattle Co.* 40 N. J. Eq. 392, 398, it was said: "Stockholders are entitled to inspect the books of the company for proper purposes at proper times, . . . and they are entitled to such inspection, though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary to their protection. To say that they have the right, but that it can be enforced only when they have ascertained, in some way, without the books, that their affairs have been mismanaged or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders." In *Com., Sellers,* v. *Phœnix Iron Co.* 105 Pa. 111, 116, 51 Am. Rep. 184, the rule was laid down that, "unless the charter provides otherwise, a shareholder in a trading corporation has the right to inspect its books and papers, and to take minutes from them, for a definite and proper purpose, at reasonable times. The doctrine of the law is that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all the stockholders." Upon a second appeal in the same case, *sub nom. Phœnix Iron Co.* v. *Com., Sellers*, 113 Pa. 563, 572, the court said: "Under the circumstances mentioned and for the purposes stated, we are of opinion that, according to our ruling when the case was here before, the relator is clearly entitled to an examination of the books and papers of the company. Such a right is, of course, not to be exercised to gratify curiosity or for speculative purposes, but in good faith and for a specific honest purpose, and where there is a particular matter in dispute, involving and affecting seriously the rights of the relator as a stockholder. . . . A stockholder in a trading corporation must certainly have some rights which a board of directors should respect. Sellers [the relator] was not bound to accept the mere statement of the board, whether under oath or otherwise, as to the contents of the books, etc. He had a right to a reasonable personal inspection of them, and, with the aid of a disinterested expert, might make such extracts as were reasonably required in the preparation of the bill he purposed to bring. The relator, we think, has a clear right, under the writ and return, to the relief he asks, and it is plain that he has no specific legal remedy for the enforcement of that right; and the existence of a supposed equitable remedy is not a ground

for refusing the mandamus." In *Cockburn* v. *Union Bank*, 13 La. Ann. 289, 290, the court, in granting a mandamus requiring the officers of a corporation to allow access by a stockholder to the books, said: "A stockholder in a corporation possesses all his individual rights, except so far as he is deprived of them by the charter or the law of the land; as long, then, as the charter, or the rules and by-laws passed in conformity thereto, and the law, do not restrict his individual rights, he possesses them in full, and can demand to exercise them. It cannot be denied that it is the right of everyone to see that his property is well managed, and to have access to the proper sources of knowledge in this respect." The same court, in a like case, declared that a stockholder in a trading corporation "has, in the very nature of things, and upon principles of equity, good faith, and fair dealing, the right to know how the affairs of the company are conducted,—whether the capital of which he has contributed so large a share is being prudently and profitably employed or otherwise. . . . In order to comply with this call, and to vote understandingly, it was certainly requisite for the relator to know the condition of the affairs and business operations of the company, and be enabled from this knowledge to act for the best interests of the stockholders and of the company." *State, Martin*, v. *Bienville Oilworks Co.* 28 La. Ann. 204, 208. See also *Stone* v. *Kellogg*, 165 Ill. 192; *Stettauer* v. *New York & S. Constr. Co.* 42 N. J. Eq. 46; *People, Bishop*, v. *Walker*, 9 Mich. 328; *State, Bergenthal*, v. *Bergenthal*, 72 Wis. 314.

The elementary works unite in holding that a corporator has the right in question, and that mandamus is a proper remedy. Mr. Wait, in his work on Insolvent Corporations, after reviewing the authorities, says: "It will be apparent from an examination of these authorities that the rule in favor of a stockholder's right of inspection and investigation of corporate books and papers is becoming very broad and general." Section 504. But, while the learned author recognizes the rule, he insists—and we agree with him—that an inspection should "not be granted to facilitate speculative schemes or to gratify idle curiosity." He declares that "mandamus is the most complete and effective form of redress available to a stockholder or party in case of a denial of the right of inspection." Section 516. Mr. Cook, in discussing the question, says that "the stockholders of a corporation had, at common law, a right to examine at any reasonable time and for any reasonable purpose, any one or all of the books and records of the corporation. This rule grew out of an analogous rule applicable to public corporations and to ordinary copartnerships, the books of which, by well-established law, are always open to the inspection of members." 2 Cook, Stock & Stockholders, § 511. "The prevailing doctrine in the United States is said to permit an incorporator the same freedom in examining the books of the company as a partner has with respect to the books of his firm. But the right only extends to such documents as are necessary to the stockholder's particular purpose. . . . Statutes giving the shareholders of corporations the right to inspect the corporate books have been passed in many of the American states and in England. These statutes, however, do not supplant the common-law right." 1 Beach, Priv. Corp. § 75. Judge Thompson, in his work on Corporations, says: "One of the privileges incident to ownership of stock in a corporation is that of an inspection of the books and condition of the company, and this privilege, in general, becomes a right when the inspection is sought at proper times and for proper purposes." Section 4406. He further declares that when the right is guaranteed by statute the motive for its exercise is immaterial, but when it rests upon the common law it will not be allowed for speculative purposes, the gratification of curiosity, or where its exercise would produce great inconvenience. Sections 4412–4420. See also Ang. & A. Corp. 9th ed. § 681; Morawetz, Priv. Corp. § 473; High, Extr. Legal Rem. § 308; 19 Am. & Eng. Enc. Law, p. 231.

We think that, according to the decided weight of authority, a stockholder has the right at common law to inspect the books of his corporation at a proper time and place, and for a proper purpose, and that, if this right is refused by the officers in charge, a writ of mandamus may issue, in the sound discretion of the court, with suitable safeguards to protect the interests of all concerned. It should not be issued to aid a blackmailer, nor withheld simply because the interest of the stockholder is small; but the court should proceed cautiously and discreetly, according to the facts of the particular case. To the extent, however, that an absolute right is conferred by statute, nothing is left to the discretion of the court; but the writ should issue as a matter of course although even then, doubtless, due precautions may be taken as to time and place, so as to prevent interruption of business or other serious inconvenience.

The appellants, however, insist that certain statutory provisions relating to the subject are exclusive, and, as they do not extend to the case under consideration, that the appellate division had no right to grant the writ. The history of legislation upon the subject in brief is as follows: By the general manufacturing act of 1848 it was made the duty of the trustees of corporations organized under it to keep a transfer book, which was required to "be opened for the inspection of stockholders and creditors of the company," substantially every business day at the office of the corporation. Laws 1848, chap. 40, § 25. This section was subsequently amended so as to require the treasurer to make a statement of the affairs of the company upon the request of persons owning a specified percentage of the capital stock. Laws 1854, chap. 201, § 1; Laws 1862, chap. 472, § 1. The business corporations law of

1875 required the directors of corporations organized thereunder "to cause to be kept at its principal office or place of business correct books of account of all its business and transactions, and every stockholder in such corporation shall have the right at all reasonable times by himself or his attorney to examine the records and books of account of such corporation." Laws 1875, chap. 611, § 16. These statutes were all repealed in 1892 by the general corporation law. Laws 1892, chap. 687, pp. 1816–1819. During the same year the stock corporation law was passed, which provides that every stock corporation shall keep a stock-book, which "shall be open daily, during business hours, for the inspection of its stockholders and judgment creditors, who may make extracts therefrom." Id. chap. 688, § 29. It also requires the treasurer, upon the request of stockholders owning a fixed percentage of the capital stock, to furnish a statement of all its assets and liabilities. Id. § 52. We do not think that the statute now in force is exclusive, or that it has abridged the common-law right of stockholders with reference to the examination of corporate books. By enabling a stockholder to get some information in a new way, it did not impliedly repeal the common-law rule which enabled him to get other information in another way; for the courts do not hold the common law to be repealed by implication, unless the intention is obvious. By simply providing an additional remedy the existing remedy was not taken away. The statute merely strengthened the common-law rule with reference to one part thereof, and left the remainder unaffected. It dealt with but a single book, and as to that it amplified the qualified right previously existing by making it absolute, and extending it to judgment creditors. The stock-book has no relation to the business carried on by a corporation; and the change was doubtless made to enable stockholders to promptly learn who are entitled to vote for directors, and judgment creditors to learn who are liable as stockholders for a failure to comply with the provisions of the act. The statute is silent as to the other books, and provides no system of inspection as a substitute for the right of examination at common law. The provision for a report from the treasurer was not designed to take away an old right, but to give a new one, not as a substitute but as an addition.

We think that the common-law right of a stockholder with reference to the inspection of the books of his corporation still exists, unimpaired by legislation; that the supreme court has power, in its sound discretion, upon good cause shown, to enforce the right; and that such power is a part of its general jurisdiction as the successor of the courts of the colony of New York, which had the jurisdiction of the court of King's bench and the court of chancery in England.

It follows that *the order appealed from should be affirmed*, with costs, and that the question certified should be answered in the affirmative.

All concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH of Massachusetts

v.

Albion P. HILTON.

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

1. **The exclusion of citizens of other states from the right to dig clams** for sale on certain flats, by a regulation restricting the right to residents of the town, does not violate the constitutional privileges or immunities of citizens.
2. **The common right of the public** and the right of regulation are the same in regard to shellfish as in regard to swimming fish.
3. **A town regulation prohibiting all persons from digging clams on certain flats** without a permit, which will be granted only to residents of the town, is not unconstitutional or in violation of Pub. Stat. chap. 91, § 68, as amended by Stat. 1889, chap. 391, which expressly saves to every inhabitant of the commonwealth a right to take them without permit "for his own family use" and a limited quantity for bait.

(June 30, 1899.)

EXCEPTIONS by defendant to rulings of the Superior Court for Essex County made during the trial of an indictment charging defendant with violating the regulations of the town of Salisbury in reference to the taking of shellfish. *Overruled.*

The facts are stated in the opinion.

Messrs. **Edmund S. Spalding, Colver J. Stone,** and **David P. Page,** for defendant:

The right of fishery in tide water on a navigable stream is a common public right.

Weston v. *Sampson*, 8 Cush. 347, 54 Am. Dec. 764; *Dunham* v. *Lamphere*, 3 Gray, 268; *Lakeman* v. *Burnham*, 7 Gray, 437; *Packard* v. *Ryder*, 144 Mass. 440, 59 Am. Rep. 101; *Preble* v. *Brown*, 47 Me. 284; *Martin* v. *Waddell*, 16 Pet. 367, 10 L. ed. 997.

This right applies equally to swimming fish and to shellfish on flats that are covered by tide water on a navigable stream or arm of the ocean.

Wharton v. *Wise*, 153 U. S. 155, 38 L. ed. 669; *Porter* v. *Shehan*, 7 Gray, 435; *Com.* v. *Bailey*, 13 Allen, 541; *Packard* v. *Ryder*, 144 Mass. 440, 59 Am. Rep. 101; *Peck* v. *Lockwood*, 5 Day, 22; *Parker* v. *Cutler Milldam Co.* 20 Me. 353, 37 Am. Dec. 56; *Moulton* v. *Libbey*, 37 Me. 472, 59 Am. Dec. 57.

NOTE.—As to governmental control over right of fishery, see *note* to People v. Truckee Lumber Co. (Cal.) 39 L. R. A. 581.

As to constitutional rights of citizens to take oysters in other states, see cases in *note* to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. on page 582.

A distinction must be made between cultivated and natural fisheries.

Com. v. *Manimon*, 136 Mass. 456; *Keene* v. *Gifford*, 158 Mass. 120; *People* v. *Hazen*, 121 N. Y. 313; *Clinton* v. *Buell*, 55 Conn. 263; *Brown* v. *De Groff*, 50 N. J. L. 400.

The commonwealth is a trustee holding the title for all the inhabitants of the state, who thereby gain a common property right in such fisheries, and the commonwealth as trustee has no power to grant to a single town an exclusive right in the fisheries.

Arnold v. *Mundy*, 6 N. J. L. 1, 10 Am. Dec. 356; *State* v. *Higgins*, 51 S. C. 51, 38 L. R. A. 561; *Skinner* v. *Hettrick*, 73 N. C. 53; *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Re Mattson*, 60 Fed. Rep. 535; *McCready* v. *Virginia*, 94 U. S. 391, 24 L. ed. 248; *Blake* v. *McClung*, 172 U. S. 239, 43 L. ed. 432; *Dunham* v. *Lamphere*, 3 Gray, 273; *West Roxbury* v. *Stoddard*, 7 Allen, 158; *Roxell* v. *Doyle*, 131 Mass. 474.

Even if it can be said that the commonwealth in the exercise of its discretion may grant an exclusive right in a particular fishery to the citizens of any one town, such grant must be made by the legislature, and in express terms, and cannot be given by implication or by general law.

Randolph v. *Braintree*, 4 Mass. 315; *Proctor* v. *Wells*, 103 Mass. 216; *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548, 1 L. R. A. 466; *Martin* v. *Waddell*, 16 Pet. 367, 10 L. ed. 997; *Stevens* v. *Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; *Paul* v. *Hazleton*, 37 N. J. L. 106; *Allen* v. *Allen*, 19 R. I. 114, 30 L. R. A. 497; *Ducelly* v. *Ducelly*, 46 Me. 377; *Preble* v. *Brown*, 47 Me. 284.

In considering grants made by the commonwealth, the ordinary rule as to deeds is reversed, and the rights and privileges which are not granted in the most express terms to a particular town will be presumed to have been retained by the commonwealth.

Com. v. *Roxbury*, 9 Gray, 451.

In the absence of grants the commonwealth stands in the position of trustee to administer the public fisheries within its borders for the benefit of all of its citizens, and the legislature undoubtedly possesses the power to pass such acts as may be necessary for the preservation of the public fisheries, or, in special localities, if for the public welfare, a fishery may be destroyed; but all such acts must be general and for the public interest.

Com. v. *Alger*, 7 Cush. 53; *Howes* v. *Grush*, 131 Mass. 207.

There can be no discrimination under pretense of prohibition, and regulation should be capable of general application.

1 Dill. Mun. Corp. 4th ed. §§ 319, 320; *Gay* v. *Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220; *Lawton* v. *Steele*, 119 N. Y. 226, 7 L. R. A. 134, 152 U. S. 133, 38 L. ed. 385; *Austin* v. *Murray*, 16 Pick. 121; *Dill* v. *Wareham*, 7 Met. 438; *Com.* v. *Wilkins*, 121 Mass. 356; *Com.* v. *Allen*, 128 Mass. 308; *Com.* v. *Roy*, 140 Mass. 432; *Newton* v. *Belger*, 143 Mass. 598; *Miller* v. *Horton*, 152 Mass. 540, 10 L. R. A. 116; *Com.* v. *Parks*, 155 Mass. 531; *Swift* v. *Falmouth*, 167 Mass. 115.

A by-law which under the pretense of regulating the fishery of clams prohibits all persons except the inhabitants of the town from taking shellfish in a navigable river is void as in contravention of common right.

Cooley, Const. Lim. 6th ed. 247; 1 Dill. Mun. Corp. 4th ed. § 325; *Com.* v. *Stodder*, 2 Cush. 562, 48 Am. Dec. 679; *Hayden* v. *Noyes*, 5 Conn. 391.

Mr. **W. Scott Peters**, for the Commonwealth:

In early English law the right of common is an incorporeal right and includes a common of piscary which is said to be a liberty or right of fishery in the water covering the soil of another, or in a river running through another man's land.

2 Bl. Com. 34, 39.

In England the preservation and regulation of the mode and time of taking fish were of public concern.

Parker v. *People*, 111 Ill. 581.

The Body of Liberties of 1641 declared that "every inhabitant that is an householder shall have free fishing and fowling in any great ponds and bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the towns where they shall dwell, unless the freemen of the same town or the general court have otherwise appropriated them."

Body of Liberties, art. 16; 28 Mass. Hist. Soc. Coll. 219.

But this article did not confer on the inhabitants of the several towns, as existing in 1641, a right of property in the fisheries within their respective limits.

The qualification "unless the freemen of the same town or the general court have otherwise appropriated them" is not a mere specific exception of privileges previously granted, but a general law, prescribing by what authority this public right may be regulated or granted away.

Coolidge v. *Williams*, 4 Mass. 144; *Randolph* v. *Braintree*, 4 Mass. 317; *Dill* v. *Wareham*, 7 Met. 446.

The public right of fishery throughout Massachusetts, as in other parts of the United States and Great Britain, includes shellfish as well as floating or swimming fish.

Weston v. *Sampson*, 8 Cush. 347, 54 Am. Dec. 764.

In 1796 a general law was passed for the regulation and preservation of the "common property" in oysters and other shellfish.

By this act so far as it extended and applied, the subject was regulated, and no right of property or control remained in the towns in their corporate capacity.

Dill v. *Wareham*, 7 Met. 438; *Moulton* v. *Libbey*, 37 Me. 494, 59 Am. Dec. 57.

Public Statutes, chap. 91, § 68, as amended by chap. 391 of the acts of 1889 empowers the mayor and aldermen of cities and the

selectmen of towns, when so instructed by their cities and towns, to control and regulate or prohibit the taking of eels, clams, quahogs, and scallops within their respective limits.

When the Revolution took place, the people of each state, in their sovereign character, acquired the absolute right to all their navigable waters and the soils under them. *Martin* v. *Waddell*, 16 Pet. 367, 10 L. ed. 997.

The citizens of one state are not invested by the United States Constitution with any interest in the common property of the citizens of another state. *McCready* v. *Virginia*, 94 U. S. 391, 24 L. ed. 248.

Whatever soil below low-water mark, within the ebb and flow of the tide, is the subject of exclusive property and ownership, belongs to the state within whose territory it lies.

But this soil is held by the state subject to, and in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of fishing.

It is the right of the state to make and enforce laws regulating the exercise of this right, so as to prevent the destruction of the fishery, and to prevent acts which would render the public right less valuable, or destroy it altogether. *Smith* v. *Maryland*, 18 How. 71, 15 L. ed. 269.

Section 2 of art. 4 of the Constitution of the United States, which provides that citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states, does not apply to the right of fishing within a state. *McCready* v. *Virginia*, 94 U. S. 391, 24 L. ed. 248; *Martin* v. *Waddell*, 16 Pet. 367, 10 L. ed. 997; *Smith* v. *Maryland*, 18 How. 71, 15 L. ed. 269; *Pollard* v. *Hagan*, 3 How. 212, 11 L. ed. 565.

This common and general right of fishing in the sea and its shores extended to shellfish, as well those which are embedded in the soil as those which lie on the surface. *Weston* v. *Sampson*, 8 Cush. 347; *Proctor* v. *Wells*, 103 Mass. 216.

The legislature has the power to regulate and control the taking of fish in any of the waters of the commonwealth, and may even grant exclusive rights of fishing at particular places in tide water. *Com.* v. *Vincent*, 108 Mass. 447; *Cooley* v. *Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996; *Gilman* v. *Philadelphia*, 3 Wall. 713, 18 L. ed. 96.

No citizen has a right to take shellfish in the waters of the state which is not subject to control or abridgment of the legislature. *Com.* v. *Manimon*, 136 Mass. 456; *Burnham* v. *Webster*, 5 Mass. 266; *Moulton* v. *Libbey*, 37 Me. 472, 59 Am. Dec. 57; *Preble* v. *Brown*, 47 Me. 284.

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

At a legal meeting of the inhabitants of the town of Salisbury, it was voted unanimously, under a proper article in the warrant, "that the selectmen be instructed to control or regulate or prohibit the taking of eels, clams, quahogs, and scallops within the town, and make such regulations concerning the taking of eels and said shellfish as they may deem expedient." Subsequently, in accordance with this vote, the selectmen made a regulation "prohibiting all persons from digging clams on Salisbury Flats to sell, except those having a permit from the selectmen, the permit only to be granted to residents of the town." The defendant dug clams in violation of this regulation, and was convicted of the offense in the superior court, under Pub. Stat. chap. 91, § 69. The defendant asked the court to rule as follows: "That the regulation of the town of Salisbury is unconstitutional and void—First, because it is in conflict with § 2, art. 4, of the Constitution of the United States, which provides that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states, and the by-law in question prevents citizens of states other than Massachusetts from availing themselves of the common right of fishery within the said town of Salisbury; second, because the right of fisheries is a public right vested in the commonwealth, and which, as trustee, the commonwealth has no power to grant to the town; third, because it abridges rights and privileges guaranteed under the law of the state, and no express grant of said right has been made by the state to the town; fourth, because no authority, expressed or implied in the charter of said town, gives a right to pass such by-law; fifth, because said by-law, which, under the pretense of regulating the fishery of clams within its limits, prohibits all persons except the inhabitants of the town from taking shellfish from a navigable river, is void, as in contravention of a common right; sixth, because it appears that the defendant and others have acquired a vested right in said fishery, of which they cannot be deprived without compensation and due process of law; seventh, because the said regulation is in conflict with article 14, § 1, of the Amendments of the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privilege or immunities of the citizens of the United States, and said by-law abridges a common privilege of all citizens of the country, namely, the common right of fishery within said town of Salisbury; eighth, that the said regulation of the town of Salisbury, so far as it prohibits inhabitants of other towns in the commonwealth from the use of the common fishery within said town of Salisbury, is unconstitutional and void." To the refusal so to rule, and to the ruling that the agreed facts would warrant a verdict of guilty, the defendant excepted.

By the common law of England, all the King's subjects had a common right of fishery in the sea, and in all bays, coves, and

arms of the sea where the tide ebbs and flows. The King, who holds the right of soil under tide water, holds the appurtenant right of fishery in trust for his subjects; and since Magna Charta he cannot by grant deprive them of it. These rights in America were granted in the colonial charters, to be held for the benefit of the inhabitants, and when the colonies achieved their independence they remained in the several states, to be exercised for the common good. *Dill* v. *Wareham*, 7 Met. 446; *Com.* v. *Alger*, 7 Cush. 53–82; *Weston* v. *Sampson*, 8 Cush. 347, 54 Am. Dec. 764; *Martin* v. *Waddell*, 16 Pet. 367, 410, 432, 10 L. ed. 997, 1012, 1021; *Pollard* v. *Hagan*, 3 How. 212, 11 L. ed. 565; *Smith* v. *Maryland*, 18 How. 71, 15 L. ed. 269; *Manchester* v. *Massachusetts*, 139 U. S. 240, 35 L. ed. 159; *Arnold* v. *Mundy*, 6 N. J. L. 1, 10 Am. Dec. 356. The rights of the states in the management and regulation of these fisheries are not limited like that of the Crown in England. The states hold them in trust for the public, but they exercise, not only the rights of sovereignty, except in those matters over which it is granted to the general government, but also the right of property, as to everything which remains in common for all the people. In *Martin* v. *Waddell*, 16 Pet., at page 410, 10 L. ed. 1012, Chief Justice Taney says: "When the Revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government. A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to grants of the British Crown, when the title is held by a single individual in trust for the whole nation." So Chief Justice Shaw, in *Com.* v. *Alger*, 7 Cush., at page 82, says that "the power of the commonwealth, by the legislature, over the sea, its shores, bays, and coves, and all tide waters, is not limited like that of the Crown at common law." It is now settled that the right of regulation and control of fisheries by the several states in the interest of the public permits, in any state, legislation that secures the benefits of this public right in property to its own inhabitants. The rights, immunities, and privileges which are secured by the Constitution of the United States to the inhabitants of the several states do not include, in favor of inhabitants of any state, rights in common property of the inhabitants of other states. *McCready* v. *Virginia*, 94 U. S. 391, 24 L. ed. 248; *Wharton* v. *Wise*, 153 U. S. 155, 38 L. ed. 669; *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Blake* v. *McClung*, 172 U. S. 239–249, 43 L. ed. 432–436. The numerous statutes in regard to fisheries which have been enacted from time to time in this commonwealth are founded on this doctrine, and our decisions recognize it. The defendant's contention that the regulation in the present case is in conflict with the Constitution of the United States, because it gives privileges to the inhabitants of Salisbury which are not given to citizens of other states, is therefore without foundation.

The next question is whether the regulation is unconstitutional, or otherwise invalid, because it gives to inhabitants of Salisbury privileges in the fishery which are not given to inhabitants of other towns and cities in this state. Pub. Stat. chap. 91, § 68, as amended by Stat. 1889, chap. 391, under which the regulation was made, expressly saves to every inhabitant of the commonwealth a right to take, without permit, eels and the shellfish mentioned, "for his own family use," and to take the shellfish for bait, not exceeding 3 bushels in any one day. The language of the statute is broad enough to authorize a regulation which prefers inhabitants of the town in issuing permits to take fish for sale. From the earliest times, in regulating common rights in fisheries, statutes have been passed which authorized a preference of inhabitants of the town in which the fishing place is situated. The Body of Liberties of 1641 (Mass. Col. Laws, ed. 1672; Whitmore's Reprint, 1887, 90 91), declared that "every inhabitant that is an householder shall have free fishing and fowling in any great ponds and bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the towns where they dwell, unless the freemen of the same town or the general court shall have otherwise appropriated them." See also Stat. 1795, chap. 71; Stat. 1838, chap. 113; Stat. 1841, chap. 64; Stat. 1844, chap. 128; Rev. Stat. chap. 55; Gen. Stat. chap. 83; Pub. Stat. chap. 91; Stat. 1889, chap. 64; Stat. 1892, chaps. 186, 188; Stat. 1893, chaps. 55, 255; Stat. 1897, chap. 289. The power of the legislature to determine the mode of use of fisheries in the public interest, even to the granting of exclusive rights of fishing to individuals, has been broadly stated by the courts, and frequently exercised. In the opinion in *Com.* v. *Vincent*, 108 Mass. 441, is this language: "The legislature of a state has the power to regulate the time and manner of fishing in the sea within its limits; and, according to the opinions of most respectable judges, may even grant exclusive rights of fishing at particular places in tide water. *Burnham* v. *Webster*, 5 Mass. 266; *Dunham* v. *Lamphere*, 3 Gray, 268; *Smith* v. *Maryland*, 18 How. 71, 15 L. ed. 269; *Corfield* v. *Coryell*, 4 Wash. C. C. 371–380; *Bennett* v. *Boggs*, Baldw. C. C. 60. In those waters, whether within or beyond the ebb and flow of the tide, which are not navigable from the sea for any useful purpose, there can be no restriction upon its authority to regulate the public right of fishing, or to make any grants of exclusive rights which do not impair other private rights already vested. *Nickerson* v. *Brackett*, 10 Mass. 212; *Cleaveland* v. *Norton*, 6 Cush. 380; *Russell* v. *Russell*, 15 Gray, 159–161." See also *Arnold* v. *Mundy*, 6 N. J. L. 1–94, 10 Am. Dec. 356; *Brown* v. *De Groff*, 50 N.

J. L. 409; *Moulton* v. *Libbey*, 37 Me. 472, 59 Am. Dec. 57. It is not to be assumed that a legislature would undertake to grant exclusive rights, except on the ground that the interests of the public would thereby be promoted. The common right of the public and the right of regulation are the same in regard to shellfish as in regard to swimming fish. *Weston* v. *Sampson*, 8 Cush. 347, 54 Am. Dec. 764; *Proctor* v. *Wells*, 103 Mass. 216; *Wharton* v. *Wise*, 153 U. S. 155, 38 L. ed. 669.

In our opinion there is no doubt of the power of the selectmen, acting under the statute and the vote of the town, to make a regulation forbidding the taking of clams without a permit, except for the purpose and in the quantities authorized by the statute, and providing that permits shall be granted only to inhabitants of the town.

Exceptions overruled.

MICHIGAN SUPREME COURT.

Charles LA DOW, *Plff. in Err.*,
v.
E. BEMENT & SONS.

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

A contract to repurchase stock "at the end of two years," if the holder so desires, does not require him to give notice on the first day after the expiration of the two years, that he requires the promisor to repurchase it, but he has a reasonable time to give such notice.

(April 18, 1899.)

ERROR to the Circuit Court for Ingham County to review a judgment in favor of defendant in an action brought to recover damages for breach of a contract to repurchase certain stock which had been sold by defendant to plaintiff under a contract to repurchase. *Reversed.*

Statement by **Grant**, Ch. J.:

On April 27, 1895, the defendant, a corporation, entered into an agreement with the plaintiff, by which it gave to him four promissory notes for $5,000 each, and also agreed to forward to him certificates for 500 shares of the 6 per cent preferred stock of said corporation of the par value of $10 per share, and agreed "to repurchase from you, if you so desire, at the end of two years from May 1, 1895, at the par value thereof, and interest or dividends thereon at 6 per cent per *annum*." The declaration sets forth the above agreement, its fulfilment, and that on May 26, 1897, plaintiff offered said shares of stock to defendant, requesting it to repurchase the same, in accordance with the terms of the agreement; that defendant refused to repurchase; that said stock was, on May 26, worthless; and claims damage by reason of such failure to repurchase. To this declaration the defendant demurred, for the reason it does not appear "by the declaration that the plaintiff notified the defendant on the 1st day of May, 1897, or at any time prior thereto, that he desired the defendant to repurchase the stock." The demurrer was sustained, and plaintiff appeals.

Messrs. **Barbour & Rexford**, for plaintiff in error:

"At," used in reference to time or place, has frequently the sense of "near."

2 Am. & Eng. Enc. Law, 2d ed. pp. 167, 168; Synonyms: "About, Near"; Standard Dictionary of the English Language, see "At."

"At the end of one year" was held to mean at the expiration of "one full and entire year," and "at" to be equivalent in meaning to "after."

Annan v. *Baker*, 49 N. H. 169; *Rogers* v. *Burr*, 97 Ga. 10; 1 Am. & Eng. Enc. Law, 1st ed. p. 893, note.

This court has given a like construction to the word "at."

Davidson v. *Crump Mfg. Co.* 99 Mich. 501.

The term "reasonable time" is a relative one, and its meaning depends entirely upon the attendant circumstances.

19 Am. & Eng. Enc. Law, p. 1089; *Gridley* v. *Globe Tobacco Co.* 71 Mich. 531; *Clark* v. *Moicyer*, 5 Mich. 472; *Stange* v. *Wilson*, 17 Mich. 347; *Grant* v. *Merchants' & Mfrs. Bank*, 35 Mich. 523.

It was a question of fact for the jury to determine whether plaintiff unreasonably delayed his demand.

Galvin v. *Galvin Brass & Iron Works*, 81 Mich. 16.

Messrs. **Cahill & Wood**, for defendants in error:

At law, as a general rule, time is deemed of the essence of a contract, and performance is required at the day, or consequences of default follow.

Beach. Contr. ¶¶ 616, 622; Pom. Contr. 2d ed. ¶ 385; *Washington County Bank* v. *Jerome*, 8 Mich. 490.

If the time is computed from an act done, it includes the day on which the act is done; if from a day specified, it excludes the day.

Bishop, Contr. ¶ 1343; *Chicago Title & T. Co.* v. *Smyth*, 94 Iowa, 401.

"At the end of two years from May 1, 1895," means the same as "two years from and after May 1, 1895."

In California a statute directed the governor to appoint the successors of certain officers at the expiration of their terms. A successor was appointed on the day of the expiration of the term, and the appointment was held valid.

NOTE.—As to rights conferred by a refusal or option, see in general *note* to Litz v. Goosling (Ky.) 21 L. R. A. 127.

People v. *Blanding*, 63 Cal. 333.

Reasonable time is so much as is necessary under the circumstances to do conveniently what the contract or duty requires in the particular case should be done.

Bowen v. *Detroit City R. Co.* 54 Mich. 501, 52 Am. Rep. 822; *Abell* v. *Munson*, 18 Mich. 306, 100 Am. Dec. 165.

Notice of the dishonor of a bill or note so as to charge a drawer or indorser must be given within a reasonable time.

2 Am. & Eng. Enc. Law, p. 414, title *Bills and Notes*.

A draft payable at sight, or a note payable on demand, must, in order to charge the drawer or indorser, be presented within a reasonable time, but as to whether it was or not is a question of law.

Phœnix Ins. Co. v. *Allen*, 11 Mich. 501, 83 Am. Dec. 756; *Phœnix Ins. Co.* v. *Gray*, 13 Mich. 191; *Carll* v. *Brown*, 2 Mich. 491.

The reasons which underlie the doctrine concerning negotiable paper have equal force when applied to contracts for the sale of stocks in railroad, mining, and manufacturing companies the value of which is liable to change from day to day.

Campbell v. *London & B. R. Co.* 5 Hare, 519; *Cleveland Rolling Mill Co.* v. *Rhodes*, 121 U. S. 255, 30 L. ed. 920; *Hamilton* v. *Phœnix Ins. Co.* 22 U. S. App. 164, 61 Fed. Rep. 379, 9 C. C. A. 530.

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

Plaintiff insists that he had a reasonable time after the expiration of the two years within which to notify defendant that he desired it to repurchase the stock. Defendant insists that the contract fixed a day certain, viz., the first business day after the expiration of the two years, within which such notification must be given. The contract does not, in express terms, fix a day, and make it of the essence of the contract. The preposition "at" is an elastic word. One lexicographer defines it as follows: "A preposition of extremely various use, primarily meaning 'to,' without implication, in itself, of motion. It expresses position attained by motion to, and hence contact, contiguity, or coincidence, actual or approximate, in space or time. Being less restricted as to relative position than other prepositions, it may in different constructions assume their office and so become equivalent, according to the context, to 'in,' 'on,' 'near,' 'by,' 'about,' 'under,' 'over,' 'through,' 'from,' 'to,' 'toward.'" etc. See also *Davidson* v. *Crump Mfg. Co.* 99 Mich. 501. Clearly, plaintiff could not exercise the option until the complete expiration of the two years. He might possibly have given notice before the expiration of the two years that he should demand the repurchase after the time had expired. That question, however, is not before us. The contract did not require him to take any action until the expiration of the time. How much time, then, after the expiration? Shall the court say that it was limited to the first business day after the expiration of the time? But the contract does not say this. This would establish an arbitrary rule, for which no authority is cited. It would result in holding that no excuse whatever can be given for not exercising the option during that day. That is not the rule applicable to giving notice of dishonor in negotiable paper. We are cited to one authority directly in point. *Rogers* v. *Burr*, 97 Ga. 10. It is true, the declaration does not allege any excuse for delay, as appears to have been done in that case. This might have been better pleading, but we do not think the rule is so technical as to require it in this case. If, when the testimony is concluded, there be no dispute as to the facts, the question as to whether notice was given within a reasonable time will become a question of law for the court. If there be a dispute as to the facts, it may become a question of fact for the jury. This is not one of those commercial transactions the custom in regard to which is so well settled that a reasonable time has been rendered certain by numerous decisions of the courts. This question of reasonable time is very ably and fully discussed in *Hamilton* v. *Phœnix Ins. Co.* 22 U. S. App. 164, 61 Fed. Rep. 379, 9 C. C. A. 530, and it is there clearly shown when it is a question of law for the court and of fact for the jury. In *Campbell* v. *London & B. R. Co.* 5 Hare, 519, cited by defendant's counsel, the agreement gave the bondholders of defendant "an option to convert the bonds, at the expiration of not more than three years, into quarter shares of the company at £10 per quarter share." The three years expired February 15, 1845, but no notice was given until the end of June following. The time for the conversion was held to be limited to the three years. That case was heard on pleadings and proofs. It will be observed that the language is stronger than that in this case. Excuses for the delay were alleged and considered, but found to be insufficient. The only question now before us is the sufficiency of the declaration. We are of the opinion that it is sufficient.

Judgment reversed, and case remanded for further proceedings under the rules and practice of the court.

The other Justices concur.

Rehearing denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Barth TELEFSEN
v.
Peter P. FEE.

(168 Mass. 189.)

1. The jurisdiction of the consul of Sweden and Norway at Boston over a claim for wages by one of the crew of a Norwegian vessel who has left the ship at that port is exclusive of any jurisdiction in the first instance of the courts of the state under art. 13 of the treaty of 1827 between the United States and Sweden and Norway making the consuls judges and arbitrators "in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge without the interference of the local authorities, unless the conduct of the crews or of the captains should disturb the order or tranquillity of the country.

2. An officer arresting the captain of a foreign vessel in port under process from a state court which has no jurisdiction because a treaty has given exclusive jurisdiction to a consul is not protected by his process when he makes the arrest after being informed of the nationality of the vessel and that the claim will be adjusted at the consulate, since when informed of the facts he is bound to know the law that the court has no jurisdiction.

(*Knowlton, J., dissents.*)

(March 23, 1897.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action for assault and battery and false imprisonment which resulted in a verdict in favor of defendant. *Sustained.*

NOTE.—*Jurisdiction and powers of consuls.*

I. *Jurisdiction in criminal cases.*
- a. *Generally.*
- b. *In non-Christian countries.*
- c. *Power to send criminals to home country for trial.*
- d. *In case of deserting seamen.*

II. *Jurisdiction in civil cases.*
- a. *In China and Japan.*
- b. *In other non-Christian countries.*
- c. *As to controversies between seamen and masters of foreign vessels.*
- d. *As to discharge of seamen abroad.*
- e. *As to disabled vessels.*
- f. *In prize cases.*
- g. *In suits between French citizens.*

III. *Powers of consul in other matters.*
- a. *To assert claims for his citizens and country.*
- b. *To administer on estates.*
- c. *To exercise diplomatic functions.*
- d. *To perform marriage ceremony.*
- e. *To grant certificates.*
- f. *To take depositions and affidavits.*
- g. *To take acknowledgments of deeds and powers of attorney.*
- h. *To retain ship's papers.*
- i. *To license illegal acts.*
- j. *To contract.*
- k. *To serve process.*

I. *Jurisdiction in criminal cases.*

a. *Generally.*

The jurisdiction and powers of consuls in criminal cases do not appear to be clearly defined in any of the text-books. They frequently exercise criminal jurisdiction at the suggestion of masters of vessels, but this practice has been condemned by the courts. They have no power whatever to punish seamen for misconduct on board a vessel. It seems that since the act of Congress of 1840 they have the power to confine refractory seamen with the aid of the local authorities, but this is not to punish them, and is only justifiable in extreme cases where it seems necessary for the safety of the ship and for the further purpose of sending the seamen to the home country for trial. In such cases when the consul and the master act in good faith it may exonerate the master from all damages.

In the following cases the power of a consul to imprison seamen abroad for misconduct is denied: *Re* Wildenhus, 28 Fed. Rep. 924; The William Harris, 1 Ware, 367; Relation of Consuls to Criminals, 8 Ops. Atty. Gen. 380; Jordan v. Williams, 1 Curt. C. C. 69.

So, in the absence of power given by treaty a consul from Belgium in this country cannot try or act as a committing magistrate where a Belgian subject commits the crime of murder in killing a Belgian sailor in New Jersey on a Belgian vessel. *Re* Wildenhus, 28 Fed. Rep. 924.

"A consul has no authority to commit seamen to prison. The laws of the United States invest their consuls and commercial agents with certain powers to be exercised for the benefit and protection of American seamen when in foreign ports; as for the relief of destitute mariners and furnishing them with the means of returning home. But no portion of the judicial power of the United States is conferred on consuls. They cannot take cognizance of the offenses of seamen in foreign ports and sentence them to punishment. When the master of a vessel finds it necessary, for the purpose of preserving discipline on board his ship and maintaining his authority, to treat any of his crew with severity, as a matter of prudence it may be well for him to consult the consul and take his advice. This is usually done on his own representation of the case, but the interposition of the consul has never been supposed to exempt the master from his own responsibility." The William Harris, 1 Ware, 367.

In Relation of Consuls to Criminals, 8 Ops. Atty. Gen. 380, it was said that if a seaman commits an offense at sea or in port the consul does not possess any criminal jurisdiction; that his powers go no further than to inquire in order to decide what his duty is in the given case, to take evidence of the facts, to collect and see to the preservation of documents and proofs, to draw up a statement of the facts, and, "if in his judgment the facts require it, to see to the further detention of the party, and his transportation in custody to the United States. . . . These particulars of the duty of consuls are not expressly defined by statute. But they belong to the very function of consuls by the law of nations, and by the general practice of Christendom. . . . And in thus detaining criminals, the consul does not usurp any judicial authority. He has no judicial authority."

And where seamen were imprisoned on shore

Nils C. Johannessen obtained a writ for the arrest of Telefsen described as master of the steamship Albert in an action to recover for labor performed on the steamship. The writ was placed for service in the hands of Fee, who was a duly qualified constable. The assault for which this action was brought was made during the execution of the writ.

Further facts appear in the opinion.

Messrs. **John Lowell** and **Edward S. Dodge,** for plaintiff:

By the treaty between the United States and the Kingdom of Sweden and Norway, the plaintiff, Telefsen, was exempt from arrest at the time the defendant arrested him.

Public Treaties of the United States, in force on the 1st day of December, 1873, ed. 1875, pp. 739, 740; Treaties and Conventions between the United States and Other Powers, 1776–1887, pp. 1062, 1063; 8 U. S. Stat. at L. p. 352.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

U. S. Const. art. 6; U. S. Rev. Stat. ed. 1878, p. 27.

This treaty is "the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature."

Foster v. *Neilson,* 2 Pet. 253, 314, 7 L. ed. 415, 435.

The manifest effect of this treaty is to give to the Norwegian consular officers in the ports of this country exclusive jurisdiction of differences arising in such ports between the captains and crews of Norwegian vessels.

The Marie, 49 Fed. Rep. 286; *The Welhaven,* 55 Fed. Rep. 80; *The Elwine Kreplin,*

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at the instance of a consul for refusing to obey the master, it was held that the consul's conduct might be justified if he considered it his duty to detain them by the aid of the local authorities that he might send them to the United States for that purpose, but on any other grounds it was grossly improper for he had no right to punish them by imprisonment. Jordan v. Williams, 1 Curt. C. C. 69.

In the following cases the practice of consuls in imprisoning seamen abroad is condemned in strong terms: Wilson v. The Mary, Gilpin, 31; Shorey v. Rennell, 1 Sprague, 407; Magee v. The Moss, Gilpin, 219; Buddington v. Smith, 13 Conn. 334, 33 Am. Dec. 407; Johnson v. The Coriolanus, Crabbe, 241.

So, where a captain consulted a consul and confined a seaman in a common gaol for insubordination, it was held that such punishment was sufficient penalty without a forfeiture of wages, and that the practice of punishing disobedient and refractory seamen in foreign gaols is one of doubtful legality. Wilson v. The Mary, Gilpin, 31. In this case it was said that masters "seem to believe that they may do anything, provided they can obtain the assent of the consul to it; which assent consuls are apt to give with very little consideration. . . . If the case were fully and fairly stated to him, and his advice faithfully pursued, it would afford a strong protection on the question of malicious or wrongful intention, but it can give no justification or legal sanction to an illegal act."

And where seamen refused to do duty until they could make a complaint before the consul, and the master had them brought before the consul, who refused to hear them, and by his order they were all sent to jail on shore and confined for thirty-three days, and afterwards, on being released, were badly maltreated on ship-board, heavy damages were awarded for such maltreatment. Shorey v. Rennell, 1 Sprague, 407. In this case the court said: "When a controversy has arisen between a master and his seamen, the parties stand upon unequal grounds; the seamen are confined to the ship, the master goes on shore when he chooses, has the ear of the consul, enters a complaint against the men, makes his own statement of the case, and the men are then brought before the consul with the bias of presumed guilt against them; and it too often happens that no other investigation is thought necessary than merely to take the statement of the complainant."

In Magee v. The Moss, Gilpin, 219, the court said: "I have declared that I will not countenance the practice of thrusting our seamen into foreign gaols by the captain, through the influence he may have with our consuls or the officers in a foreign port. . . . The punishments which the law authorizes the master to inflict on board his vessel, by personal correction, by confinement and other privations, are generally sufficient for all the purposes of discipline." Quoted and approved in Buddington v. Smith, 13 Conn. 334, 33 Am. Dec. 407.

And where a seaman had a quarrel with the mate, and the second day thereafter a boat was sent to the ship with a police officer and the man carried off to prison without a hearing or any examination of the circumstances of the case, except such as the captain chose to give to the consul, the seaman was allowed his wages for the whole voyage. Johnson v. The Coriolanus, Crabbe, 241. In this case the court said: "And here I would again correct an error into which captains are continually falling. They seem to believe that if they can get the consent or co-operation of the consul to their proceedings it will be a full justification for them when they come home. I wish them to understand that I will judge for myself, after hearing both parties and their evidence, of the necessity and propriety of these summary incarcerations; and the part the consul may have taken in it will have very little weight with me. In all my experience I have never known a consul refuse the application of a captain to imprison a seaman, nor to furnish a certificate, duly ornamented with his official seal, of the offense committed, of which he generally knows nothing but from the representations of the captain or officers of the vessel. I never suffer these certificates to be read; they are infinitely weaker than *ex parte* depositions. Our consuls, unfortunately, are merchants also; their profits and their living depend upon the business they can do, especially by the consignments of cargoes to them. It is therefore very important to them to have the good will of the captains of vessels, who may make a good report of them to their owners."

In the following cases the action of a consul in causing seamen to be imprisoned was held to exonerate the captain from damages where the consul acted in good faith: Chester v. Benner,

9 Blatchf. 438; *Ex parte Newman*, 14 Wall. 152, 20 L. ed. 877; United States Consular Regulations 1888, § 66, p. 25, § 273, p. 92; *The Salomoni*, 29 Fed. Rep. 534.

There has never been the slightest doubt as to the entire legality of such exclusive jurisdiction.

1 Wharton's Digest of International Law, § 35, p. 129.

It is the clear intention of the treaty to secure to each nation the right to have all disputes between the masters of the vessels of either nation and the members of their respective crews settled by the laws, regulations, and customs of the nation to which the vessel belongs, and to have those laws, regulations, and customs administered and applied by the consular officers of that nation, as being officers particularly acquainted with such laws, regulations, and customs, and familiar with the national language.

The Elvine Kreplin, 9 Blatchf. 438; *The Amalia*, 3 Fed. Rep. 652.

And so strictly is this intention respected that even American citizens, serving upon Norwegian vessels, are held to have waived their right to access to the courts of their own country in the matter of disputes arising between them and the master of the vessel upon which they were so serving.

The Marie, 49 Fed. Rep. 286; *The Welhaven*, 55 Fed. Rep. 80; *The Amalia*, 3 Fed. Rep. 652; *Re Ross*, 140 U. S. 453, 472–480, 35 L. ed. 581, 588–591.

The facts that the seaman, Johannessen, had brought the suit against the captain to recover his wages, and that his claim was to have been "adjusted" at the consulate of the Kingdom of Sweden and Norway, show that such a "difference" had arisen between them as is contemplated in the treaty.

The process by virtue of which the defendant, Fee, arrested the plaintiff, Telefsen, was not sufficient to justify the defendant in arresting the plaintiff.

Fisher v. *McGirr*, 1 Gray, 1, 61 Am. Dec.

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2 Low. Dec. 76; Jordan v. Williams, 1 Curt. C. C. 69.

And the same was said to be the rule in Snow v. Wope, 2 Curt. C. C. 301, Affirming Wope v. Hemenway, 1 Sprague, 300.

So, where seamen were imprisoned in a foreign jail by order of an American consul at that port at the instance of the master for insubordination and drunkenness, and there was no evidence of bad faith on the part of the master, the seamen were required to pay the necessary charges of the imprisonment and the expenses of hiring substitutes, but not the consul's fees. Chester v. Benner, 2 Low. Dec. 76. In this case it was said that the act of Congress of 1840 has been construed in the circuit court for that circuit, to give consuls jurisdiction over the imprisonment of our seamen in foreign jails, and in such case to relieve the master from responsibility in the matter if he has acted in good faith. (Citing but doubting the authority of Jordan v. Williams, 1 Curt. C. C. 69.)

As to this latter proposition the citation is correct, but the same case holds that consuls have no criminal judicial power.

Under act of Congress July, 1840, providing that it shall be the duty of consuls and commercial agents to reclaim deserters and discountenance insubordination by every means within their power, and when the local authorities can be usefully employed for that purpose to lend their aid and use their exertions to that end, the action of a consul in imprisoning refractory seamen where he and the master act in good faith is held to exonerate the master. *Ibid.* This case holds that consuls have the power, and it is their duty, where the local authorities can in their judgment, fairly exercised, be usefully employed to restrain a part or the whole of a crew who are in a state of insubordination, to use their exertions to that end in the most effectual manner, and that this restraint may be exercised by confinement on shore in such place as ordinarily used by the local authorities for similar purposes.

But where a seaman requested a discharge, and instead the master caused him to be imprisoned by the local authorities on shore for the space of thirty-four days in a common prison, and the clerk of the consul aided the master, it was said: "If this had been done by the consul, under the powers conferred on him by the act of Congress of July 20, 1840, and there was no illegality in the conduct of the master in applying to him for his action in the matter, then, as was held by this court in Jordan v. Williams, 1 Curt. C. C. 69, the master would not have been liable for such imprisonment. But no one but a duly appointed consul or commercial agent of the United States is intrusted by the act of Congress with power to employ the local authorities to check insubordination. . . . And if it had been true that the libellant was bound to continue on board and do duty, and that he insisted on his discharge and refused duty, no case existed for confining him in a foreign jail,—especially in such a prison as is described by the testimony in this case." Snow v. Wope, 2 Curt. C. C. 301, Affirming Wope v. Hemenway, 1 Sprague, 300.

And in Patch v. Marshall, 1 Curt. C. C. 452, the imprisonment of an American citizen in a foreign jail by a master of a vessel, through the official intervention of a consul on false allegations, was held not to prevent the investigation of the courts of the United States, although the vessel and commander were British, where the voyage was made on account of merchants in Boston, who hired the master on wages and manned the vessel, and the voyage terminated in Boston.

And where the master on consultation with a consul brought soldiers on board and forcibly removed a sailor and left him in confinement in a foreign port without justifiable cause, it was held that the seaman was entitled to damages. Gardner v. Bibbins, Blatchf. & H. 356.

And in Jay v. Almy, 1 Woodb. & M. 262, it was said that a master is not excused for imprisonment of a seaman, although ordered by the consul.

In Cours de Droit Commercial, Pardessus, it is said that a French consul cannot have criminal jurisdiction in a foreign country unless it is expressly given, and that there is no instance of such power in any Christian country, and that a sovereign cannot invest a consul with judicial power over his own subjects in a foreign country. Authority and Jurisdiction of Consuls, 2 Ops. Atty. Gen. 378.

But in Ord. du 29 October, 1833, title III, art. 22,—De Clercqq, Form tom. II, p. 65, it is said that the "French laws do not hesitate to prescribe that when crimes are committed on board a French vessel in a foreign port, by one of the crew against another of the same

381; *Learnard* v. *Bailey*, 111 Mass. 160; *Kelly* v. *Bemis*, 4 Gray, 83, 64 Am. Dec. 50; *Brown* v. *Webber*, 6 Cush. 560; *Smith* v. *Shaw*, 12 Johns. 257; *Wise* v. *Withers*, 3 Cranch, 331, 337, 2 L. ed. 457, 459; *Greene* v. *Briggs*, 1 Curt. C. C. 311, 333; *The J. W. French*, 13 Fed. Rep. 916.

It is of no importance whether the defendant knew, or did not know, that the court had no jurisdiction.

Nichols v. *Thomas*, 4 Mass. 232; *Sandford* v. *Nichols*, 13 Mass. 286, 7 Am. Dec. 151; *Com.* v. *Kennard*, 8 Pick. 133; *Wilmarth* v. *Burt*, 7 Met. 257; *Donahoe* v. *Shed*, 8 Met. 326; *Folger* v. *Hinckley*, 5 Cush. 263; *Fisher* v. *McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Ela* v. *Smith*, 5 Gray, 121, 66 Am. Dec. 356; *Cheever* v. *Merritt*, 5 Allen, 563; *Smith* v. *Keniston*, 100 Mass. 172; *Underwood* v. *Robinson*, 106 Mass. 296; *Erskine* v. *Hohnbach*, 14 Wall. 613, 20 L. ed. 745.

Ignorance of such diplomatic immunities, or of the fact that the person arrested is a foreign minister, does not protect the officer making the arrest or assault.

United States v. *Benner*, Baldw. 234; *United States* v. *Liddle*, 2 Wash. C. C. 205; *United States* v. *Ortega*, 4 Wash. C. C. 531; 1 Wharton's Digest of International Law, § 93, p. 645.

The defendant, however, knew that he was serving a writ issued by a court having no jurisdiction.

He is presumed to know the "supreme law of the land."

He cannot be protected if, after being so informed, he persists in executing the process.

Chase v. *Ingalls*, 97 Mass. 524; *Pearce* v. *Atwood*, 13 Mass. 324; *Grace* v. *Mitchell*, 31 Wis. 533, 11 Am. Rep. 613; *Sprague* v. *Birchard*, 1 Wis. 457; *Leachman* v. *Dougherty*, 81 Ill. 324.

Mr. B. Hall with **Mr. A. F. Coulter**, for defendant.

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crew, the French consul is to resist the application of the local authorities to the case." American Ships in Foreign Ports, 8 Ops. Atty. Gen. 78.

And the legislation of France confers on her consuls jurisdiction in such matters. Decret du 24 Mars, 1852, De Clercq, Formul. tom. II, p. 348; American Ships in Foreign Ports, 8 Ops. Atty. Gen. 73.

Consuls' judicial powers are not exclusive under art. 8 of the Convention with France of 1778, giving to consuls the right to exercise police over all vessels in their respective nations confined to the interior of the vessels; but this is not to interfere with the police of the ports where the vessel shall be, and under art. 10, providing that where the respective subjects shall have committed any crime or breach of the peace they shall be amenable to the judges of the country. Authority and Jurisdiction of Consuls, 2 Ops. Atty. Gen. 378.

1 Beawes's Lex Mercatoria, 423, says that "another hardship upon British consuls is, that they are often obliged to imprison disorderly seamen upon the complaint of their masters, as an indispensable duty of their office; yet every one of these seamen has it in his power to bring his action against the consul for false imprisonment in the courts of law in England, when it is probable that the master is on some other voyage in some other part of the world. Therefore it is the duty of the consul to be very cautious how he confines or punishes British seamen, or masters of ships, upon their mutual complaints against each other."

This statement *supra* is cited by Chitty on Commercial Law, p. 63, saying that it is the duty of consuls upon complaint of masters to imprison disorderly seamen.

b. *In non-Christian countries.*

Treaties exist with many non-Christian countries giving consuls in such countries criminal jurisdiction of offenses committed by their countrymen. Where such treaties exist consuls have such jurisdiction.

American consuls in China may try and sentence American citizens for offenses committed in that country. Jurisdiction of United States Consuls in Turkey, 9 Ops. Atty. Gen. 296.

This jurisdiction is exercised under U. S. Rev. Stat. §§ 4083, 4084, providing that under the treaty consuls have jurisdiction to try all citizens of the United States charged with offenses against law, committed in China, Japan, Siam, Egypt, and Madagascar, and to sentence such offenders and to carry their authority into execution.

And the same power, so far as can be executed under the treaties in Tripoli, Tunis, Morocco, and Muscat, is conferred on American consuls of the United States. U. S. Rev. Stat. § 4127.

Under treaty with Japan, June 17, 1857, art. 4, providing that Americans committing offenses in Japan shall be tried by the American consul general or consul, and shall be punished according to the American law, consuls in Japan could try and sentence a seaman of an American vessel for murder committed on board the vessel at a Japanese port, although the seaman was a British subject, and an indictment and trial by jury were denied the prisoner. In re Ross, 140 U. S. 453, 35 L. ed. 581, Affirming 44 Fed. Rep. 185.

The provisions of this treaty were superseded by the treaty of 1894, which took effect July 17, 1899, and since then United States consuls in Japan have no judicial jurisdiction.

This jurisdiction was exercised under U. S. Rev. Stat. §§ 4102–4106, providing that consuls have jurisdiction in murder cases in China, Japan, Siam, Egypt, and Madagascar, where the crime is committed by an American citizen, but in such cases he shall summon four citizens of the United States to sit with him at the trial, and all of them must concur in the judgment, and their opinion must be approved by the minister.

And a consul of the United States in Turkey may try and punish American citizens in the Dominion of the Ottoman Porte for offenses committed in that country. Dainese v. United States, 15 Ct. Cl. 64, 7 Ops. Atty. Gen. 495.

The place of imprisonment of prisoners sentenced by consuls in China and the Ottoman Porte is regulated by the acting functionary in the absence of any regulation, under act of Congress August 11, 1848, providing for carrying into effect the treaties between the United States and China and the Ottoman Porte. Act of 1848 and Treaty with the Ottoman Porte, 5 Ops. Atty. Gen. 67.

But an American consul in Japan could not try citizens of other countries for offenses committed in Japan. 11 Ops. Atty. Gen. 474.

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

The municipal court of the city of Boston had no jurisdiction of the action brought against the plaintiff in this case for wages alleged to be due one Johannessen, and the writ upon which the plaintiff was arrested on mesne process was of no effect. By article 13 of the treaty between the United States and Sweden and Norway of 1827 (8 Stat. at L. 352), it is provided that "the consuls, vice consuls, or commercial agents, or the persons duly authorized to supply their places, shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the order or tranquillity of the country; or the said consuls, vice consuls, or commercial agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country." There are similar treaties with other countries, including one with Prussia in 1828 (8 Stat. at L. 382). Many of these treaties are referred to in 7 Am. L. Rev. 417. Later treaties have been made with the Netherlands in 1855 (10 Stat at L. 1150, 1155), with Denmark in 1861 (13 Stat. at L. 605), with Germany in 1871 (17 Stat. at L. 921, 928), and with Italy in 1878 (20 Stat. at L. 725, 729). By article 6 of the Constitution of the United States, it is declared that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary

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c. *Power to send criminals to home country for trial.*

Where consuls have jurisdiction to try and punish they have no power to send the convicts of such courts to this country for imprisonment. In other cases it seems that they cannot compel a merchant vessel to carry to this country offenders for trial; but they may contract for transportation for that purpose.

American consuls at Smyrna and Constantinople have no power to send convicts of such courts to this country for imprisonment. Imprisonment of Convicts, Consular Courts, 14 Ops. Atty. Gen. 522.

And a British consul cannot have the cooperation of the courts of this country to enforce an order made by him sending a prisoner to England for trial. *Re* Aubrey, 26 Fed. Rep. 848. In this case the prisoner was released on habeas corpus.

And United States marshals are not required to execute a sentence of a French consul under convention, art. 12, with his most Christian Majesty and the United States. Duties of District Marshals, 1 Ops. Atty. Gen. 43.

"It has been held that a master is not 'obliged' to take on board persons accused of crimes to be transported to the United States for prosecution." United States Consular Regulations 1896, § 276.

And consuls cannot require ship masters to receive and convey to the United States, for prosecution, seamen or other persons accused of crime. Duty of Shipmasters Respecting Criminal Seamen, 7 Ops. Atty. Gen. 722.

In this case the offense was mutiny on the high seas, and the consul in India placed the offenders on board a merchant vessel to send them to this country, and the master allowed them to escape. The conduct of the consul was approved, but the master could not be held liable in the absence of any statute.

In *Re* Ross, 140 U. S. 453, 35 L. ed. 581, it was said that there is no law of Congress compelling the master of a vessel to carry or transport a criminal offender to any foreign port when he can be turned over to the consular court having jurisdiction of criminal offenses committed in a foreign country. (Citing 7 Ops. Atty. Gen. 722.)

But the local authorities in France cannot lawfully interpose to release the crew of an American vessel confined at the instance of a consul where acts of violence occurred upon the high seas, and the offenders are imprisoned on arrival at a French port, and then placed on the vessel to be sent to this country for trial. American Ships in Foreign Ports, 8 Ops. Atty. Gen. (Cushing) 73.

In case of mutiny the consular officer should, if the laws of the country permit, cause the mutineers to be confined to be sent home for trial, or discharge them. United States Consular Regulations 1896, § 250.

"The new 'Consular Regulations' say that 'if a citizen of the United States be charged with a criminal offense alleged to have been committed at sea, on board of an American vessel (or on such vessel in port, under such circumstances as give jurisdiction to the courts of the United States), it will be the duty of the consular officers to require that the individual so accused be delivered to him to be sent home for trial.' (Nos. 384, 385.) All that is but detention by or at the instance of the consul, for the purpose of trial in the United States." Relation of Consuls to Criminals, 8 Ops. Atty. Gen. (Cushing) 380.

The question arose in this case as to the power of the American consul in Havana.

There is no statute of the United States authorizing consuls to take seamen from a vessel for criminal conduct, and send them home in another vessel for trial. United States v. Lunt, 18 Law Rep. 683. In this case the court said that it is customary for consuls to do so under instructions from the department of state; but they have no jurisdiction, and their certificates are not evidence.

Where the conduct of seamen was reported to the United States consul for mutiny and revolt, and he ordered them to be discharged from the ship and sent to the United States for trial, and placed them in prison at Marseilles, it was held that when on clear prima facie proof a consul orders a seaman to be discharged from a vessel for criminal conduct threatening the safety of the vessel or of her officers or company, and transmit him home for trial on the accusation, such discharge is a bar to any continuing claim for wages. Tingle v. Tucker, 1 Abb. Adm. 519.

In Bernhard v. Creene, 3 Sawy. 230, it was said that a consular court is for the purpose of ascertaining whether certain crimes had been

notwithstanding." Such a treaty as that with Sweden and Norway has been almost uniformly held to take away all right of action for wages in the courts of this country, by a seaman coming within the scope of the treaty, whether the action be *in rem* or *in personam*. *Norberg* v. *Hillgreu*, 5 N. Y. Legal Obs. 177; *The Elwine Kreplin*, 9 Blatchf. 438, where the question is considered at length; *The Salomoni*, 29 Fed. Rep. 534; *The Burchard*, 42 Fed. Rep. 608; *The Marie*, 49 Fed. Rep. 286; *The Welhaven*, 55 Fed. Rep. 80. In *The Amalia*, 3 Fed. Rep. 652, jurisdiction was entertained by Judge Fox of the United States district court in Maine of a libel against a Swedish vessel, on the ground that there was no consular representative of Sweden in the district of Maine. But this case has no bearing upon the one before us. An examination of the treaty and authorities above cited makes it plain that the court has no discretion in the matter, and that the local authorities have no right to interfere. Where jurisdiction is given by a treaty to a consul, vice consul, or a commercial agent, he alone has authority to act in determining in the first instance whether wages are due, and the amount.

It is to be remembered that the United States government has the same right by the treaty in regard to its vessels in Norway, and this right is insisted upon by our government. In the United States Consular Regulations of 1888 (p. 25, ¶ 66), under the title "Jurisdiction over Disputes between Masters, Officers, and Crews," appears the following: "Exclusive jurisdiction over such disputes in the vessels of the United States, including questions of wages, is conferred by treaties or conventions with" several governments named, and, among them, Sweden and Norway. And on page 92, ¶ 273, is also the following: "In many instances, by treaty and consular convention,

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committed on a vessel, and if so to send the accused parties with the witnesses home for trial.

d. *In case of deserting seamen.*

In the absence of a treaty or convention, a consular officer cannot claim as a right from the local authorities the detention or return of a deserter. This right is given to consuls in some countries by treaty.

United States Consular Regulations 1896, § 89, says: "The right to reclaim deserters from the vessels of the United States is conferred by treaties or conventions with Austria-Hungary, Bolivia, Belgium, Columbia, Denmark, Dominican Republic, Ecuador, France, Great Britain, Greece, Germany, Hanseatic Republics, Haiti, Hawaiian Islands, Italy, Kongo Free State, Japan, Madagascar, Netherlands (and colonies), Peru, Portugal, Roumania, Russia, Salvador, Sweden and Norway, and Siam. But if a deserter has committed a crime against local law the surrender will be delayed until after punishment."

A United States consul at the Sandwich Islands had the right to require the Hawaiian authorities to surrender to him a deserting seaman whose name appeared on the ship's roll under the treaty with Hawaii. Judicial Powers of United States Consuls in Sandwich Islands, 11 Ops. Atty. Gen. 508.

The treaty provided that consuls should enjoy the same privileges and powers with those of the most favored nations, and the treaty of France and the Sandwich Islands provides that the respective consuls shall alone take cognizance of crimes and misdemeanors and other matters of differences in relation to the internal order of the vessel.

Where authorized by a treaty consuls may cause the arrest of deserting seamen and imprison them until sent on board the vessel, but this is not to punish, and the consul cannot punish after the discharge of the seamen. In the absence of a treaty a consul cannot claim as a right from the local authorities the detention or return of a deserter. Jordan v. Williams, 1 Curt. C. C. 69.

An arrest of a deserter from a Spanish ship cannot be made at the instance of a consul where he produced an extract from a ship's roll certified by himself, but did not exhibit the original roll, under the treaty with Spain requiring that in such a case the Spanish consul in American ports shall exhibit the ship's rolls, 15 L. R. A.

and the name of the deserter must appear in it before he can be arrested, held in custody, or delivered. Spanish Deserter, 9 Ops. Atty. Gen. 96.

II. *Jurisdiction in civil cases.*

a. *In China and Japan.*

Under the treaty between the United States and China, the consular court in China has jurisdiction of all civil cases arising under the treaty, of a demand by a Chinese against an American. An Englishman may sue an American in the United States consular courts of China. But the consular courts of China (and the same was formerly true of those in Japan) have no jurisdiction of claims of foreign citizens against that government.

But an American consul in China has no authority by a treaty or statute to entertain jurisdiction of a suit by the Chinese government for duties, and has no jurisdiction of a suit where the government of China is plaintiff. 7 Ops. Atty. Gen. 495.

This was so held because the treaty mentions explicitly "the subjects of China" and "the subjects of other governments." Besides, the treaty provides for compulsory payment of duties by authorizing the retention of the ship's papers.

The treaty of the United States with Japan, November 22, 1894, taking effect July 17, 1899, provides that the former treaties shall cease, and that the jurisdiction exercised by courts of the United States in Japan shall cease thereafter, and that such jurisdiction shall be exercised by Japanese courts.

British consular courts in China and Japan had no jurisdiction of a "counterclaim" in an action by the Emperor of Japan against a British subject under treaties giving such courts jurisdiction of actions against British subjects exclusively. Japanese Government v. Peninsular & O. Steam Nav. Co. [1895] A. C. 644, 64 L. J. P. C. N. S. 107, 11 Reports, 493, 72 L. T. N. S. 881, 8 Asp. Mar. L. Cas. 50.

An appeal to the circuit court of California from a consular decision in a libel suit could be taken where the amount in dispute, exclusive of costs, exceeded $2,500, under U. S. Rev. Stat. §§ 4092-4109, providing that where the matter in dispute exceeds $2,500 an appeal from the final judgment of any consular court shall be allowed to the circuit court for the district of California. The Ping-On, 7 Sawy. 483; The Ping-On v. Blethen, 11 Fed. Rep. 607.

the United States have secured to their consular officers jurisdiction over questions of wages, shipment, and discharge of seamen."

The bill of exceptions is not so full as it should be as to what occurred on the arrival of the ship in Boston. It is merely said that "Johannessen left the ship at Boston because his term of service had expired." It does not appear whether he had been discharged, or had left without the permission of the master, though perhaps the more reasonable interpretation of the exceptions is that the statement of the cause of his leaving precludes our assuming other reasons to exist. However this may be, whether he was discharged or not, there was still the question of wages to be determined; and the defendant had been informed, before he made the arrest, that the claim of Johannessen would be adjusted at the consulate of the Kingdom of Sweden and Norway. It seems to us impossible to say that there was not such a difference between the master and Johannessen that the consul had not exclusive jurisdiction in the premises. The facts in the case of *The Elwine Kreplin* are not fully set forth in the report in 9 Blatchf. 438. But they are found at length in the report of the case in the district court (4 Ben. 413). It was there considered by Judge Benedict that the connection of the men with the ship was severed by mutual consent, and that they were entitled to their wages. While this view of the facts was not fully assented to by Judge Woodruff, his opinion was that, although the men were entitled to their discharge and to be paid off, and the master was in the wrong, yet this matter of difference "was left by the treaty in the hands of the consul," and the libel of the seamen was dismissed. In *The Burchard*, 42 Fed. Rep. 608, Judge Toulmin dismissed a libel for wages against a German vessel brought by an American seaman who had shipped on board, and who claimed to be entitled to a discharge. He stated, how-

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On an appeal in a libel case from a consular court in China and Japan to the United States circuit court for the district of California the record should show an allowance of the appeal. Tazaymon v. Twombley, 5 Sawy. 79; The Spark v. Lee Choi Chum, 1 Sawy. 713.

In the latter case it was said that a libel before a consul is defective in not stating the facts necessary to give the consular courts jurisdiction under act of Congress in the treaty between the United States and the Empire of China. The jurisdictional facts must all be distinctly averred.

b. *In other non-Christian countries.*

The consuls of Christian states, in the countries not Christian, exercise the functions of municipal magistrates for their countrymen, their commercial or international capacity being but a part of their general capacity as the delegated administrative and judicial agents of their nation.

So, a British consular court at Constantinople has jurisdiction between British and Russian subjects in an action for collision between British and foreign ships when authorized by a decree of the Russian chancellerie, and the British suitor cannot object to such jurisdiction. Papayanni v. Russian Steam Nav. & Trading Co. 2 Moore, P. C. C. N. S. 161, 9 Jur. N. S. 1160.

This was on the ground that the Turkish government has long acquiesced in allowing British consuls to exercise jurisdiction between citizens of Christian powers, under 6 & 7 Vict. chap. 94, providing that whereas by treaty, capitulation, usage, grant, sufferance, and other lawful means Her Majesty hath jurisdiction within divers countries out of her dominion, it shall be lawful to exercise jurisdiction as if acquired by cession or conquest, and Order in Council August 27, 1860, providing that Her Majesty's jurisdiction, civil and criminal, in the dominions of the Ottoman Porte shall be vested exclusively in the supreme consular court.

An order of sale of partnership land in a suit for dissolution before the supreme consular court at Constantinople was not *ultra vires*, although the land was held by British subjects in the name of a Turkish subject, and they had not availed themselves of the protocol of June, 1867, permitting British subjects to hold land in their own names, which had the legal effect to render them directly amenable to the Ottoman civil court in regard to real property. Abbott v. Abbott, L. R. 6 P. C. 220.

The effect of the order was held to be no more than the power to sell the beneficial interests of the partners in the premises, and to compel the partners to carry it into effect.

In Messina v. Petrococchino, L. R. 4 P. C. 144, 41 L. J. P. C. N. S. 27, 26 L. T. N. S. 561, 20 Week. Rep. 451, it was said that Her Majesty has established a supreme consular court at Constantinople and provincial courts, with rules for the exercise of civil and criminal jurisdiction.

And a plea of payment of a judgment for the same cause of action in the consular court at Constantinople is a bar to another action in England for the same cause of action, under 7 & 8 Vict. chap. 94, "An Act to Remove Doubts as to the Exercise of Power and . . . within Divers Countries and Places out of Her Majesty's Dominions [in Her Majesty's dominions], and to Render the Same More Effectual." Barber v. Lamb, 8 C. B. N. S. 95, 29 L. J. C. P. N. S. 234, 6 Jur. N. S. 981, 8 Week. Rep. 461.

In Dainese v. Hale, 91 U. S. 13, 23 L. ed. 190, it was said that the treaty between the United States and the Ottoman Empire, concluded June 5, 1862 (if not that made in 1830), has the effect of conceding to the United States the same privilege, in respect to consular courts and the civil jurisdiction thereof, which are enjoyed by other Christian nations; and the act of Congress of June 22, 1860, established the necessary regulations for the exercise of such jurisdiction.

In Mahony v. United States, 3 Ct. Cl. 152, it was said that in the Mohammedan government, "those consuls were accordingly charged with other duties than those commercial agents who superintend and watch over commerce in European countries, and were invested by treaties with certain diplomatic and even judicial powers."

In United States Judicial Authority in China, 7 Ops. Atty. Gen. 496, it was said that "the treaties of the United States with the Barbary powers, and with Muscat, confer judicial functions on our consuls in those countries, and the treaty with Turkey places the same authority in the hands of the minister or consul, as the substitute for the local jurisdiction, which, in each case of controversy, would control it if it arose in Europe or America." These treaties accord with general usage and with the princi-

ever, that he was inclined to take jurisdiction, if the fact had been proved that a discharge had been granted. In the later case of *The Welhaven*, 55 Fed. Rep. 80, a libel was brought against a Norwegian steamship by a citizen of the United States, for damages and for wages, alleging that he shipped on the vessel at Mobile, for a round voyage to Tampico, and that, on his arrival in Mobile bay on the return trip, he was put ashore, manacled, and finally discharged at Mobile, without full pay. On the intervention of the Norwegian consul, claiming jurisdiction, Judge Toulmin sustained the consul's position, and dismissed the libel. The case appears to have been heard on exceptions to the libel, as the judge concludes the opinion thus: "I am therefore constrained to sustain the exceptions to the libel, and to order that the libel be dismissed."

It appears, therefore, that the consul of Sweden and Norway had exclusive jurisdiction of the controversy or difference between Johannessen and Telefsen, and that the municipal court of the city of Boston had no jurisdiction, either of the subject-matter or of the persons of the parties in the action which the seaman saw fit to bring against the master. The officer who arrested the master was therefore acting illegally and without justification, and is liable in this action, unless he is protected by virtue of his writ. This presents a question of some difficulty, and one which is not wholly free from doubt. Before proceeding to consider the principal question, it may be well to state briefly certain principles laid down by the courts in regard to which there is little or no dispute. Where the process is in due form, and comes from a court of general jurisdiction over the subject-matter, the officer is justified in acting according to its tenor, even if irregularities making the process voidable have previously occurred. *Savacool* v. *Boughton*, 5 Wend. 171, 21 Am. Dec. 181; *Earl* v. *Camp*, 16 Wend. 563; *Ela* v.

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ples of the law of nations in relation to the non-Christian powers.

And the award of a Russian consul of salvage was binding on the insurers, where an English vessel from London was transferred after insurance to Russian owners and was wrecked in Turkish territory. By capitulations of the great powers all matters touching ships and their cargoes are to be decided by the consular courts of the country to which the ship belongs. Dent v. Smith, L. R. 4 Q. B. 414, 38 L. J. Q. B. N. S. 144, 20 L. T. N. S. 868, 17 Week. Rep. 646.

A bottomry bond held by a bona fide holder executed under a sentence of a Greek consular court at Constantinople in regard to a disabled Greek ship, and a cargo owned by Greek subjects, was sustained in the absence of any evidence of fraud. Messina v. Petrococchino, L. R. 4 P. C. 144, 41 L. J. P. C. N. S. 27, 26 L. T. N. S. 561, 20 Week. Rep. 431.

In Functions of Consuls, 7 Ops. Atty. Gen. 346, it was said: "There is one European country, and, so far as my observation goes, but one, where the exterritoriality, claimed by Christians in all Mohammedan governments, is reciprocated by the Christians. Spain has conceded to the subjects of Turkey, Morocco, and Tripoli the same immunity which these last have conceded to Spaniards, that is, the privilege of being subject, each in the country of the other, only to the authority of their own consuls. Riquelona, Derecho Internacional, tom. i, p. 303."

But a railroad company and partnership complete and existing in a foreign country is not within the purview of the English joint-stock companies acts 1856, 1857, so as to enable the English consular court in Egypt to issue a sequestration against such members of the company as reside within the jurisdiction of that court for not complying with an order of that court to register the company as one of limited liability under the English acts. Bulkeley v. Schutz, L. R. 3 P. C. 764, 8 Moore, P. C. C. N. S. 170.

This is because the English companies act does not apply to a company formed in a foreign dependency of the English Crown.

And where a consul general of Egypt in 1864 issued an attachment against property of citizens of the United States not residents or sojourners in the Turkish dominion, and the consul general was sued for this act and pleaded jurisdiction, the plea was held defective in not setting forth the law or usages of Turkey upon which the treaty and act of Congress conferring jurisdiction was made to depend. Dainese v. Hale, 91 U. S. 13, 23 L. ed. 190.

And a judgment in a consular court in Egypt for the full amount of freight charges paid under protest on a guaranty required before delivery was held to be no bar to an action in England to recover one half of the same, where the charterer had given his acceptance for such half on shipment which was not due at the time of delivery, and he had suspended payment before the arrival of the ship in Egypt, but which acceptance was paid before suit in the consular court, as the payment of the judgment though a final settlement by the guarantors was not a final settlement by them as agents of the plaintiffs and defendants. Tamvaco v. Simpson, 13 L. T. N. S. 160.

Where a Prussian consul made application to the British consular court to appoint a referee to take part in a mixed commission in a case for collision in the Dardanelles brought by the owners of an English ship against a Prussian ship, and the English consul declined to co-operate, the judgment of the Prussian court was held to be no bar to proceedings in admiralty in England. The Griefswald, Swabey, Adm. 430. In this case it was not shown that the former judgment was made by a court having jurisdiction by treaty, usage, or voluntary submission.

In Pitts v. La Fontaine, L. R. 5 App. Cas. 564, it was said that the consular court in Turkey had no jurisdiction over real property, the title to which was in a Turk. The consular court held that as the Turk had become a British subject by her marriage it could compel a sale by a decree *in personam*, although the court could not transfer the property. The orders made by the consular court were set aside on account of many irregularities.

c. *As to controversies between seamen and masters of foreign vessels.*

As to whether the jurisdiction of the consul is exclusive in controversies between foreign seamen and the master of foreign ships the courts do not all agree. The English admiralty court asserts a discretion in yielding to the jurisdiction claimed by consuls in controversies between seamen and masters of the vessels belonging to foreign countries. But they usually refuse to retain a case against the protest of

Shepard, 32 N. H. 277; *Dwinnels* v. *Boynton*, 3 Allen, 310; *Chase* v. *Ingalls*, 97 Mass. 524; *Bergin* v. *Hayward*, 102 Mass. 414; *Chesebro* v. *Barme*, 163 Mass. 79, 82; *Howard* v. *Proctor*, 7 Gray, 128; *Hubbard* v. *Garfield*, 102 Mass. 72; *Rawson* v. *Spencer*, 113 Mass. 40; *Hines* v. *Chambers*, 29 Minn. 7; *Hann* v. *Lloyd*, 50 N. J. L. 1. Where, however, the process is void on its face, the officer is not protected. *Clark* v. *Woods*, 2 Exch. 395; *Pearce* v. *Atwood*, 13 Mass. 324; *Eames* v. *Johnson*, 4 Allen, 382; *Thurston* v. *Adams*, 41 Me. 419; *Harwood* v. *Siphers*, 70 Me. 464; *Brown* v. *Howard*, 86 Me. 342; *Rosen* v. *Fischel*, 44 Conn. 371; *Frazier* v. *Turner*, 76 Wis. 562; *Sheldon* v. *Hill*, 33 Mich. 171; *Poulk* v. *Slocum*, 3 Blackf. 421. An officer is bound to know the law, and to know the jurisdiction of the court whose officer he is. If, therefore, he does not act in obedience to a precept of the court, and the court has no jurisdiction in the matter, either because the statute under which the court acted is unconstitutional, or there is a want of jurisdiction for any other reason, it would seem that the officer is not protected. There are many authorities to this effect. *Fisher* v. *McGirr*, 1 Gray, 45, 61 Am. Dec. 381; *Warren* v. *Kelley*, 80 Me. 512; *Batchelder* v. *Currier*, 45 N. H. 460; *Thurston* v. *Martin*, 5 Mason, 499; *Campbell* v. *Sherman*, 35 Wis. 103; *Sumner* v. *Beeler*, 50 Ind. 341, 19 Am. Rep. 718; *The Marshalsea*, 10 Coke, 68*b*; *Crepp* v. *Durden*, 2 Cowp. 640; *Brown* v. *Compton*, 8 T. R. 424; *Watson* v. *Bodell*, 14 Mees. & W. 57. Whether this doctrine applies to a case like the present, where the court had general jurisdiction over the subject-matter, but no jurisdiction over the particular controversy between the parties, and no jurisdiction over their persons, we need not decide, because, on the facts in this case, we are of opinion that the officer may be held liable. He was informed, before making the arrest, that the vessel was a Norwegian vessel, and the cap-

a consul. The Federal courts of this country generally refuse to entertain jurisdiction in such cases if the foreign consul objects, unless the voyage is terminated, or has been unduly prolonged or diverted, or the master has been guilty of extreme cruelty, and it is necessary in the furtherance of justice that the admiralty court should retain jurisdiction. In some cases exclusive jurisdiction is given to the consul by treaty.

In the following cases the admiralty court required that notice be given to the consul of the proceedings: La Blache v. Rangel, L. R. 2 P. C. 38; The Franz et Elize, 5 L. T. N. S. 290, 2 Maritime Cases, 26, 1 Lush. Adm. Cas. 377; The Golubchick, 1 W. Rob. Adm. 143; The Milford, Swabey, Adm. 362, 4 Jur. N. S. 417.

An admiralty court will not entertain jurisdiction of controversies between foreign seamen and masters of foreign ships when the consul objects. The Herzogin Marie, 1 Lush. Adm. Cas. 292, 5 L. T. N. S. 88; The Octavie, 33 L. J. Adm. N. S. 115; The Infanta, Abb. Adm. 263; Saunders v. The Victoria, 11 Legal Int. 70, Fed. Cas. 12,377; Graham v. Hoskins, Olcott, 224; Lynch v. Crowder, 12 Law Rep. 355; The Becherdass Ambaidass, 1 Low. Dec. 569; The Salomoni, 29 Fed. Rep. 534; The Elwin Kreplin, 4 Ben. 413, Reversing 9 Blatchf. 438; *Ex parte* Newman, 14 Wall. 152, 20 L. ed. 877; The Burchard, 42 Fed. Rep. 608; Norberg v. Hillgren, 5 N. Y. Legal Obs. 177; The Marie, 49 Fed. Rep. 286; The Weihaven, 55 Fed. Rep. 89.

In TELEFSEN v. FEE it was held that an officer executing a warrant of arrest in an action for wages against a captain of a Norwegian vessel issued from a state court is liable in damages, as said court has no jurisdiction under treaty with Norway, 1827, art. 13, providing that consuls, vice consuls, or commercial agents shall have the right as such to sit as judges and arbitrators in such differences as may arise between the captain and crews of the vessel belonging to the nations whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of their captain should disturb the order or tranquillity of the country, but that this shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country.

This is in accord with the rule in American

courts yielding to the consular courts exclusive jurisdiction in the absence of special circumstances of extreme cruelty or ending or deviation of voyage. In this case it was said that in The Amalia, 3 Fed. Rep. 652, jurisdiction was entertained in the United States district court of Maine, of a libel against a Swedish vessel, on the ground that there was no consular representative of Sweden in the district of Maine. The court said: "But this case has no bearing upon the one before us."

So, where the master of a foreign ship brought suit for his wages in the admiralty court, and the foreign consul protested against the cause proceeding, the case was dismissed. The Herzogin Marie, 1 Lush. Adm. Cas. 292, 5 L. T. N. S. 88. In this case the court said that "if the representative of the foreign state expresses his dissent to the suit, this court, though not bound so to do, will incline to hold its hand and remit the plaintiff to remedy under the law of his own country."

In The La Blache v. Rangel, L. R. 2 P. C. 38, it was held that the nationality of the vessel, and not that of the seaman, determines the procedure. The court also held that it is discretionary with the court whether it will proceed, but that it will dismiss the case if the seaman contracts in writing to submit such controversies to the consul. In this case the rule is laid down that the court of admiralty will proceed with the action if the foreign consul protests without giving reasons, but that if he gives reasons then the court of admiralty will inquire into their sufficiency and allow the consul's allegations to be contradicted; but that when the court has entered into the facts it will proceed to exercise its discretion.

And the court in its discretion dismissed the case where a Belgian consul protested against the admiralty court hearing a case for wages against a ship of his country. The Octavie, 33 L. J. Adm. N. S. 115.

In The Franz et Elize, 5 L. T. N. S. 290, 2 Maritime Cases, 26, 1 Lush. Adm. Cas. 377, the court said that it has jurisdiction if it thinks proper to exercise it.

And an action by a British seaman against a Spanish vessel was dismissed where a Spanish consul protested and the seaman served under a Spanish contract restricting him from suing except in Spain or Spanish colonies, or except before Spanish consuls. The Leon XIII. L. R. 8

tain of the vessel a Norwegian, and that the claim of Johannessen would be adjusted at the consulate of the Kingdom of Sweden and Norway. Being informed of the facts, he was bound to know the law that the court had no jurisdiction over the person of the captain or the subject-matter of the action. *Sprague* v. *Birchard*, 1 Wis. 457, 464, 469, 60 Am. Dec. 393; *Grace* v. *Mitchell*, 31 Wis. 533, 539, 545, 11 Am. Rep. 613; *Leachman* v. *Dougherty*, 81 Ill. 324, 327, 328.

There are, without doubt, cases which lay down a more stringent rule, and say that the officer need not look beyond his precept, and is not bound to take notice of extrinsic facts; but all of these are cases which are distinguishable from the case at bar. The leading case on this subject is *People* v. *Warren*, 5 Hill, 440. The defendant was indicted for assaulting an officer. The inspectors of an election issued a warrant to a constable for the arrest of the defendant for interrupting the proceedings at the election by disorderly conduct in the presence of the inspectors. The defendant offered to show that he had not been in the presence of the inspectors at any time during the election, and that the constable knew it. This was held to be rightly excluded. The opinion is *per curiam*, and is very brief. While it says that the inspectors had no jurisdiction of the subject-matter, yet the clear meaning is that, if the defendant was not in their presence, they acted in excess of their jurisdiction. Knowledge by an officer that a man was innocent would, of course, be no excuse for assaulting the officer, if he arrested the man upon a warrant from a court of competent jurisdiction. An officer in a criminal case is obliged to obey his warrant, whatever his knowledge may be. This disposes, also, of the case of *State* v. *Weed*, 21 N. H. 262, 53 Am. Dec. 188. Several cases have been called to our attention in which there are *dicta* to the effect that an officer is not bound to look beyond his precept, even

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Prob. Div. 121, 52 L. J. Adm. N. S. 58, 48 L. T. N. S. 770, 5 Asp. Mar. L. Cas. 73.

In The Golubchick, 1 W. Rob. Adm. 143, all doubt as to jurisdiction was removed by a letter from the Russian consul stating that the vessel was no longer under the Russian flag.

In Willendson v. The Försöket, 1 Pet. Adm. 197, where a foreign seaman asserted a claim in admiralty for wages against a Danish ship, and the vessel had not completed her voyage, the court said: "It has been my general rule not to take cognizance of disputes between the masters and crews of foreign ships." In this case the master claimed that the mariner had deserted, and denied that he had discharged the seaman, and claimed a forfeiture of wages. On the hearing the master agreed to forgive the seaman for past offenses and pay him his wages, and it was stipulated on the part of the captain, by authority from the Danish consul, that the master should bona fide comply with his engagement.

So, where a consul protests against proceedings in admiralty by a British seaman for wages against a British vessel the libel will be dismissed on it appearing that the parties are about to pass within British jurisdiction, and relief may be had from the tribunals of their own country. Saunders v. The Victoria, 11 Legal Int. 70 Fed. Cas. No. 12,377.

And if seamen are discharged by a master without being permitted to return with the vessel to her home port their proper course will be to seek redress from their own consul, as courts of this country will take cognizance of their claim for wages against a British vessel only in case of flagrant wrong or suffering on their part, and not upon a breach of contract. Graham v. Hoskins, Olcott, 224.

And where a seaman brought a libel for wages in the admiralty court, and the certificate of a British vice consul was indorsed upon shipping articles "that the master has with his sanction discharged and paid off Robert Wood, the first mate," it was held that if this evidence does not conclude Wood in any court it affords satisfactory reasons to this court for declining cognizance of the matter and for remitting him to the tribunals of his country. The Infanta, Abb. Adm. 263.

And where seamen requested to be discharged in this country before a termination of the voyage, and the master assented to their leaving the vessel and going to the British consul's office for their tickets of nationality and service, but the master subsequently refused to consent to their discharge or to pay them their wages, the United States district court refused to entertain jurisdiction of a libel against the protest of a British consul. Lynch v. Crowder, 12 Law Rep. 355.

In The Belgenland, 114 U. S. 355, 29 L. ed. 152, the court said that if by treaty stipulations the consul has the sole right to adjudge controversies between master and crew such stipulation should be observed.

And a libel in the United States court will not be entertained against a British vessel for wages by British sailors shipped for a voyage ending in a home port where the British consul protests and special circumstances are not shown, such as a clear deviation from the voyage described in the articles, cruelty, or the breaking up of the voyage. The Becherdass Ambaidass, 1 Low. Dec. 569. In this case the court said that objections to the jurisdiction against the protest of the consul have weight as showing the opinion of the person who is interested in the care of British seamen, and that there is no such hardship in this case as required the libellants to be paid here rather than at home.

In Morris v. Cornell, 1 Sprague, 62, it was said that the right given to seamen by act of Congress 1840, to lay their complaints before an American consul in a foreign port, is one of great importance which the court of admiralty will carefully guard.

And the Italian consul has exclusive jurisdiction of a demand for wages by an Italian seaman against the master of an Italian vessel under treaty between United States and Italy September, 1878, providing that the consul general, consuls, vice consuls, and consular agents shall have exclusive charge of internal order on board of merchant vessels of their nation, and shall alone take cognizance of questions of whatever kind that may arise between the captain, officers, and seamen without exception, and especially of those relating to wages and the fulfilment of agreements reciprocally made. The Salomoni, 29 Fed. Rep. 534.

And an adjudication by a Prussian consul at New York of a claim for wages by a Prussian seaman is held to be a bar to a proceeding *in rem* in the United States district court. The

if he has knowledge that the court has no jurisdiction; but an examination of these cases shows that the facts known to the officer did not affect the jurisdiction of the court, but related to irregularities in the prior proceedings, or to matters merely of defense to the action. See cases above cited. Of course, where the court has jurisdiction of the subject-matter and of the parties to an action, knowledge on the part of the officer or information to him that there is some irregularity in the proceeding can make no difference. *Underwood* v. *Robinson*, 106 Mass. 296. Nor can it make any difference that the officer is informed that there is a defense to the action, such as that the defendant has a receipt (*Tuitchell* v. *Shaw*, 10 Cush. 46, 57 Am. Dec. 80); or a discharge in insolvency (*Wilmarth* v. *Burt*, 7 Met. 257); or that the defendant is an infant (*Cassier* v. *Fales*, 139 Mass. 461). But the question of jurisdiction is a more serious matter, and if facts are brought to the attention of the officer about which he can have no reasonable doubt, and he knows, or is bound to know, that on these facts the court has no jurisdiction of the controversy, he may well be held to proceed at his peril. We can see no hardship upon the officer in holding him responsible in this case for an illegal arrest and for a false imprisonment. If an officer has reasonable cause to doubt the lawfulness of an arrest, he may demand from the plaintiff a bond of indemnity, and so save himself harmless. *Marsh* v. *Gold*, 2 Pick. 285, 290. We are not aware that this case has ever been doubted, and in practice bonds of indemnity have often been required. In the case at bar, after receiving full information, he chose to proceed, and, in defiance of the treaty, to subject the subject of a foreign nation to a gross indignity, for the purpose of extorting money from him, under the guise of a precept, which the court had no jurisdiction to issue, and which it would not have issued, had the facts been before it. We approve of the language of

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Elwine Krepiin, 4 Ben. 413, Reversing 9 Blatchf. 438.

In *Ex parte* Newman, 14 Wall. 152, 20 L. ed. 877, a mandamus compelling the circuit court to take jurisdiction in this case was denied where it had reversed the decision in the district court on an appeal.

And a consul has exclusive jurisdiction of a controversy between Prussian seamen and masters of a Prussian vessel in regard to contracts for wages although the proceeding may be *in rem*, under Prussian treaty May 1, 1828, providing that consuls, vice consuls, and commercial agents shall have the right as such to sit as judges and arbitrators in such differences as may arise between the captain and crews belonging to the nation whose interests are committed to their charge without the interference of local authorities except in certain cases. *Ex parte* Newman, 14 Wall. 152, 20 L. ed. 877.

So, a German consul has the sole jurisdiction to determine whether or not American seamen shipped on a German vessel are entitled to their discharge in a United States port under the shipping articles, under treaty with Germany, December 11, 1871, Public Treaties, 258. The Burchard, 42 Fed. Rep. 608.

And the marine court of New York has no jurisdiction of an action for seamen's wages earned on board of a Swedish vessel, under treaty with Norway and Sweden, providing that consuls and vice consuls shall have full jurisdiction in such cases. Norberg v. Hillgreu, 5 N. Y. Legal Obs. 177.

And a Norwegian consul in this country has exclusive jurisdiction of a dispute between a seaman and a master of a vessel in regard to wages, although such seaman is an American citizen and shipped at an American port, under treaty with Norway, July 4, 1827, art. 13, Public Treaties, p. 740, providing that the consuls of either nation shall have the right to sit as judges or arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nations whose interests are committed to their charge without the interference of the local authorities. The Marie, 49 Fed. Rep. 286.

So, a Norwegian consul has exclusive jurisdiction in a libel by a citizen of the United States for wages as seaman on a Norwegian vessel where he claimed that on his arrival in this country he was put ashore, manacled, and finally discharged without further pay. The Welhaven, 55 Fed. Rep. 80.

In Seidel v. Peschkaw, 27 N. J. L. 427, it was said that a consul is authorized to hear complaints of seamen against the master.

In the following cases jurisdiction of a consul is held not to be so exclusive as to prevent other courts from entertaining jurisdiction in controversies between seamen and masters of foreign vessels under the peculiar circumstances of each case. The Amalia, 3 Fed. Rep. 652; Weiberg v. The St. Oloff, 2 Pet. Adm. 428; Orr v. The Achsah (Phila. Dist. Ct. Dec. 1849), Brightly's Fed. Dig. 166; Moran v. Baudin, 2 Pet. Adm. 415; The Lilian M. Vigus, 10 Ben. 385; The Havana, 1 Sprague, 402; The Becherdass Ambaidass, 1 Low. Dec. 569; Davis v. Leslie, Abb. Adm. 123; Bernhard v. Creene, 3 Sawy. 230; Patch v. Marshall, 1 Curt. C. C. 452.

In The Amalia, 3 Fed. Rep. 652, where there was no consul or other officers of Sweden within this jurisdiction, the nearest being the vice consul at Boston, a libel was allowed in the United States district court of Maine against a Swedish vessed by a seaman notwithstanding the treaty between the United States and Sweden July 4, 1827, 8 U. S. Stat. 346, 352, providing that the country shall have the right to appoint consuls, vice consuls, etc., in the commercial ports and places of the other country; and that such consuls shall have the right as such to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nations whose interests are committed to their charge. In this case the master sailed from Gibraltar for Portland with an inadequate supply of provisions, violating the laws of Sweden, and compelling great hardship which authorized the discharge of the seamen.

In Weiberg v. The St. Oloff, 2 Pet. Adm. 428, a libel was sustained notwithstanding the protest of the foreign consul where Swedish seamen asserted a claim for wages against a Swedish vessel. It was held that a deviation from the original voyage authorized a demand for wages, and where the libellant was treated with cruelty by the master for filing the libel the master was found guilty of contempt and fined $20, to stand committed until paid. The Swedish minister denied the jurisdiction of the court on the ground that the Swedish maritime law prohibited the parties from suing for redress in

Mr. Freeman in *Savacool* v. *Boughton*, 21 Am. Dec. 204, where, after a discussion of the cases bearing upon the question of the liability of an officer, he says: "We apprehend, at all events, that the protection of process cannot so far extend as to protect an officer who, from all the circumstances of the case, does not appear to have acted in good faith, and whose conduct shows that his eyes were wilfully closed to enable him not to see and know that he was too ready an instrument in the perpetration of a grievous wrong." In the opinion of a majority of the court the instruction requested should have been given.

Exceptions sustained.

Knowlton, J., dissenting:

It seems to me that the opinion of the majority of the court is wrong, in holding that the defendant was bound to receive statements made by the plaintiff or others for the purpose of determining whether he could lawfully serve a writ which was regular in form, and which on its face showed a case within the jurisdiction of the court. The exceptions on this point present a naked proposition of law, and raise no question in regard to the good faith of the defendant in performing his official duty. The writ which he served stated an ordinary case for the collection of a debt. An officer is bound to know the law, even to the extent of determining whether a statute on which his process is founded is or is not constitutional. But for the facts, he is not called upon to take the testimony of anybody in regard to anything outside of the statements contained in the process, nor even to act upon what he believes to be his own knowledge. The juris-

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a place subject to a foreign government. The Swedish consul offered to settle the case and ship the libellants to Sweden on some other vessel, but afterwards declined on the ground that after the protest he had made he could not permit the seamen to be received on board of any other vessel.

In The Becherdass Ambaidass, 1 Low. Dec. 569, it was said that some circumstances may be strong enough to induce action of the admiralty court in a claim by seamen against a master, notwithstanding the protest by the consul, that in The St. Oloff Case there had been both cruelty and deviation, and the protest of the consul was disregarded.

In Davis v. Leslie, Abb. Adm. 123, it was said that the case of Welberg v. The St. Oloff, is of doubtful authority as to admiralty jurisdiction where the voyage is not terminated, unless it was placed upon the ground that the seamen were not proved to have been duly bound to the vessel.

The protest of a foreign consul will not prevent the district court from taking jurisdiction of a suit for wages, where the voyage of a foreign vessel has been broken up and the seamen discharged in an American port. Orr v. The Achsah (Phila. Dist. Ct. Dec. 1849), Brightly's Fed. Dig. 166, Mss., cited in M'Afee v. The Creole, 1 Phila. 190.

In Moran v. Baudin, 2 Pet. Adm. 415, a French sailor maintained a libel in admiralty for wages where the vessel had made many deviations from her course. No question of jurisdiction was made in this case. But in Davis v. Leslie, Abb. Adm. 125, it was said that this case was of questionable authority unless placed upon the ground that the seamen were not proved to have been duly bound to the vessel.

In Thomson v. The Nanny, Bee. 217, it was said that in the case of Moran v. Baudin there had been a total deviation of voyage for two years, and France and America were then allied, and no consular convention existed, and no plea was made to the jurisdiction.

In The Lilian M. Vigus, 10 Ben. 385, a libel by British seamen against a British vessel was entertained notwithstanding the protest of a British consul, where it did not appear that any of the seamen belonged to Nova Scotia where the vessel belonged, and several of them were from different European countries, and the bark had long since finished her voyage, and it was uncertain where she was, and when the libel was filed it was uncertain for what port she would sail.

The court said that to send these sailors to Halifax to prosecute their claim would be practically equivalent to denying their claim, since there appeared to be no probability that they would find either the vessels or owners at that place.

And the United States district court may entertain jurisdiction against a British vessel in favor of a British master for wages, and will more readily take jurisdiction if no objection be made by the consul of the nation to which the vessel belongs. The Havana, 1 Sprague, 402.

In The Belgenland, 114 U. S. 355, 29 L. ed. 152, it was said that circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum, as in cases of foreign seamen suing for wages or because of ill-treatment; and the consent of their consul or minister is frequently required before the court will entertain jurisdiction, not on the ground that it has not jurisdiction, but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not. The court said that where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of a consul.

In The Becherdass Ambaidass, 1 Low. Dec. 569, it was said that where the voyage is ended or broken up, and no treaty prescribes the mode of proceeding, a suit in admiralty may be brought for seamen's wages.

In Bucker v. Klorkgeter, Abb. Adm. 402, it was said that the courts of the United States will take jurisdiction of cases of foreign seamen against a foreign master for wages, where the voyage is broken up or ended in this country or when the men are discharged here. The court further said that the American courts show a greater favor to seamen than do the courts of Great Britain, for the former proceed irrespective of any interference on behalf of the seamen by his consul, while the English courts would seem still to insist that the sanction of such an officer to the action shall be procured unless the nature of the case forbids.

A certificate of a British consul as to the desertion of a British seaman was disregarded where it was not shown that the consul had knowledge that an entry to that effect on the ship's log was not made on the day of occurrence, and the entry was made by a person not attached to the ship, under the captain's direction. The Lilian M. Vigus, 10 Ben. 385.

diction which the court must have in order to justify him is jurisdiction of the case stated in the writ. It may turn out that there was no real case upon which to issue a writ, and that the prosecution is grossly malicious, or that there is a real case materially different from that stated, and which does not come within the jurisdiction of the court; but the officer is not bound to inquire into matters of this kind. This has been held in a great many cases in Massachusetts and elsewhere, and the reasons for the rule have been elaborately stated in different jurisdictions. These reasons seem to me fully to cover the present case. *Chase* v. *Ingalls*, 97 Mass. 524; *Cassier* v. *Fales*, 139 Mass. 461; *Donahoe* v. *Shed*, 8 Met. 326; *Clarke* v. *May*, 2 Gray, 410, 61 Am. Dec. 470; *Wilmarth* v. *Burt*, 7 Met. 257; *Twitchell* v. *Shaw*, 10 Cush. 46, 57 Am. Dec. 80; *Underwood* v. *Robinson*, 106 Mass. 296, 297; *Rawson* v. *Spencer*, 113 Mass. 40–46; *Fisher* v. *McGirr*, 1 Gray, 1–45, 61 Am. Dec. 381; *State* v. *Weed*, 21 N. H. 262, 53 Am. Dec. 188; *Batchelder* v. *Currier*, 45 N. H. 460; *Watson* v. *Watson*, 9 Conn. 140, 23 Am. Dec. 324; *Warren* v. *Kelley*, 80 Me. 513–531; *Earl* v. *Camp*, 16 Wend. 562; *Webber* v. *Gay*, 24 Wend. 485; *People* v. *Warren*, 5 Hill, 440; *Hann* v. *Lloyd*, 50 N. J. L. 1; *Taylor* v. *Alexander*, 6 Ohio, 147; *Henline* v. *Reese*, 54 Ohio St. 599; *Wall* v. *Trumbull*, 16 Mich. 228–234.

The cases in Wisconsin and Illinois, cited in the opinion, are the only ones that I have been able to find, after considerable investigation, which hold a different doctrine. On the authorities cited above, I am unable to

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In England the assent of the representative of the government to which the seamen belong is required before the court of admiralty will take jurisdiction of a claim for seamen's wages against a foreign vessel; but this assent is not required in the United States if the voyage is terminated or the contract of hiring dissolved by the wrongful act of the owner or master. Davis v. Leslie, Abb. Adm. 123. In this case it was said that if the vessel is still in the prosecution of the voyage, United States courts will not take jurisdiction unless the representative of the vessel's country assent.

The admiralty court will entertain jurisdiction of a suit by French and German citizens against a British master for cruelty to them as seamen, notwithstanding the protest of the vice consul. Bernhard v. Creene, 3 Sawy. 230.

In this case the court said that the consul is not the representative of the libellants nor authorized to speak for their governments because they are not British subjects, and the parties cannot be remitted to the home forum, for, being subjects of the different governments, there is no such tribunal. The consul said that he was about to examine into the question in the consular court, but to this it was said that such court had not yet been organized, and that if it was a case of concurrent jurisdiction the jurisdiction of the admiralty court having first attached would be exclusive. It was further said that the consular court has no jurisdiction over this claim or power to give relief.

In Patch v. Marshall, 1 Curt. C. C. 452, an admiralty court entertained jurisdiction of a libel for a tort by a seaman against the master of a British vessel notwithstanding the protest of the British consul, saying: "It is true this court should not call in question a British consul for his official acts respecting the crew of a British vessel in a foreign port. . . . But it does not follow that the conduct of the master of such a vessel in procuring the official intervention of the consul upon false allegations to the injury of an American citizen by imprisonment in a foreign jail is not to be here investigated."

A discharge by a consul, and securing one month's wages, are not a satisfaction of a claim for damages existing for any actual injuries inflicted by cruelty or as a bar to such claim, under U. S. Rev. Stat. § 4600, Amend. June 26, 1884, providing that a consular officer in case of apprehension of a seaman deserting on account of unusual or cruel treatment shall discharge him, requiring payment of one month's extra pay. The W. L. White, 25 Fed. Rep. 503.

In The Salomoni, 29 Fed. Rep. 534, it was said that if a seaman file a libel in the admiralty court for an assault by a master on a seaman of an Italian vessel the treaty would not prevent the Federal court from entertaining jurisdiction.

But in the absence of termination of voyage, discharge of seaman, or brutality, the admiralty court will refuse to entertain jurisdiction in an action for damages by a seaman for assault and battery on a British vessel. The Carolina, 14 Fed. Rep. 424; Fry v. Cook, 14 Fed. Rep. 424.

And the same was held in an action by a Chinese seaman against a British vessel. The Montapedia, 14 Fed. Rep. 427.

The United States district court asserted jurisdiction of a libel for wages on request of a British consul who had advised a seaman to leave a British vessel loaded for Chili (then in insurrection), where the movements of the vessel were uncertain. The Sirius, 47 Fed. Rep. 825.

This jurisdiction was asserted notwithstanding English merchants' shipping act 1854, § 190, providing that no seaman engaged for a voyage to terminate in the United Kingdom shall sue for wages in any foreign court unless discharged at the master's written consent, or he proves ill usage.

d. As to discharge of seamen abroad.

Generally masters give bonds to return to the port bringing back the seamen shipped unless in case of desertion, death, etc. The consuls in foreign countries generally inquire into complaints and pass upon discharges of seamen and enter on the ship's roll their findings. A lawful discharge of a seaman, approved by a consul, will exonerate the master if he has paid to the consul the amount due to the seaman. If the discharge is wrongful, or the consul fraudulently approves the same, the facts may be inquired into notwithstanding the consul's action.

Act of Congress February 28, 1803, Rev. Stat. § 4582, provided for the payment of three months' extra wages to the consul when a vessel is sold abroad and her company discharged, or when a seaman, a citizen of the United States, is with his own consent discharged abroad. The Amendment of June 26, 1884, provides for the payment of one month's wages.

United States Rev. Stat. § 4583, amended June 26, 1884, provides that a consul shall require the payment of one month's extra wages when a discharge is made abroad on complaint of the seaman that the voyage is continued contrary to agreement, or when a seaman is dis-

see that it makes any difference whether the outside information communicated to the officer, if taken to be true, would show the real case to be one upon which such a precept cannot properly be issued, because it comes within a treaty giving exclusive jurisdiction to another tribunal, or would show the precept to be unwarranted for any one of numerous other causes. That the defendant in the original action happens to be a captain of a Norwegian ship, and to owe the plaintiff in his official capacity, gives him a privilege of which he may or may not avail himself, to take the case out of the general jurisdiction of the court. I think this fact calls for the application of the same principle as a strictly personal privilege. Indeed, the principle of the cases seems to cover every kind of external fact which operates to take away a jurisdiction that appears to be perfect on the face of the papers. It has been held that an officer may, if he chooses, act upon his knowledge or information of actual facts which show that the court was without jurisdiction, and refuse to serve the writ. *Earl* v. *Camp*, 16 Wend. 562; *Henline* v. *Reese*, 54 Ohio St. 599. But this is very different from requiring him, at his peril, to determine questions of fact. I think the exceptions should be overruled.

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charged by a consul in consequence of an injury received in the services of the vessel.

The prior acts of 1803 and 1840 required payment to the consul of three months' extra wages unless the consul deemed it just to discharge without exacting extra wages.

A discharge of a seaman at a foreign port must be made before a consul. Hathaway v. Jones, 2 Sprague, 56.

And a consul may discharge a seaman abroad for refusing to do any duty. Jordan v. Williams, 1 Curt. C. C. 69.

A discharge of a seaman in a foreign port, under acts of Congress February 28, 1803, and July 20, 1840, can be ordered by a consul only upon the consent of the seaman. The certificate of a consul must present a distinct impression of a seal so that it may be identified. The Atlantic, Abb. Adm. 451.

And a consul at a foreign port has no power to discharge a seaman for disability arising from wounds contracted in the service of the ship when the seaman is confined to his bed on shore. Callon v. Williams, 2 Low. Dec. 1. In this case the court said that the statute authorizing a discharge by a consul was intended for a case in which there is some choice exercised to go or stay. Since the amendment of 1884 a consul may discharge for such a cause.

But where a vessel is wrecked in a foreign country, and the captain sells the vessel and the company are discharged, not by any consent of their own, but by a casualty, the act of Congress of 1803, providing for payment to the consul of wages of seamen, does not apply. Gilpin's Ops. Atty. Gen. 811.

And the act of Congress February 28, 1803, does not apply to American seamen employed in a foreign vessel. Gilpin's Ops. Atty. Gen. 830.

Where seamen are too sick to return in the vessel from a foreign port three months' extra wages are to be paid to the consul. Gilpin's Ops. Atty. Gen. 442.

And where an American seaman is by his own consent discharged in a foreign port, and is prevented by the conduct of the master from making an application to the American consul at the place of discharge, the seaman may recover wages, under act of Congress 1840, Rev. Stat. §§ 4582, 4584, providing for the payment of extra wages on discharge at a foreign port. Wilson v. Borstel, 73 Me. 273.

And where an American seaman is discharged by a master in a foreign port if three months' extra wages be not paid to the consul abroad the same may be recovered by libel. Orne v. Townsend, 4 Mason, 541.

Where a vessel is disabled, and the master has paid to the consul the whole amount of extra wages which would have been required of him if the vessel had been voluntarily sold, the master is relieved from further liability al-

though the seamen may not have demanded their wages from the consul. Drew v. Pope, 2 Sawy. 72.

And where the certificate of a consul stated that a whaling seaman was discharged by reason of sickness, and his hurt was received in the ship's service, it was held that he was entitled to be paid from the ultimate proceeds the same proportion of his lay for the whole voyage as the time he served was of the time of the whole voyage, deducting what he had already received. Brunent v. Taber, 1 Sprague, 243.

Some cases hold that a certificate of a consul that the discharge is granted on the seamen's consent is conclusive as to that fact in the absence of proof of fraud. Tingle v. Tucker, Abb. Adm. 519; Lamb v. Briard, Abb. Adm. 367.

In the latter case the seaman contended that his consent was induced by the threats of the master and consul that he should be brought home in irons. But the court said that his conduct would have justified such treatment. This case was distinguished in Callon v. Williams, 2 Low. Dec. 1, on the ground that it showed the discharge to have been made on the seaman's consent.

But where seamen were ill treated and complained to the master at a foreign port, and the master agreed to discharge the mate if the men would navigate the ship to the next port, but the men refused duty because the master did not discharge the mate, and they were then discharged for disobedience, by the consul, it was held that they were entitled to extra wages required to be paid for discharge in a foreign port. Coffin v. Weld, 2 Low. Dec. 81. The court said that if the consul had decided that there had been no cruelty his finding might be conclusive, but he made no such decision at any time.

In Foye v. Leckie, 1 Sprague, 210, where a second mate was wrongfully discharged before a consul without wages, having previously been placed in irons until the arrival at that port for refusing to obey an order given as punishment when there has been no offense, it was held that he was entitled to damages as indemnity for the wrong done.

And where a master had allowed a sailor to drift away on a raft, and afterwards refused him permission to board the vessel, he was held liable for a wrongful discharge notwithstanding the sailor had set up such claim as a set-off in an action by the master for converting the raft to his own use, and notwithstanding the master produced a certificate of a consul stating that the master has produced evidence satisfactory to him of the desertion of one of his crew, and that he had with his consent discharged another. Hutchinson v. Coombs, 1 Ware, 65.

And a whaling seaman discharged at his own request before a consul at a foreign port, where

his rights are not explained to him by the master or consul, is not bound by the settlement where he is not paid the full value of his services. Jenks v. Cox, Holmes, 92.

And where a seaman is discharged by a United States consul at a foreign port without the payment of three months' wages, such discharge will not bar an action for the portion accruing to the sailor unless the consul makes an official entry on the crew's list and upon the shipping articles, under act of Congress July 20, 1840. Miner v. Harbeck, Abb. Adm. 546.

In Jay v. Almy, 1 Woodb. & M. 262, it was said that the master is not excused for improperly discharging a seaman abroad by the consul's approbation.

Seamen do not forfeit their wages where they are suspicious of the character of the voyage, and complain to a consul, who orders a seizure of the vessel, although the facts may not be sufficient to justify a forfeiture of the vessel. The City of Mexico, 28 Fed. Rep. 207.

The fact that foreigners were employed as seamen in the merchant ships of the United States, or had deserted from an American ship and become destitute, does not devest the authority of the consul to require another American ship to bring them to the United States. Matthews v. Offley, 3 Sumn. 115.

But a consul or vice consul cannot maintain an action in his own name, under act of Congress 1803, providing for the recovery of a penalty for the benefit of the United States, where the master refuses to take on board destitute seamen and transport them to the United States, as the action must be brought in the name of the United States. *Ibid.*

And a master is not required to return to this country foreign seamen shipped at their own home for a particular cruise ending there, and discharged there without the consent of a consul. United States v. Parsons, 1 Low. Dec. 107.

Where a minor secretes himself in a whaling vessel, and is not discovered until the vessel is at sea, and the master sets the minor at work, he is entitled to wages, as it is the duty of the master to leave him at the first port in order that the consul may cause him to be sent to the home port. Luscum v. Osgood, 1 Sprague, 82.

A libel for wages due a British seaman was dismissed where the consul refused to discharge him, although he had been absent for several days from the vessel, and when he returned the master told him to go about his own business, and an entry was made on the ship's log of desertion; but in the libel case the master expressed his willingness to receive him on board and take him to home port. Wilson v. The John Ritson, 35 Fed. Rep. 663.

e. As to disabled vessels.

A consul has power to cause a survey to be made of disabled vessels, and his duty requires him to look after cargoes of stranded vessels, and to take prompt measures for their preservation. The United States Consular Regulations authorize the consul to appoint inspectors where complaint is made as to the seaworthiness of a vessel.

A survey of a disabled vessel may be directed by an American consul, as by usage a part of his official duty. Potter v. Ocean Ins. Co. 3 Sumn. 27.

In Seidel v. Peschkaw, 27 N. J. L. 427, it was said that a consul is to inquire into the seaworthiness of ships, and is to take measures for the preservation of stranded vessels of the United States and their cargoes.

But a consul has no authority to order a sale of a ship in a foreign port either on complaint of the crew or otherwise, under act of Congress July 20, 1840, 5 Stat. at L. 396, providing for the discharge of seamen of an unseaworthy ship. Power of Consuls, 6 Ops. Atty. Gen. 617.

In The Bee, 1 Ware, 336, where a libel for salvage of a British vessel was filed in admiralty, the British consul asserted a claim for the owners claiming that the vessel was not abandoned at sea. Afterwards an objection to the jurisdiction of the admiralty court was made, but it was held that the objection came too late.

f. In prize cases.

A consul has no power to adjust the claims made against prize vessels.

A stipulation by the captains of the respective vessels, and by the French and Spanish consuls, that a vessel captured by a French privateer should be sold and the proceeds paid as the two governments should decide, was enforced in the United States district court. Gernon v. Cochran, Bee, 209.

In Gilpin's Ops. Atty. Gen. 39, it was said that the French consul at Charleston has highly misbehaved in holding a court within the United States for condemning a capture as prize, and in causing a sale to be made under his authority.

g. In suits between French citizens.

A state court had no jurisdiction of an action for slander between French citizens, under Convention, art. 12 (1778), providing that all disputes between the subjects of France in the United States, or between the citizens of the United States in France, shall be determined by their respective consuls or vice consuls either by reference to arbitrators or by summary judgment without costs. Goddard v. Luby, 1 Bay, 440.

This provision is omitted from the later consular treaty with France in 1853.

And a state court had no jurisdiction in a civil suit between two French subjects to hold the defendant to bail, although the consul of France had made a decree in favor of the plaintiff, and the plaintiff was without remedy. Bertrandt v. Gautier, 1 Yeates, 371. In this case the court said that if the French consul has no power to enforce his own decree, the minister of France can readily remedy the defect by negotiation and agreeing on an additional article with the executive authority of the United States.

But under the consular convention between the United States and France, the consular jurisdiction of French consuls did not extend generally to all differences and suits between Frenchmen. Villeneuve v. Barrion, 2 Dall. 235, note, 1 L. ed. 362.

And a French consul had no such jurisdiction as to oust the state courts from jurisdiction in a case against a citizen of France where the plaintiff was not also a citizen of France, although he might not have been naturalized in this country, under the Consular Convention, art. 12, that provided that all differences and suits between the citizens of France in the United States, or between the citizens of the United States within the Dominion of France, shall be determined by the respective consul and vice consul, and that no officer of the country, civil or military, shall interfere therein. Caignet v. Pettit, 2 Dall. 234, 1 L. ed. 362.

The 12th article of the Convention between America and France, November 14, 1778, did not oust a state court from jurisdiction between one French subject and another French subject

who had taken the oath of allegiance to the United States. Portier v. Le Roy, 1 Yeates, 371.

III. *Powers of consul in other matters.*

a. *To assert claims for his citizens and country.*

A consul may assert a claim in behalf of his fellow citizens, even where the claimants are unknown, without any special authority. But he must have special authority before he can obtain actual restitution or proceeds.

A Spanish consul is authorized to assert a claim for property of his fellow citizen legally captured by a privateer fitted out in this country for a South American country at war with Spain and recaptured by the crew, and seized for violation by such crew of our revenue laws. But a consul cannot receive actual restitution of the property without special authority from the individuals entitled thereto. The Bello Corrunes, 6 Wheat. 152, 5 L. ed. 229.

And a consul of a foreign country was entitled to assert a claim for slaves belonging to the subjects of that country wrongfully captured and brought to this country by a privateer; but he was not entitled to have them surrendered without satisfactory proof as to who was the real owner. The Antelope, 10 Wheat. 66, 6 L. ed. 268.

And a consul in the absence of any authorized agent, could claim on behalf of subjects of his nation property seized where a British ship was captured by a privateer and all the cargo excepting 6,276 hides were condemned as enemy's property. The hides were claimed by the Spanish consul as Spanish property. The London Packet, 1 Mason, 14.

And a foreign consul has authority to petition the court to order the marshal to pay into the registry proceeds of a sale of property liable for salvage, in which the citizens of his country are interested, they being absent and having no other legal representative in this country. The Adolph, 1 Curt. C. C. 87. In this case the consul had not received his *exequatur* when he filed his petition.

So, a consul may intervene to contest the question of forfeiture for breach of neutrality, where his government has an interest in the vessel. The Conserva, 38 Fed. Rep. 431.

In a libel for salvage of a vessel where a claim was interposed by a Spanish consul for property as belonging to certain Spanish subjects unknown, an order was made directing the sale of the cargo and vessels and the proceeds to be brought into court for distribution. Rowe v. Brig, 1 Mason, 372.

In L'Invincible, 1 Wheat. 239, 4 L. ed. 81, a French consul interposed a claim on behalf of French owners where a French privateer was captured by a British cruiser and recaptured by an American privateer, and recaptured by British frigates, and recaptured by an American privateer and brought into a United States port as a prize.

And where a privateer of a Spanish colony at war with Spain seized a Spanish vessel, and the privateer brought it into a neutral port of this country, the consul of Spain filed a libel against the same, and his right was recognized. The Divina Pastora, 4 Wheat. 52, 4 L. ed. 512.

In The Vrow Anna Catharina, 5 C. Rob. Adm. 15, a claim of territory was made by a Portugese consul for a vessel seized within neutral limits.

But a Spanish consul is not authorized, merely by virtue of his office, to interpose a claim for a prize belonging to British subjects seized by an American privateer in neutral Spanish territory during war between this country and Great Britain, as the claim for the violation of neutral territory must be made by the government. The Anne, 3 Wheat. 435, 4 L. ed. 428.

b. *To administer on estates.*

The Federal statute makes it the duty of consuls in foreign countries, where the law of the country permits, to take possession of the personal property of citizens of the United States who shall die within their consulates, there being no legal representative. The consuls have acted upon this statute in a good many cases; but where the question arose in England the court refused to recognize the right, and in Louisiana it is held that a consul has no right to be appointed administrator in such case.

A consul general of Italy has authority to demand the distributive shares in an estate belonging to persons in his country deposited in court, under treaty with Italy, providing that a consul general may have recourse to the authorities of the respective countries within their respective districts, in order to defend the rights and interests of their countrymen. *Re* Tartaglio, 12 Misc. 245.

And in an application for letters of administration a French consul is entitled to be heard informally as a national agent of parties supposed to be interested, under treaty with France securing to the consuls of both nations the right to apply to the authorities of their respective governments, whether Federal or local, judicial or executive, for the purpose of protecting informally the rights and interests of their countrymen, especially in cases of absence. Ferrie v. Public Administrator, 3 Bradf. 249.

A consul must account to the government for fees received by him, under U. S. Rev. Stat. § 1709, making it the duty of consuls and vice consuls to administer upon the personal estate left by any citizen of the United States who shall die within their consulates, and Consuls Regulations 1888, ¶ 508, item 56, regulating fees in such cases. United States v. Eaton, 169 U. S. 331, 42 L. ed. 767.

And a consul in a foreign country acting as administrator, after the payment of debts cannot retain the surplus as against an administrator of deceased in order to assert a lien for a tort alleged to have been committed by the intestate against him. Sturgis v. Slacum, 18 Pick. 36.

In Seidel v. Peschkaw, 27 N. J. L. 427, it was said that a consul is to take possession of the personal estate of such citizens of the United States as shall die within his consulate unrepresented, and to administer the same by paying the local debts and remitting the residue to the United States treasury.

But in Thompson's Succession, 9 La. Ann. 96, and Lanfear v. Ritchie, 9 La. Ann. 96, it is held that a vice consul of Sweden is not entitled to supersede an administrator of a Swedish subject appointed in Louisiana, as no international law or treaty gives any such right, and the distribution of assets of foreigners is the subject of special legislation in the state.

In Aspinwall v. The Queen's Proctor, 2 Curt. Eccl. Rep. 241, the administration of the effects of a citizen of the United States dying intestate in England, *in itinere*, limited for the purpose of paying his debts and transmitting the balance to the treasury of the United States, was refused to the American consul upon the nonappearance of any next of kin, where the Crown opposed the grant. In this case the court said:

"It has been said that by the law of the United States British consuls may take possession of the property of British subjects in similar circumstances But this is not by the law of nations, but by custom or express enactment, and is not a law which this country is bound to follow; this country has not adopted the principle of reciprocity in this respect."

c. *To exercise diplomatic functions.*

A consul is not a diplomatic officer. The Anne, 3 Wheat. 435, 4 L. ed. 428. In this case the court said that there is no doubt that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominion he assumes to exercise it.

In Otterbourg v. United States, 5 Ct. Cl. 430, it was said: "No consular officer shall exercise diplomatic functions, or hold any diplomatic correspondence or relation on the part of the United States, in, with, or to the government or country to which he shall be appointed, or any other country or government, when there shall be in such country any officer of the United States authorized to perform diplomatic functions therein, nor in any case unless expressly authorized by the President so to do." 11 Stat. at L. p. 53.

In Functions of Consuls, 7 Ops. Atty. Gen. 342, it was said that consuls in China and Turkey have not any diplomatic privileges except such as they might have in France during the absence of the minister.

d. *To perform marriage ceremony.*

It seems to be a question of some doubt as to whether or not a consul can perform marriage ceremonies, although it is held in Massachusetts that a marriage before a foreign consul is valid, and it has been suggested that a consul in a non-Christian country may perform marriage ceremonies.

In Loring v. Thorndike (1862), 5 Allen, 257, where an American citizen and woman of Hesse Darmstadt were temporarily residing at the city of Frankfort and were married by contract in writing in the presence of witnesses by and before the American consul at Frankfort, it was held that such marriage was valid. In this case there was some conflict in evidence as to the validity of such marriages in that country, but it was shown that the consul was in the habit of marrying foreigners, and that such marriages were recognized in that country as valid.

But where a marriage between a British subject domiciled in England and a female ward of court was celebrated in the presence of the British consul, and in the English church at Antwerp by a clergyman of the Church of England, who had been appointed chaplain of the church and was paid by the British government, the marriage was held invalid where certain ceremonies prescribed by the law of Belgium had not been observed. Kent v. Burgess, 11 Sim. 361, 5 Jur. 166.

Consuls have no lawful authority, as such, to solemnize marriages in countries comprehended within the pale of the international public law of Christendom. 7 Ops. Atty. Gen. 18, 342.

In regard to states not Christian, a contract of marriage is not subject to the *lex loci*, but it is governed by the law of the domicil, and in such cases a valid contract. Marriage may be solemnized by a consul of the United States in countries not Christian. 7 Ops. Atty. Gen. 18.

There is some question as to his authority in non-Christian countries. Celebration of Marriages by Consuls, Functions of Consuls, 7 Ops. Atty. Gen. 342.

In Celebration of Marriages by Consuls, 7 Ops. Atty. Gen. 23, it was said that "the Code (arts. 47, 48) provides that any civil act of Frenchmen abroad shall be valid if it be drawn up in pursuance of the forms of the place, according to the rule *locus regit actum;* or if it has been received conformably to the laws by the diplomatic agents or consuls of France. It has been doubted whether this applies to marriage, though the better opinion is that it does. (Dalloz, *ubi supra* [Dict. Jur. Mariage] Nos. 362, 363; Toullier, Droit Civil, tom. 1, No. 360; Merlin, Répert., Mariage, p. 641) It is said, however, that if one of the parties to a marriage by a French consul abroad is French and the other not, then the marriage is null, because the consul has no jurisdiction as to the party not French, and the marriage may be attacked by either party. (Dalloz, *ubi supra,* [Dict. Jur. Mariage] Nos. 365, 366). In one of the cases where this point was decided, the parties possessed an act of marriage, with twenty years' cohabitation and two children. (Proudhon, Tr. des Personnes, tom. 1, note a.)"

e. *To grant certificates.*

A consul's certificate must show clearly his signature and seal, and is of no value in regard to matters not clearly within his official duties. In regard to a discharge of a seaman, the certificate must show upon what grounds the consul proceeded, and that his action is official, and that he had jurisdiction. A certificate as to an official act is admissible in evidence, and in some cases, in the absence of fraud and when supported by depositions, has been held conclusive as to official acts.

In order to entitle a consular certificate to be used in evidence the signature and the impression of the seal must be legible. The Atlantic, Abb. Adm. 451.

And a certificate under seal of the United States consul at Portugal, as to a copy of the Portugese law, is insufficient. Church v. Hubbart, 2 Cranch, 187, 2 L. ed. 249.

And the fact that there is but one bill of lading will not justify admitting in evidence a copy certified by a United States consul to be a true copy where the original is in the possession of the libellant, as a consular certificate cannot be accepted as evidence except where it has been made such by statute. The Alice, 12 Fed. Rep. 923; Citing Levy v. Burley, 2 Sumn. 355; Church v. Hubbart, 2 Cranch, 187, 2 L. ed. 249; United States v. Mitchell, 2 Wash. C. C. 478.

And the certificate of a British vice consul at the Brazils, of the amount of the proceeds of damaged goods which, by the law of that country, are compelled to be sold under his direction, is incompetent. Waldron v. Coombe, 3 Taunt. 163.

So, a consular certificate as to the proceedings of an admiralty court is of no effect, as the law of nations recognizes a consul only in commercial transactions, but not as clothed with any authority to authenticate judicial proceedings. Catlet v. Pacific Ins. Co. 1 Paine, 594.

Consuls of the United States are authorized by the 24th section of the act of August 18, 1856, to perform any notarial acts, but a certificate as to official character of a foreign notary is not a notarial act. Notarial Powers of American Consuls, 12 Ops. Atty. Gen. 1.

And a consul is not a judicial officer, and a

passport issued by him is not evidence of the fact that the holder was at the place where it was issued, and that he resided there. Foster v. Davis, 1 Litt. (Ky.) 73.

A certificate of a consul to prove another certificate of the time of a seaman's discharge from a hospital and proceedings in a police court, and a sentence of that court, and the nature of a wound inflicted on a seaman, and the hospital expenses, is not admissible in evidence, as such acts are not official. But it was admitted to show that the seaman was left at that port without the consul's knowledge or consent. Brown v. The Independence, Crabbe, 54.

And a certificate of a consul is not evidence to prove the arrival or departure of a vessel in an action brought in the name of the consul to recover a penalty for not depositing with the consul the ship's register at her arrival at his port, under act of Congress 1803, chap. 62, § 2, providing that for the refusal or neglect of a master to deposit his register with a consul or other commercial agent of the United States at a foreign port he is to forfeit and pay $500. Levy v. Burley, 2 Sumn. 355.

And the certificate of a consul as to a seaman's discharge was held not to affect his right to wages, where the captain and the consul made up the account without consulting him, and paid over what they stated to be the balance, he then being entirely helpless, and it was not made with his own consent. Brunent v. Taber, 1 Sprague, 243.

And a consul's certificate of desertion of a seaman, obtained by a master of a ship without notice to the seaman, is not conclusive evidence in a summary action for wages before a justice of the peace. Lewis v. Jewhurst, 15 L. T. N. S. 275.

So, a certificate of a consul as to a desertion by a sailor will be disregarded where it is not shown to have been made with knowledge of all the facts. The Lilian M. Vigus, 10 Ben. 385.

And a consular certificate of the facts inducing the summary imprisonment of a seaman in a foreign port is not evidence. Johnson v. The Coriolanus, Crabbe, 239.

The court said that a certificate duly ornamented with the consul's official seal of the offense committed, of which he generally knows nothing but from the representation of the captain or of the officers of the vessel, should never be allowed to be read; and they are infinitely weaker than *ex parte* depositions.

A certificate of a consul that a seaman was "duly" discharged for disability arising from wounds contracted in the service of a ship is of no value as evidence, as the statute authorizing consuls to discharge seamen with their own consent does not apply to men who are so ill as to be unable to continue the voyage, and do not consent. Callon v. Williams, 2 Low. Dec. 1. In this case the court said: "A district judge of great experience is reported to have held that the consul's certificate of the seaman's consent to be discharged is conclusive evidence thereof (Lamb v. Briard, Abb. Adm. 367); but as the consul has not so certified in this case, that question does not arise."

It is not enough for a consul to certify that he gave a seaman a discharge "lawfully," or that he gave it "in accordance with the laws of the United States." It must be made to appear upon what grounds he proceeded, and the court cannot intend that it was on the joint request of the master and seaman, nor that it was on the sole application of the latter, nor either that one or other ingredient of fact actually existed. The Atlantic, Abb. Adm. 451.

But a certificate of an American consul is prima facie evidence of the refusal of the master to take seamen on board, under act of Congress 1803, chap. 62, providing for the recovery of a penalty for the benefit of the United States, where the master refuses to transport destitute seamen to the United States. Matthews v. Offley, 3 Sumn. 115.

And a certificate by a consul as to the discharge by him of a seaman for mutinous conduct was held conclusive as to the termination of the connection of the seaman with the ship, in the absence of proof of fraud. Tingle v. Tucker, Abb. Adm. 519.

This was on the ground that the consul had examined the case officially, and decided the same upon a full hearing of the proofs.

A certificate of a consul of the United States in a foreign port that a seaman was discharged upon his own consent is conclusive against the seaman, unless the conduct of the consul be shown to have been corrupt or fraudulent, under act of Congress July 20, 1840, authorizing United States consuls to discharge absolutely mariners from vessels on the joint application of both master and the men. Lamb v. Briard, Abb. Adm. 367. In this case the consul, in addition, gave a deposition to the same effect corroborated by the evidence of the consul's assistant. In addition to this the seaman had given a receipt stating that he had been discharged at his own request, and that the sum paid was in full. This receipt was also authenticated by the consular seal and proved by the deposition of the assistant.

In this case it was said that it was doubtful whether evidence could be received on the part of the seaman impeaching the validity of the certificate and the official act of the consul, unless it amounted to proof of fraud or plain dereliction of duty on his part.

A certificate of an American consul at a foreign port that the ship's papers were lodged with him agreeably to the embargo act of Congress under his seal of office was admitted as evidence, and other parts of it as to other facts struck out. United States v. Mitchell, 2 Wash. C. C. 478.

In Levy v. Burley, 2 Sumn. 355, it was said by Story, J., that "In the case of United States v. Mitchell, 2 Wash. C. C. 478, my late brother, Mr. Justice Washington (a truly able and cautious judge) admitted a consul's certificate to be evidence that the ship's register was deposited with him, but he rejected it as to all other facts. I do not now meddle with this point, because it is not necessary to the decision of the case before the court; and there may be good reason to hold that the certificate, in relation to an official fact, of which the consul may have exclusive knowledge, may be properly admissible, when, as to all other facts, it would be inadmissible, because they might admit of proof *aliunde*, or even of proof of a higher nature. If the certificate in this case had been of the positive deposit of the register, and were admissible as evidence of that fact (as Mr. Justice Washington held it was), then I should have no doubt that it was prima facie evidence of the arrival of the vessel; for it would be a natural presumption that it was deposited by the master in the ordinary discharge of his duty. But where the certificate is merely negative of the non-deposit of the register, it would seem at most to establish only its own verity."

Act of Congress 1803, chap. 62, § 4, providing for depositing ship's papers, does not make a consular certificate evidence of refusal or neglect. Parsons v. Hunter, 2 Sumn. 419.

f. To take depositions and affidavits.

Previous to the act of Congress of 1856, it seems that depositions and affidavits could not be taken before a consul under any act of Congress, although such officer would have the power under a state law rendering such depositions and affidavits valid. Such papers to be used in a state court must be taken in accordance with the local laws of such state.

United States Rev. Stat. § 1750, act of Congress August 18, 1856, provides that a consular officer is authorized to administer to or take from any person an oath affirmation affidavit, or deposition, and to perform any notarial act which any notary public is authorized by law to do, within the United States.

Depositions for extradition may be taken before a vice consul, under 22 U. S. Stat. at L. 216, providing that depositions shall be received if they be properly and legally authenticated so as to be entitled to be received for similar purposes before tribunals of a foreign country from which the accused shall have escaped, and Rev. Stat. § 1674, providing that "vice consuls" and "vice commercial agents" shall be deemed to denote consular officers who shall be substituted temporarily to fill the places of consuls general, consuls, or commercial agents when they shall be temporarily absent or relieved from duty, and the vice consul is not a deputy but an acting consul. *Re* Herres, 33 Fed. Rep. 167.

A deposition was held competent where it was taken before an officer who gave his official title as "Consular agent of the United States at Camargo, Mexico," although the seal contained the words "United States Commercial Agency," under U. S. Rev. Stat. § 1674, providing that consul general, consul, and commercial agent shall be deemed to denote full, principal, and permanent consular officers as distinguished from subordinates and substitutes. Schunior v. Russell, 83 Tex. 83.

In this case evidently a commission was issued for a deposition to be taken before a consul, and the question was whether "consul" and "commercial agent" were synonymous terms. No question was made as to the powers of a consul in such a case.

An affidavit for service by publication could be made in Spain before an American consul, under Ala. Code, § 158, authorizing proof of personal service on absent defendants to be made by affidavit, and U. S. Rev. Stat. § 1878, p. 311, authorizing consular agents to take affidavits. Marine Wharf & Storage Co. v. Parsons, 49 S. C. 136.

And an affidavit to justify an order for bail may be taken before a consul of the United States in Austria, under N. J. act March 10, Nixon's Dig. 132, P. L. 157, authorizing the administration of an oath or affirmation to hold to bail by any ambassador, public minister, *charge de affaires*, or other representative of the United States for the time being, at any foreign court or government. A consul must be regarded as a representative of the United States within our statutes. Seidel v. Peschkaw, 27 N. J. L. 427.

And an affidavit made before a consul in a foreign country will be received, where a notary public certifies that by the laws of that country the British consul has power to administer an oath. *Ex parte* Hutchinson, 5 C. B. 499, 5 Dowl. & L. 523, 17 L. J. C. P. N. S. 111.

And an affidavit of a plaintiff in a cause residing at Havana, taken before the commercial and naval agent of the United States resident there, may be read in a New York court on a motion for a commission to take the examination of witnesses abroad. Welsh v. Hill, 2 Johns. 373.

But a consul in a foreign country could not administer an oath required under act of Congress July 4, 1836, in patent cases; but the oath should be administered by a competent magistrate of that country, and the deposition so made should be authenticated by the consul. Gilpin's Ops. Atty. Gen. (1840) 1320.

The power to administer an oath was given consuls by act of Congress 1856.

A stipulation that an answer may be sworn to before a notary public or other person authorized to administer an oath "by the law of France" will not sustain a verification of an American consul in France. Herman v. Herman, 4 Wash. C. C. 555.

The court said that the act of Congress giving consuls power to administer oaths is confined to particular cases of a maritime or commercial character; but that if the power was general it would not affect this stipulation.

g. To take acknowledgments of deeds and powers of attorney.

The power of a consul, vice consul, or consular agent to take acknowledgments of deeds and powers of attorney depends largely on the local statute where such instrument is to be used. It has been held that a statute authorizing a deed to be acknowledged before a consul includes a vice consul. But in the same state it was held that the term "consul" does not include a "consular agent."

A deed may be acknowledged before an American consul at a foreign port, where the grantor resides, under Mass. Stat. 1783, chap. 37, § 4, providing that deeds may be acknowledged before a magistrate in any other state or kingdom where the grantor resides. The term "magistrate" is held to mean a ministerial officer exercising like powers with those of a justice of the peace when acting in his ministerial capacity. Such an officer is a consul. Scanlan v. Wright, 13 Pick. 528, 25 Am. Dec. 344.

And an acknowledgment of a deed by a married woman before a United States commercial agent in Canada is sufficient to pass her title to land in Pennsylvania. Moore v. Miller, 147 Pa. 378.

An assignment of firm assets for creditors, executed in China by a resident partner before an American consul, is valid, under the Treaty of the United States and China of 1844, and act of Congress of 1848, authorizing United States authorities to carry out the treaty, (1st) under the laws of the United States; (2d) under the common law; (3d) under decrees and regulations by the commissioner. It was also held that the assignment was not void as against an English creditor, as the consular court is a court of the United States into which, by the general laws, an alien friend may enter for redress against a citizen of the country of which the court is an appendage. Forbes v. Scannell, 13 Cal. 242.

An acknowledgment of a deed taken before a vice consul in Hawaii in 1857 is valid, under Cal. act April 16, 1850, authorizing an acknowledgment proved without the United States to be taken by any judge, etc., of any state, Kingdom, or Empire, having a seal, or by any consul of the United States appointed to reside therein, as "any" consul embraces consuls of every grade. Mott v. Smith, 16 Cal. 553.

In McMinn v. O'Connor, 27 Cal. 238, it was held that a consular agent in Ireland in 1859 was not authorized to take and certify the ac-

knowledgment of a deed to be recorded in California.

This decision does not distinguish Mott v. Smith, 16 Cal. 553, although the same statute was in effect at the time of the execution of both deeds.

In this case the statute authorized an acknowledgment before a "consul." The present statute authorizes an acknowledgment to be made before a "consul, vice consul, or commercial agent," and this decision evidently was on the ground that a "consular agent" is not embraced within the statute authorizing the acknowledgment before a "consul."

A letter of attorney to be used in bankrupt proceedings may be administered in a foreign country before a United States consul, under bankrupt act, § 20, sub. 3, providing that oaths required by the act may be administered by diplomatic or consular officers of the United States in any foreign country. *Re* Sugenheimer, 91 Fed. Rep. 744.

And a power of attorney authorizing a suit to be brought and acknowledged before a United States consul in a foreign country and authenticated by his seal is sufficiently proved without any other evidence of the genuineness of the signature or seal, under 1 N. Y. Rev. Stat. 747, 2d ed. sub. 3, authorizing an acknowledgment of a deed or a mortgage to be made before a consul. St. John v. Croel, 5 Hill, 573.

In United States v. Badeau, 33 Fed. Rep. 572, it was said that when a state statute declares that for the purpose of recording mortgages or deeds or powers of attorney persons in London may go before the United States consul and acknowledge such papers in the form prescribed by the state law, and that when he certifies the fact under his hand and seal they shall be entitled to be recorded, such act is done by the consul under an authority wholly in pursuance of a state law, and has nothing to do with the business of the consulate.

h. *To retain ship's papers.*

Act of Congress February 22, 1803, requires masters of vessels to deposit the ship's papers with the consul at the arrival in a foreign port.

This act does not apply where the vessel merely touches at a port without coming to an entry or transacting any business. Toler v. White, 1 Ware, 277.

And does not apply where the arrival is not for the purpose of business requiring an entry and clearance. Harrison v. Vose, 9 How. 372, 13 L. ed. 179; Deposit of Ship's Papers with Consuls, 6 Ops. Atty. Gen. 163; Shipmasters, 5 Ops. Atty. Gen. 161; Shipmasters Abroad, 4 Ops. Atty. Gen. 390.

And a master of a vessel is not required to deposit ship's papers in the hands of a consul, where the consul was at another point some 20 miles distant, and owing to the weather it would have been dangerous for him to have left his ship for that purpose. Gould v. Staples, 9 Fed. Rep. 159.

A consul has not power to withhold ship's papers in all cases, under act of Congress August 18, 1856, § 28 (11 Stat. at L. 63), providing that consuls are authorized to retain ship's papers until payment of demands and wages where suit has been brought and the vessel released on bond. He may detain the papers to enforce wages in certain cases and consular fees, but has no power to decide all disputed claims against American vessels. 9 Ops. Atty. Gen. 384.

A penalty for not depositing the ship's register with the consul on arrival in a foreign port, under consular act 1803, chap. 62, § 4, providing a penalty of $500, must be sued for within two years, under act of Congress 1870, chap. 36, § 31. Parsons v. Hunter, 2 Sumn. 419.

i. *To license illegal acts.*

A consul has no power to grant a license to trade with an enemy or to do any illegal act. But a license to trade with the enemy may be ratified by the government represented by the consul.

An American consul at Mexico in conjunction with the assent of chief officers of the American squadron at Vera Cruz, cannot license a neutral residing in Mexico to sail his vessel under the Mexican flag and protect the same during war between Mexico and this country. Rogers v. The Amado, Newberry, Adm. 400.

In this case the alleged license was only a recommendation by the consul to the officers of the squadron to allow the vessel, owner, and family to pass out and return, and she was captured inside Mexican lines some six months later, having a Mexican passport.

A license made by a consul of a neutral power with a citizen of a belligerent state to protect from capture merchandise held by such citizen within the enemy's lines is against public policy and void. Coppell v. Hall, 7 Wall. 553, 19 L. ed. 246.

But a certificate for limited trade in an enemy's country, granted by a British consul and also by a British vice admiral to an American vessel, may be so ratified by the government as to entitle a release on capture by a British ship. The Hope, 1 Dodson, Adm. 226.

The advice of an American consul in a foreign port gives to the master of a vessel no justification for an illegal act in imprisoning seamen. Wilson v. The Mary, Gilpin, 31.

j. *To contract.*

A consul general cannot recover on a contract for his influence in favor of a military arms company to have his government purchase arms from that company, as it is against public policy. Oscanyon v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539.

A consul selling a vessel in a foreign port cannot at such sale become a purchaser indirectly, so as to cut out a prior bottomry bond. Riley v. The Obell Mitchell, N. Y. Times, May 16, 1861, Fed. Cas. No. 11, 839.

k. *To serve process.*

A consul in the absence of any statute cannot serve process from a court in Louisiana in an action to have a curator appointed, where the defendant resides in France. *Re* Dumas, 32 La. Ann. 679.

L. T.

William H. QUIGLEY
v.
Alexander B. CLOUGH.

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

A barbed-wire fence running diagonally from the corner of a house across the grass on private premises to a street corner, put there to prevent people from taking a short cut across the grass, after plain wire fence has been found ineffectual for that

NOTE.—For negligence as to barbed-wire fence, see also Loveland v. Gardner (Cal.) 4 L. R. A. 395.

purpose, does not make the owner liable to a person who, by mistake after dark, left the line of the street, walked upon the grass, and was injured by the fence.

(May 10, 1899.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence which resulted in a judgment in defendant's favor. *Overruled.*

The facts are stated in the opinion.

Messrs. **Arthur H. Russell** and **Ralph S. Bartlett,** for plaintiff:

Chapter 272 of the acts of 1884 provides: "No barbed-wire fence shall be hereafter built or maintained within 6 feet above the ground, along any sidewalk located on or upon any public street or highway."

If the fence in question were maintained in violation of the statute it was a violation of a criminal statute, which violation is in itself evidence of negligence.

Stone v. *Boston & A. Horse R. Co.* 171 Mass. 536, 41 L. R. A. 794; *Hanlon* v. *South Boston Horse R. Co.* 129 Mass. 310; *Hall* v. *Ripley,* 119 Mass. 135.

The decisions relating to mantraps and spring guns apply.

Chenery v. *Fitchburg R. Co.* 160 Mass. 211, 22 L. R. A. 575; *Pierce* v. *Cunard S. S. Co.* 153 Mass. 87; *Marble* v. *Ross,* 124 Mass. 44; *Daniels* v. *New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248.

A landowner owes no duty to a trespasser except that he must not wantonly or intentionally injure or expose him to injury.

If the fence were in such a situation and of such a character as to be dangerous to persons passing along the street in the exercise of due care it became the duty of the defendant to take all proper precautions to avoid danger.

Larue v. *Farren Hotel Co.* 116 Mass. 67; *Lynch* v. *Nurdin,* 1 Q. B. 29; *Birge* v. *Gardiner,* 19 Conn. 507, 50 Am. Dec. 261; *Hydraulic Works Co.* v. *Orr,* 83 Pa. 332; *Bird* v. *Holbrook,* 4 Bing. 628; *Beck* v. *Carter,* 6 Hun. 604; *Barnes* v. *Ward,* 9 C. B. 392; *Hadley* v. *Taylor,* L. R. 1 C. P. 53; *Crogan* v. *Schiele,* 53 Conn. 186, 55 Am. Rep. 88; *Sioux City & P. R. Co.* v. *Stout,* 17 Wall. 657, 21 L. ed. 745; *Lane* v. *Atlantic Works,* 111 Mass. 136.

Messrs. **Alfred Hemenway** and **Salem D. Charles,** for defendant:

The statute does not forbid the erection of fences of barbed wire. It only regulates their use along sidewalks. The statutory provision is not to be extended by construction.

Where the plaintiff is a trespasser, the defendant owes him no duty or obligation, except the negative one, not to injure him maliciously or with gross and reckless carelessness.

Johnson v. *Boston & M. R. Co.* 125 Mass. 75; *Morrissey* v. *Eastern R. Co.* 126 Mass. 377, 30 Am. Rep. 686; *Wright* v. *Boston & M. R. Co.* 129 Mass. 440.

A former fence had been replaced by this one, so that the defendant held out no invitation for people to cross his premises. It was not a trap for which the defendant would be liable.

Howland v. *Vincent,* 10 Met. 371, 43 Am. Dec. 442; *Rockwood* v. *Wilson,* 11 Cush. 226; *Mistler* v. *O'Grady,* 132 Mass. 139; *Reardon* v. *Thompson,* 149 Mass. 267; *McIntire* v. *Roberts,* 149 Mass. 450, 4 L. R. A. 519.

If the plaintiff voluntarily left the sidewalk and passed upon the defendant's land where he had no right to go, instead of stepping into the street where he could find a safe way provided for him to reach his team, he was guilty of taking a risk which the law will not excuse, and he was not in the exercise of due care.

Taylor v. *Carew Mfg. Co.* 140 Mass. 150.

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

This is an action for personal injuries. The defendant had a house at the corner of two streets, which were at right angles to each other, and the sides of the house were parallel to, and at a distance from, the streets. The defendant maintained a barbed wire fence running diagonally from the corner of his house across the grass to the corner of the streets. The plaintiff, by mistake, after dark, left the line of the street, walked upon the grass, came against the fence, and was injured. The judge directed a verdict for the defendant, and the case is here on exceptions.

It does not need argument to show that this was not a fence maintained "along" a sidewalk, within Stat. 1884, chap. 272, § 1. But it seems that there had been a plain-wire fence in the same place, which had been replaced by the present one, and it appeared that the defendant said that he put up this one because the plain-wire fence did not serve his purposes. The plaintiff argues that, especially taking this indication of the defendant's purpose into account, the defendant is answerable, on the principle of liability for spring guns. *Chenery* v. *Fitchburg R. Co.* 160 Mass. 211, 213, 22 L. R. A. 575.

But we are of opinion that the ruling was right. Barbed wire is well known, and has been widely used for fencing, as more efficient than common wire. Not only does experience not warrant saying that the use of it upon a man's own land, upon which he has a right to expect people not to trespass, shows an expectation that they will come there, and an intent to hurt them when they do, but everyone knows the contrary,—that barbed wire has been used by hundreds of people who had no malicious intent. It is or has been a common article of commerce, and the use of it simply shows an intent to make it more difficult to pass the line of the fence. Therefore the limitation laid down in *Chenery* v. *Fitchbury R. Co.* 160 Mass. 211, 22 L. R. A. 575, applies. The remark of the defendant confirms, rather than weakens, our conclusion; for it implies that the plain-wire

fence was put there with the same purpose as the barbed. The common purpose can only have been to prevent people from taking a short cut across the defendant's grass, and that is the common sense of the matter.

Marble v. *Ross*, 124 Mass. 44, goes, at least, to the verge of the law. But there the vicious stag was an active source of harm, which attacked the trespasser. Here there was nothing but an inert object, intended to prevent trespassing, which could do no harm unless the trespass itself brought the trespasser into contact with it. See *Daniels* v. *New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248; *Holbrook* v. *Aldrich*, 168 Mass. 15, 36 L. R. A. 493; *Howland* v. *Vincent*, 10 Met. 371, 43 Am. Dec. 442; *McIntire* v. *Roberts*, 149 Mass. 450, 452, 453, 4 L. R. A. 519.

Exceptions overruled.

ALABAMA SUPREME COURT.

Brooks FULLER, *Appt.*,
v.
STATE of Alabama.

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

1. **The parole of a convict** is in the nature of a conditional pardon, and within the constitutional grant of the pardoning power to the governor.
2. **A convict who elects to accept a parole** and avails himself of the liberty which it confers must do so subject to the conditions upon which alone it is granted to him.
3. **The summary arrest of a convict** who has violated his parole, and his summary return or remandment to servitude or imprisonment under his sentence, are not in violation of the constitutional guaranties governing the arrest and trial of criminals.

(June 1, 1899.)

APPEAL by petitioner from an order of the Probate Court for Montgomery County denying a petition for writ of habeas corpus to obtain the release of petitioner from custody to which he had been committed for violation of his parole. *Affirmed.*

Fuller was convicted of assault with intent to murder. The governor paroled him under authority of Code 1896, §§ 5461, 5462. He subsequently issued an order reciting that he had received information that Fuller had violated his parole, and directing that he be delivered to the convict department to serve out his term according to law. He was thereupon reincarcerated, and he filed a petition for his release upon the ground of lack of authority for his recommitment.

Further facts appear in the opinion.

Mr. **John W. A. Sandford, Jr.,** for appellant.

Mr. **Charles G. Brown,** Attorney General, for appellee.

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

Section 12 of article 5 of the Constitution confers the pardoning power on the governor in this language: "The governor shall have power to remit fines and forfeitures, under such rules and regulations as may be prescribed by law, and, after conviction, to grant reprieves, commutation of sentence, and pardons (except in cases of treason and impeachment)." It is the settled law that this grant includes power to grant conditional pardons, the condition to be either precedent or subsequent, and of any nature, so long as it is not illegal, immoral, or impossible of performance, and that a breach of the condition avoids and annuls the pardon. *Ex parte Wells*, 18 How. 307, 15 L. ed. 421; *Woodward* v. *Murdock*, 13 Crim. L. Mag. 71, and notes (124 Ind. 439); *Arthur* v. *Craig*, 48 Iowa, 264, 30 Am. Rep. 395; *State* v. *Barnes*, 32 S. C. 14, 6 L. R. A. 743, and cases cited; *State, O'Connor,* v. *Wolfer*, 53 Minn. 135, 19 L. R. A. 783, and cases cited; note to *People* v. *Cummings* (Mich.) 14 L. R. A. 285.

The parole of a convict is in the nature of a conditional pardon, and within the constitutional grant of the pardoning power to the governor. The power to grant pardons, absolute or conditional, cannot, of course, be taken away from the executive, nor limited by legislative action, but the general assembly may enact laws to render its exercise convenient and efficient. *Kennedy's Case*, 135 Mass. 48. The legislature of this state has enacted such a law in respect of that description of conditional pardons known as "paroles," and this statute is now embodied in §§ 5461, 5462, Code, which are as follows:

"Sec. 5461. Governor may Suspend Sentence and Parole Convict on Good Behavior.—The governor may, whenever he thinks best, authorize and direct the discharge of any convict from custody and suspend the sentence of such convict without granting a pardon, and prescribe the terms upon which a convict so paroled shall have his sentence suspended.

"Sec. 5462. Convict Failing to Observe Terms of Parole may be Rearrested and Required to Serve Out Sentence. Upon the failure of any convict to observe the conditions of his parole, to be determined by the governor, the governor shall have authority to direct the rearrest and return of such convict to custody, and thereupon said convict shall be required to carry out the sentence of the court as though no parole had been granted him."

These sections are really not open to construction, and little need be said in their in-

NOTE.—As to parole of convict, see also People v. Cummings (Mich.) 14 L. R. A. 285, and *note*.

terpretation. The parole does not in any wise displace or abridge the sentence. It merely stops its execution for a time only, it may be, or indefinitely, it may prove. It suspends, not destroys. The suspension is like that which occurs constantly in the administration of criminal laws where the defendant appeals from the judgment of conviction. The execution of the sentence is by the appeal superseded and postponed pending the appeal, and, if the judgment is affirmed, the execution of the sentence thereupon begins, and continues for the period set down originally in the judgment. So the word is used in this statute, and, upon condition broken, the sentence, which has all along hung in its entirety over the liberty of the paroled convict, is to be executed upon him "as though no parole had been granted to him." This is the plain meaning of the statute; and, so interpreted, it involves, of necessary consequence, the proposition that upon condition broken, even after the time at which the sentence would have ended but for its suspension, the convict may still be remanded to custody; that the unserved, and hence unexpired, part of the sentence—that part which he was released from serving during the period of durance originally specified—may be executed upon him. So the law is written.

That it was competent for the legislature to so provide, we entertain no serious doubt. A parole, like every other pardon, is subject to rejection or acceptance by the convict. He has an unfettered election in that regard, and the executive order is not effective or operative until it has been accepted by him. If he prefers to serve out his sentence, as originally imposed upon him, to a suspension of it by subjecting himself to the conditions nominated in the parole, he has the clear right to do so. But if he elects to accept the parole, and avails himself of the liberty it confers, he must do so upon the conditions upon which alone it is granted to him. One of these conditions is that his sentence shall continue *in fieri* and that the governor shall have the power to execute it in full upon him should he forfeit the liberty and immunity conditionally secured to him by the executive order. That a convict, having only a short time remaining of his sentence, would make an unwise choice by accepting a parole, upon onerous conditions, for a breach of which he might, years after, be remanded to complete his sentence, affords no argument against the constitutional integrity of the enactment. That a person cannot by convention with the governor become a convict, and that by mere convention with the executive a convict cannot alter his term of servitude, or the dates at which it is to begin and end, is no impeachment of a statute which provides for such alterations,—for the suspension of a sentence during a part of its original period, and its execution as to such part at a time beyond that fixed in the judgment of conviction for its termination. The same power which provides for the original sentence—the law-making power of the land—provides, also, in this instance, for its suspension, and for its ultimate execution, in a given contingency, at another and different time, and it is equally potent in both respects. And the postponing of the sentence in such case is not merely by convention with the governor, but is, by force of a potential statute, well within legislative competency to deal with the execution of sentences imposed upon convicts. It is the law that in such case postpones, under certain circumstances, the execution of the sentence to another time, just as it is the law which postpones, upon appeal taken, the execution of sentence until another time. So it has been ruled of a similar statute in Massachusetts (*Conlon's Case*, 148 Mass. 168); such is the view of the supreme court of Minnesota, expressed in a well-considered opinion (*State, O'Connor, v. Wolfer*, 53 Minn. 135, 19 L. R. A. 783); and in South Carolina a like result is rested alone upon the governor's constitutional pardoning power (*State* v. *Barnes*, 32 S. C. 14, 6 L. R. A. 743, and cases there cited). And at an earlier day it was supposed in Massachusetts to be necessary to provide by statute that the time during which the convict is at large under parole should not be deducted from the unexpired sentence upon his remandment for breach of the condition of the parole, to the end that he should be made to serve beyond the time fixed for the termination of the original sentence. *West's Case*, 111 Mass. 443. This statute was afterwards amended as indicated in *Conlon's Case*, 148 Mass. 168. See also, on the general question of the constitutionality of statutes providing for paroling convicts, *State, Atty. Gen.*, v. *Peters*, 43 Ohio St. 629.

But it is insisted that this statute, in so far as it undertakes to authorize the governor to determine that the condition of the parole has not been complied with, and the summary arrest of the convict thereupon by the direction of the governor, and his summary return or remandment to servitude or imprisonment under the sentence, is violative of organic guaranties of jury trial, that no warrant shall be issued to seize any person without probable cause, supported by oath or affirmation, etc. This position takes no account of the fact that the person being dealt with is a convict, that he has already been seized in a constitutional way, been confronted by his accusers and the witnesses against him, been tried by the jury of his peers secured to him by the Constitution, and by them been convicted of crime, and been sentenced to punishment therefor. In respect of that crime and his attitude before the law after conviction of it, he is not a citizen, nor entitled to invoke the organic safeguards which hedge about the citizen's liberty, but he is a felon, at large by the mere grace of the executive, and not entitled to be at large after he has breached the conditions upon which that grace was extended to him. In the absence of this statute, a convict who had broken the conditions of a pardon would, if there were no

question of his identity or the fact of breach of the conditions, be subject to summary arrest, and remandment, as matter of course, to imprisonment, under the original sentence by the court of his conviction, or any court of co-ordinate or superior jurisdiction,—a purely formal proceeding. If the person arrested denied his identity with the convict sought to be remanded, he might be entitled to a jury trial on that issue alone. If he denied only the alleged breach of the conditions of his enlargement, he would not be entitled to a jury on that issue, but it would be determinable in a summary way, by the court before whom he is brought. But the statute supervenes to avoid the necessity for any action by the courts in the premises. The executive clemency under it is extended upon the conditions named in it, and he accepts it upon those conditions. One of these is that the governor may withdraw his grace in a certain contingency, and another is that the governor shall himself determine when that contingency has arisen. It is as if the convict, with full competency to bind himself in the premises, had expressly contracted and agreed that, whenever the governor should conclude that he had violated the conditions of his parole, an executive order for his arrest and remandment to prison should at once issue, and be conclusive upon him. Of course, if, in the execution of the order of arrest, the wrong man should be taken, he would be entitled to enlargement on habeas corpus; but there is no question of identity in the case before us. Upon such determination by the governor, evidenced by the executive order of arrest, the parole is avoided, and the person who has been at large upon it at once falls into the category of an escaped convict, so far as measures for his apprehension and remandment under the original sentence are concerned, and he is, no more than an escaped convict, entitled to freedom from arrest, except upon probable cause, supported by oath or affirmation, nor to a trial by jury, nor to his day in court for any purpose. *Kennedy's Case*, 135 Mass. 48; *Conlon's Case*, 148 Mass. 168; *Arthur* v. *Craig*, 48 Iowa, 264, 30 Am. Rep. 395; *State*, *O'Connor*, v. *Wolfer*, 53 Minn. 135, 19 L. R. A. 783.

Appellant relies mainly upon the case of *People* v. *Cummings*, decided by the supreme court of Michigan, 83 Mich. 249. Neither the argument nor the conclusion in that case is satisfactory, and its unsoundness is demonstrated, we think, in the *notes* appended to the report of it in 14 L. R. A. 285.

The order of the probate judge denying the convict's petition for habeas corpus is in consonance with the foregoing views, and it will be *affirmed*.

INDIANA SUPREME COURT.

STATE of Indiana, *Appt.*,
v.
George HOGRIEVER.

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

1. **An affidavit charging violation of a statute** against playing baseball on Sunday where an admittance fee is charged need not set out the name of any person paying such fee.
2. **A statute prohibiting baseball on Sunday** where any fee is charged is not void for uncertainty and ambiguity because it does not describe what is meant by "fee" or by whom it is to be paid.
3. **The rule that a penal statute is to be strictly construed** should not be unreasonably applied so as to defeat the sovereign will, when that will is expressed with ordinary certainty and is easily intelligible.
4. **The constitutional prohibition against class legislation** is not violated by a statute prohibiting the playing of baseball on Sunday where a fee is charged, under a penalty of a fine upon the players.
5. **Imposing a larger penalty on persons who play baseball** on Sunday in violation of a statute than upon those who are engaged in hunting, fishing, rioting, quarreling, and in acts of common labor, does not violate the constitutional right of citizens to equal privileges and immunities.

(May 23, 1899.)

APPEAL by the State from a judgment of the Criminal Court for Marion County quashing an affidavit charging defendant with playing baseball on Sunday in violation of statute. *Reversed.*

The facts are stated in the opinion.

Messrs. **William L. Taylor**, Attorney General, **Merrill Moores**, and **C. C. Hadley**, for appellant:

It is difficult to see how any law which simply forbids "playing any game of baseball where any fee is charged, or where any reward or prize or profit, or article of value, is dependent upon the result of the game, on the first day of the week, commonly called Sunday," can interfere with any man's right of worship or freedom of thought or give preference to any particular creed.

It is an article of faith in the religion of a very extensive religious body that polygamy is a religious duty, and yet it has been absolutely forbidden by the laws of the various states and of the United States, and such laws have been uniformly sustained as

NOTE.—As to constitutionality of statute prohibiting baseball on Sunday, see also State v. Powell (Ohio) 41 L. R. A. 854.

As to constitutionality of Sunday laws in general, see *note* to Judefind v. State (Md.) 22 L. R. A. 721; also People v. Havnor (N. Y.) 31 L. R. A. 689; *Ex parte* Jentzsch (Cal.) 32 L. R. A. 664; and Eden v. People (Ill.) 32 L. R. A. 659.

constitutional, and as not impairing religious freedom or liberty of conscience; nor does religious belief or duty constitute any defense to a prosecution for violating a penal statute.

Reynolds v. *United States*, 98 U. S. 161, 25 L. ed. 248.

The Sunday laws are not in contravention of the constitutional guaranty of religious liberty.

State v. *Powell*, 58 Ohio St. 324, 41 L. R. A. 854; *Voglesong* v. *State*, 9 Ind. 114; *Foltz* v. *State*, 33 Ind. 216; *Johns* v. *State*, 78 Ind. 333, 41 Am. Rep. 577; *Shaw* v. *Williams*, 87 Ind. 158, 44 Am. Rep. 756; *State* v. *Goode*, 5 Ohio N. P. 181; *Frolickstein* v. *Mobile*, 40 Ala. 725; *Scales* v. *State*, 47 Ark. 482, 58 Am. Rep. 768; *Ex parte Andrews*, 18 Cal. 684; *Ex parte Burke*, 59 Cal. 13; *Gunn* v. *State*, 89 Ga. 342; *Hennington* v. *State*, 90 Ga. 396, 4 Inters. Com. Rep. 413; *State, Walker*, v. *Judge of Section "A,"* 39 La. Ann. 136; *Judefind* v. *State*, 78 Md. 515, 22 L. R. A. 721; *Com.* v. *Has*, 122 Mass. 42; *State* v. *Ambs*, 20 Mo. 216; *St. Joseph* v. *Elliott*, 47 Mo. App. 422; *State* v. *O'Rourk*, 35 Neb. 614, 17 L. R. A. 830; *Lindenmuller* v. *People*, 33 Barb. 548; *Neuendorff* v. *Duryea*, 69 N. Y. 562, 25 Am. Rep. 235; *Specht* v. *Com.* 8 Pa. 322, 49 Am. Dec. 518; *Charleston* v. *Benjamin*, 2 Strobh. L. 508, 49 Am. Dec. 608; *Gabel* v. *Houston*, 29 Tex. 346; *Ex parte Sundstrom*, 25 Tex. App. 151; *Smith* v. *Wilcox*, 24 N. Y. 353, 82 Am. Dec. 303; *Church of the Holy Trinity* v. *United States*, 143 U. S. 470, 36 L. ed. 231.

From the very beginning of the law personal liberty has been restricted by the old maxim *Sic utere tuo ut alienum nonlædas.* This liberty of action has always been restricted by the police power of the state.

Health Department of New York v. *Trinity Church*, 145 N. Y. 39, 27 L. R. A. 710; *State* v. *Powell*, 58 Ohio St. 324, 41 L. R. A. 854; *State* v. *O'Rourk*, 35 Neb. 628, 17 L. R. A. 830; *Frolickstein* v. *Mobile*, 40 Ala. 728; *Ex parte Andrews*, 18 Cal. 681; *Hennington* v. *State*, 90 Ga. 397, 4 Inters. Com. Rep. 413; *People* v. *Griffin*, 1 Idaho, 479; *State, Walker*, v. *Judge of Section "A"*, 39 La. Ann. 137; *People* v. *Bellet*, 99 Mich. 155, 22 L. R. A. 698; *Lindenmuller* v. *People*, 33 Barb. 548; *Neuendorff* v. *Duryea*, 69 N. Y. 561, 25 Am. Rep. 235; *People* v. *Moses*, 140 N. Y. 215; *People* v. *Havnor*, 149 N. Y. 202, 31 L. R. A. 690; *Holden* v. *Hardy*, 169 U. S. 392, 42 L. ed. 791.

Judges ought to abstain from interfering with the action of the legislature where the statute does not impose any burdens or restrictions, but merely prohibits certain transactions which are prejudicial to others.

27 Am. L. Rev. 871; *Ex parte Andrews*, 18 Cal. 682; *People* v. *Havnor*, 149 N. Y. 199, 31 L. R. A. 689; *State, Duensing*, v. *Roby*, 142 Ind. 181, 33 L. R. A. 213.

The provision of the Constitution against the impairment of the obligation of contracts does not prevent the statutory regulation of future contracts.

Fry v. *State*, 63 Ind. 552, 30 Am. Rep. 238; *Churchman* v. *Martin*, 54 Ind. 383; *Hancock* v. *Yaden*, 121 Ind. 366, 6 L. R. A. 576; *McCracken* v. *Hayward*, 2 How. 608, 11 L. ed. 397.

This is by no means the first time in the history of the state that the state has undertaken to regulate lawful occupations, or the uses of property.

Eastman v. *State*, 109 Ind. 278, 58 Am. Rep. 400; *State, Burroughs*, v. *Webster*, 150 Ind. 607, 41 L. R. A. 212; *Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623; *Hawker* v. *New York*, 170 U. S. 189, 42 L. ed. 1002; *Wilkins* v. *State*, 113 Ind. 514; *Ferner* v. *State*, 151 Ind. 247; *Singer* v. *State*, 72 Md. 464, 8 L. R. A. 551; *People, Nechamcus*, v. *Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718; *Smith* v. *Alabama*, 124 U. S. 465, 31 L. ed. 508; *Powell* v. *Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *Health Department of New York* v. *Trinity Church*, 145 N. Y. 43, 27 L. R. A. 710; *Fry* v. *State*, 63 Ind. 552, 30 Am. Rep. 238; *Hancock* v. *Yaden*, 121 Ind. 366, 6 L. R. A. 576; *Churchman* v. *Martin*, 54 Ind. 383; *State* v. *Ohio Oil Co.* 150 Ind. 21.

If playing ball on Sunday can be constitutionally forbidden in an act which includes it with other offenses (*State* v. *O'Rourk*, 35 Neb. 614, 17 L. R. A. 830; *State* v. *Williams*, 35 Mo. App. 541; *State* v. *Miller*, 68 Conn. 373; *Re Rupp*, 33 App. Div. 468), it must be true that it can also be forbidden in an act in which it only is denounced, which act was obviously passed for the purpose of supplementing the general Sunday law, and supplying what the legislature deemed an omission.

Daniels v. *State*, 150 Ind. 348; *Johns* v. *State*, 78 Ind. 332, 41 Am. Rep. 577; *Lindenmuller* v. *People*, 33 Barb. 548; *Neuendorff* v. *Duryea*, 69 N. Y. 557, 25 Am. Rep. 235; *People* v. *Moses*, 140 N. Y. 214; *People* v. *Dennin*, 35 Hun, 327; *Theisen* v. *McDavid*, 34 Fla. 440, 26 L. R. A. 234; *Nesbit* v. *State* (Kan. App.) 54 Pac. 327; *State, Walker*, v. *Judge of Section "A"*, 39 La. Ann. 136; *Bohl* v. *State*, 3 Tex. App. 685; *Hennington* v. *State*, 90 Ga. 396, 4 Inters. Com. Rep. 413; *State* v. *Baltimore & O. R. Co.* 24 W. Va. 783, 49 Am. Rep. 290; *Norfolk & W. R. Co.* v. *Com.* 88 Va. 95, 13 L. R. A. 107; *Hennington* v. *Georgia*, 163 U. S. 299, 41 L. ed. 166; *Schoolcraft* v. *Louisville & N. R. Co.* 92 Ky. 233, 14 L. R. A. 579; *Pittsburg, C. C. & St. L. R. Co.* v. *Montgomery*, 152 Ind. 1; *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205, 32 L. ed. 107; *Re Oberg*, 21 Or. 406, 14 L. R. A. 577; *People* v. *Japinga*, 115 Mich. 222; *People* v. *Bellet*, 99 Mich. 151, 22 L. R. A. 696; *People* v. *Havnor*, 149 N. Y. 195, 31 L. R. A. 689.

As to ordinary persons there can be no denial that the state has the same right to forbid baseball on Sunday, or altogether, if it believes it to be detrimental to the public welfare, that it has to forbid horse-racing, or any other offenses classed as *mala prohibita.*

State, Duensing, v. *Roby*, 142 Ind. 192, 33 L. R. A. 213.

An affidavit for a statutory offense is sufficient if it describe the offense in substantially the words of the statute, and it is not necessary to follow the exact words of the statute, but equivalent words may be used.

State v. *Sarlls*, 135 Ind. 200; *Sloan* v. *State*, 42 Ind. 571; *State* v. *Miller*, 98 Ind. 72; *State* v. *Sutton*, 116 Ind. 527; *Riggs* v. *State*, 104 Ind. 261; *Franklin* v. *State*, 108 Ind. 47; *State* v. *Anderson*, 103 Ind. 173; *Henning* v. *State*, 106 Ind. 389, 55 Am. Rep. 756; *Larelle* v. *State*, 136 Ind. 235; *State* v. *Williams*, 139 Ind. 45; *Voght* v. *State*, 145 Ind. 14; Gillett, Crim. L. § 132.

The distinction has never been drawn between such offenses as the unlawful sale of liquor to persons of a certain class, on the one hand, and the keeping open a place for the unlawful sale of liquor at prohibited times, or without license.

Black, Intoxicating Liquors, § 464; *State* v. *Crawford*, 64 Ark. 194; *Newman* v. *State*, 101 Ga. 538; *State* v. *Moseli*, 49 Kan. 142; *Com.* v. *Mulrey*, 170 Mass. 106; *Hudson* v. *State*, 73 Miss. 784; *State* v. *Wingfield*, 115 Mo. 439; *State* v. *Ford*, 47 Mo. App. 601; *Osgood* v. *People*, 39 N. Y. 451; *People* v. *Polhamus*, 8 App. Div. 133; *State* v. *Dellaire*, 4 N. D. 312; *State* v. *Williams* (S. D.) 75 N. W. 815; *State* v. *Bielby*, 21 Wis. 209; *State* v. *Brown*, 41 La. Ann. 771; *Nelson* v. *United States*, 30 Fed. Rep. 117; *Hipes* v. *State*, 18 Ind. App. 428; *Dutton* v. *State*, 2 Ind. App. 448.

It is the duty of the judge to make such construction as shall suppress all evasions for the continuance of the mischief. When the thing done is substantially that which was prohibited it falls within the act simply because, according to the true construction of the statute, it is the thing prohibited.

Maxwell, Interpretation of Statutes, chap. 4, § 1, p. 133; Sutherland, Stat. Constr. 354; *State* v. *Hirsch*, 125 Ind. 212, 9 L. R. A. 170; *State* v. *Indiana & I. S. R. Co.* 133 Ind. 72, 18 L. R. A. 502; *State, Duensing*, v. *Roby*, 142 Ind. 182, 33 L. R. A. 213; *State* v. *Gerhardt*, 145 Ind. 450, 33 L. R. A. 313.

Ambiguity and doubt are no ground for holding a law void.

Pomeroy v. *Beach*, 149 Ind. 511; *Miller* v. *State*, 149 Ind. 607, 40 L. R. A. 109; *Vancleave* v. *State*, 150 Ind. 273; *Daniels* v. *State*, 150 Ind. 348; *State, Burroughs*, v. *Webster*, 150 Ind. 607, 41 L. R. A. 212.

Mr. **Charles S. Wiltsie** also for appellant.

Messrs. **Frank B. Burke** and **Henry Warrum**, for appellee:

The affidavit does not state facts sufficient to constitute a public offense.

The very fact that the affidavit refers to these third persons ("spectators") should have suggested to the pleader that particularity and certainty were required in describing them.

Harris. Crim. L. 265, 266; 10 Enc. Pl. & Pr. pp. 505, 506; *State* v. *Stucky*, 2 Blackf. 289; *State* v. *Jackson*, 4 Blackf. 49; *State* v. *Noland*, 29 Ind. 212; *Zook* v. *State*, 47 Ind. 463; *Alexander* v. *State*, 48 Ind. 394; *McLaughlin* v. *State*, 45 Ind. 338.

The affidavit does not charge an offense under § 2087. The statute does not make it a misdemeanor to play base ball on Sunday "where admission fee is charged spectators to witness the game."

The language of this section is so vague, indefinite, and uncertain that as a penal statute it is void.

The fee contemplated is a license or privilege fee which may be exacted for such game.

Sumner v. *State*, 74 Ind. 52.

The act is ambiguous and uncertain, and therefore void.

Penal statutes must be strictly construed.

United States v. *Wiltberger*, 5 Wheat. 95, 5 L. ed. 42; *Kent* v. *State*, 8 Blackf. 163; *Steel* v. *State*, 26 Ind. 82; *Western U. Teleg. Co.* v. *Steele*, 108 Ind. 163; *Western U. Teleg Co.* v. *Axtell*, 69 Ind. 202.

The spirit of a criminal statute will prevail over the latter only to secure the release or acquittal of one charged with its violation. It never overrides the letter of the law to subject one to the penalties imposed.

United States v. *Reese*, 5 Dill. 405; *United States* v. *Whittier*, 5 Dill. 35; *United States* v. *Garretson*, 42 Fed. Rep. 25.

A court cannot create a penalty by construction, but must avoid it by construction unless it is brought within the letter and the necessary meaning of the act creating it.

Western U. Teleg. Co. v. *Axtell*, 69 Ind. 202; *Western U. Teleg. Co.* v. *Wilson*, 108 Ind. 311; *Burgh* v. *State, McCormick*, 108 Ind. 134; *Fletcher* v. *Sondes*, 3 Bing. 580; Cooley's Bl. Com. *92; *King* v. *Bond*, 1 Barn. & Ald. 392; *Ex parte McNulty*, 77 Cal. 164.

Crimes cannot be created by vague implications.

Atlanta v. *White*, 33 Ga. 229; *Underhill* v. *Longridge*, 29 L. J. M. C. N. S. 65; *Western U. Teleg. Co.* v. *Steele*, 108 Ind. 163; Maxwell, Interpretation of Statutes, 368; Coke, Inst. 4, p. 332; Endlich, Interpretation of Statutes, 329; *Ex parte McNulty*, 77 Cal. 164; *United States* v. *Fisher*, 2 Cranch, 390, 2 L. ed. 314; *Andrews* v. *United States*, 2 Story, 203; *United States* v. *Reese*, 92 U. S. 214, 23 L. ed. 563.

The courts have no authority to supply words of limitation or give a meaning to a penal statute that the statute itself does not contain.

Endlich, Interpretation of Statutes, § 24; *McConvill* v. *Jersey City*, 39 N. J. L. 38; *State* v. *Partlow*, 91 N. C. 550, 49 Am. Rep. 652.

If the facts are capable of two constructions, one leading to conviction and one to acquittal, the defendant is entitled to that construction that will acquit.

Dickinson v. *Fletcher*, L. R. 9 C. P. 7; Potter's Dwarr. Stat. 225; *United States* v. Reese, 5 Dill. 405; *Kent* v. *State*, 8 Blackf. 163.

When there is such an ambiguity in a penal statute as to leave reasonable doubt of its meaning, it is the duty of the court not to inflict the penalty.

Com. v. *Standard Oil Co.* 101 Pa. 119; *The Enterprise*, 1 Paine, 32; *Hines* v. *Wilmington & W. R. Co.* 95 N. C. 434; *State* v. *Finch*, 37 Minn. 433.

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

The appellee, with three other persons, was charged, upon affidavit, in the police court of the city of Indianapolis, with a violation of the statute prohibiting the playing of baseball on Sunday where any fee is charged. He was found guilty and fined. He appealed to the Marion criminal court, and on his motion the affidavit was quashed, and he was discharged. The state appealed, and the error assigned is the ruling of the court on the motion to quash.

The affidavit thus brought under review is in these words:

STATE OF INDIANA,
MARION COUNTY,
CITY OF INDIANAPOLIS. } *ss:*

Be it remembered that on this day before the judge of the police court of the city of Indianapolis personally came Chris Kruger, who, being duly sworn, upon his oath says that Albert H. Pardee, George Hogriever, Ed. H. Deady, Jess. Hoffmeister, late of said city and county, on the 22d day of May, in the year of 1898, at and in the city of Indianapolis, county aforesaid, did then and there unlawfully engage in playing a game of baseball, where an admittance fee of twenty-five cents each was charged, and paid by the spectators then and there being, the said day being the first day of the week, commonly called Sunday, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Indiana.

[Signed] Chris Kruger.

Subscribed and sworn to before me this 23d day of May, 1898.

Charles E. Cox, Judge.

The affidavit is assailed upon the grounds (1) that it does not state facts sufficient to constitute a public offense; (2) that the act of the legislature upon which it is based is unconstitutional; and (3) that the said act is ambiguous and uncertain, and therefore void.

The statute so assailed is in these words: "It shall be unlawful for any person or persons to engage in playing any game of baseball where any fee is charged, or where any reward, or prize, or profit, or article of value is depending upon the result of such game, on the first day of the week, commonly called Sunday, and every person so offending shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding $25." Acts 1885, p. 127 (Burns's Rev. Stat. 1894, § 2087). Among the objections taken to the sufficiency of the affidavit, it is urged that if the word "fee," in the statute, means a charge for admission, then the name of some person paying it should be stated, and in support of this objection we are referred to 10 Enc. Pl. & Pr. pp. 505, 506; Harris, Crim. L. pp. 265, 266; *State* v. *Stucky*, 2 Blackf. 289; *State* v. *Jackson*, 4 Blackf. 49; *State* v. *Noland*, 29 Ind. 212; *Zook* v. *State*, 47 Ind. 463; *Alexander* v. *State*, 48 Ind. 394; and *McLaughlin* v. *State*, 45 Ind. 346. But the rule as laid down in these authorities goes only to the extent that when the names of third parties enter into the offense, and are necessary for the description of the crime charged, and for its identification, they must be set out. In the case of *State* v. *Stucky* the indictment charged a sale of liquor "to divers persons" without license. Held, that the names of the persons should be stated, if known. In *State* v. *Jackson* the charge of selling liquor to an Indian of the Miami tribe, whose name was unknown, was held good. *State* v. *Noland* was an indictment for suffering a house to be used for gaming. Held, that the names of the persons who were suffered to gamble should be set out, if known. *Zook* v. *State* and *Alexander* v. *State* were prosecutions against owners of billiard tables for permitting minors to play billiards. Held, that the names of the minors, and of the persons with whom they played, should be stated, or the reason given for not doing so. *McLaughlin* v. *State* was an indictment for selling liquor to persons intoxicated, etc. Held, that the names of the persons to whom sales were made should be set out, if known. It will be observed that none of these offenses bears the least resemblance to the misdemeanor before the court, in its character, circumstances, or legal description, and the rule which governs those cases does not apply to the offense set forth in this record. The object and meaning of the statute under examination are plain. The intention of the people of the state was by this law to prohibit the playing of baseball on Sunday where a fee was charged. "Where" signifies, "a place at which," or, "under circumstances in which." Standard Dict.; Webster, International Dict. The law applies to exhibitions in which the actors or players engage in the game of baseball. It discriminates between free exhibitions of this kind, and those where a fee must be paid by the persons witnessing the performance. It knows but two parties to such an exhibition,—the players and the spectators. It does not in the least concern itself with managers or owners of baseball teams, lessors or lessees of the grounds where the game is played, or the proprietors of adjoining lands or buildings. It is immaterial to whom the fee is paid, whether directly to the players, to their agent or manager, or to some person or company hiring or otherwise securing the services of the players. The natural meaning and obvious signification of the word "fee," in its connection in this statute, is the sum charged each person admitted to witness the game of baseball by the persons giving the exhibition. It is not necessary to set out the name of any person paying such fee for admittance. It is enough to aver that a fee

for admittance was charged. This indicates that the exhibition was not free, but was given for the purpose of gain, and in that respect it sufficiently describes the offense. *Hull v. State*, 120 Ind. 153. On the trial it would not be necessary to prove that any particular person paid a fee for admittance. It would be sufficient to show that the exhibition was not free, but that persons desiring to witness it were required to pay a fee or buy a ticket to secure that privilege. Evidence that one or more persons did pay fees for admittance would, of course, be competent proof that it was not a free entertainment, but one where a fee was exacted from the spectators. This construction of the statute does not extend its scope beyond the fair and natural import of its terms.

We are next asked to hold the statute void for uncertainty and ambiguity, and the supposed defect consists in the use of the words "where any fee is charged." It is said that this part of the act is indefinite and uncertain, and that it cannot be understood what is meant by "fee," or by whom it is to be paid. What we have said in regard to the affidavit is a sufficient answer to this objection. There are but two kinds of exhibitions,—one free, where the spectator is admitted without charge; the other restricted, where the spectator is charged a fee for admittance. Two classes of persons, only, are recognized by the statute as concerned in such exhibition,—the players, and the persons assembled to witness the game. Keeping these facts in view, there is not the slightest difficulty in determining what is meant by the term "fee," or by whom and to whom it is to be paid.

The constitutionality of the statute is attacked, and, in connection with this assault, it is contended that, the act being penal, it is to be strictly construed. We recognize the importance of the rule as to the construction of penal statutes in all cases to which it properly applies, but we do not believe it should be so unreasonably enforced as to defeat the sovereign will, when that will is expressed, as it is here, with ordinary certainty, and is easily intelligible. A law established by the legislature is entitled to the respect of every branch of the state government. It should never be lightly overthrown or set aside as unconstitutional. A statute enacted with the constitutional formalities comes before this court sustained and authenticated by the sanction and approval of two of the three great departments of the state government. The power to set aside and declare void an enactment so sanctioned and approved is the highest exertion of the constitutional authority of this court,—a prerogative always exercised with reluctance, and never asserted where the question of the constitutionality of a statute is in doubt. Counsel for appellee insist that the act prohibiting the playing of baseball on Sunday, where a fee is charged, and subjecting the players to a fine, is in conflict with those clauses of the Federal and state Constitutions which forbid class legislation. The 14th Amendment of the Constitution of the United States provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens, . . . nor deny to any person within its jurisdiction the equal protection of the laws." The Constitution of the state of Indiana contains this clause (art. 1, § 23): "The general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Does a statute which prohibits the playing of games of baseball on Sunday, where a fee is charged, abridge the privileges or immunities of citizens of the United States, or deny to any person within the jurisdiction of the state the equal protection of its laws? Does it grant to any citizen or class of citizens privileges or immunities which, upon the same terms, do not equally belong to all citizens? The argument of counsel for appellee is that baseball playing is an occupation by which persons skilled in the game earn a livelihood; that the persons engaged in this particular calling cannot be singled out, and prohibited from exercising it on Sunday, under different and more severe penalties than those imposed on citizens engaged in other kinds of business; and that, as the statute before us makes this discrimination, it violates the organic law. Whether or not the game or sport is entitled to recognition as a form of labor, and therefore stands on the same footing as blacksmithing, farming, or selling merchandise, is not material. The state deals with it, in the exercise of its police power, to circumscribe certain evils which are likely to result from its unrestrained practice, to repress certain known pernicious tendencies, and to protect the citizens of the state in the enjoyment of that repose and quiet on the day set apart by secular laws for rest and recuperation to which they are entitled. The objects of the game of baseball, as stated in the brief of counsel for appellee, are to furnish entertainment and amusement to the spectators of the sport. It is said to be popular. It attracts great throngs, including persons of all ages and of both sexes. Both chance and skill enter into the doubtful results of the game. It affords opportunity for, and furnishes strong inducements to, that species of gambling known as "betting." The contests between the players are often close and exciting, and the decisions of umpires unsatisfactory. Tumults, riots, and breaches of the peace at the games are not uncommon. Wherever these conditions exist, the peace and quiet of neighborhoods are liable to be disturbed, and the public order broken. Under such circumstances, it follows that extraordinary police regulation and supervision become necessary; and, this being the case, these exhibitions fall, unquestionably, within the class of entertainments and occupations which, in the legitimate exercise of the police power of the state, may be regulated, restrained, or even prohibited, by the people, through the legislature, without a violation of any provision of the Constitu-

tion, state or Federal. Familiar instances of the exercise of this power are found in the laws and in municipal ordinances relating to the selling of liquor, the maintenance of dance houses and concert saloons, theaters, circus performances, horse racing, the keeping of places for sports and games, billiard rooms, the ringing of bells, regulating the speed of horses on streets and highways, regulating sales in markets, relating to persons having infectious diseases, regulating the business of mining, and many others. The statute of this state known as the "General Sunday Act" has a wider scope than is sometimes ascribed to it. It prohibits not only acts of common labor, but it forbids rioting, hunting, fishing, and quarreling on the first day of the week, commonly called Sunday. It applies to amusements and recreations as well as to labor and conduct tending to a breach of the peace. Burns's Rev. Stat. 1894, § 2086. Its constitutionality has repeatedly been assailed by litigants, and as often affirmed by the decisions of this court. In *Voglesong* v. *State*, 9 Ind. 112, it is said: "The constitutionality of the Sunday act we shall not discuss, though the counsel in this case has presented a very learned and able printed argument against its validity. The question can hardly be considered as an open one. The grounds upon which such acts are sustained have been thoroughly examined, and are generally admitted to be substantial. This court has acted upon them as such." Again, in *Foltz* v. *State*, 33 Ind. 215, the court says: "It is urged that the law under which the prosecution was had is obnoxious to the Constitution of the state. We decline the discussion of this question, for the reason that the act in question has been so long recognized and acted upon, and so often affirmed by this court, that it cannot longer be regarded as an open question in this state." The question of the validity of the Sunday act was again before the court in *Johns* v. *State*, 78 Ind. 332, 41 Am. Rep. 577, and was disposed of in these words: "The second question is this: Is the 95th section of the act of April 14, 1881, in conflict with any constitutional provision? A long line of decisions affirms the validity of this law. It has been sustained against repeated assaults. It has been a part of the statutory law of the state since its organization. Cases old and new have sustained and enforced it. *Rogers* v. *Western Union Teleg. Co.* 78 Ind. 169, 41 Am. Rep. 558, and authorities cited; *Mueller* v. *State*, 76 Ind. 310, 40 Am. Rep. 245. Like statutes have been upheld in almost all the states of the Union. The cases in which the constitutionality of similar statutes has been sustained are practically innumerable. A few of the more important are the following: *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 36 L. ed. 226; *Health Department of New York* v. *Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710; *State* v. *Powell*, 58 Ohio St. 324, 41 L. R. A. 854; *State, Walker*, v. *Judge of Section "A."* 39 La. Ann. 137; *People* v. *Bellet*, 99 Mich. 151, 22 L. R. A. 696; *Lindenmuller* v. *People*, 33 Barb. 548; *People* v. *Havnor*, 149 N. Y. 195, 31 L. R. A. 689; *Holden* v. *Hardy*, 169 U. S. 392, 42 L. ed. 791; *State* v. *O'Rourk*, 35 Neb. 614, 17 L. R. A. 830; *State* v. *Williams*, 35 Mo. App. 541; *Re Rupp*, 33 App. Div. 468; *People* v. *Moses*, 140 N. Y. 214. These decisions, and many others which might be named, indicate the general sentiment and the fixed public policy in the states of the Union on the subject of Sunday legislation. That sentiment is too widely spread and profound, and that policy too firmly embedded in the laws and in the decisions of the courts, to be changed or overthrown.

But it is said that under the general statute making hunting, fishing, rioting, quarreling, and engaging in acts of common labor unlawful, the person offending is subject only to a fine of not more than $10, while the baseball player, under the act of 1885, for practically the same offense, may be subjected to a penalty of $25. Hence, it is claimed, the effect of this act, if upheld, is to grant to other citizens privileges and immunities which, upon the same terms, shall not equally belong to all citizens. The constitutional authority of the legislature to enact any statute making it unlawful to do certain acts on the first day of the week, commonly called Sunday, being admitted, violations of such laws are not privileges and immunities which must be secured to all citizens alike, and upon the same terms. Where several different acts are prohibited by law, a difference in the penalties for violations of such several acts cannot be said to constitute a breach of the constitutional provisions intended to secure equal rights to all citizens. It is but reasonable that in every case of the violation of law the penalty should be graduated by the character and circumstances of the offense, and in proportion to its injurious consequences to the public. This principle has been recognized and adopted in this state from the earliest period of its government. Special penalties for selling liquor on Sunday have been enforced. Thirteen separate species of embezzlement are mentioned in the Criminal Code, and seven distinct kinds of punishment are provided for the crime, ranging from imprisonment for six months to confinement for twenty-one years. Many other instances may be found in the statutes. The state officer who is found guilty of the crime of embezzlement may be imprisoned twenty-one years, and fined double the value of the money embezzled. A tenant who embezzles the crops of his landlord can be imprisoned only three years. Could the state officer overthrow the statute which denounces his crime, as class legislation, because the penalty for another species of embezzlement is imprisonment for three years only? Natural justice requires that the penalty shall bear some proportion to the nature and circumstances of the offense. The legislature is clothed with the power of defining crimes and misdemeanors, and fixing their punishment; and its discretion in this respect, exercised within consti-

tutional limits, is not subject to review by the courts. If the legislature deemed it expedient for the public welfare that a baseball player, who gave a public exhibition of his skill on Sunday, where a fee was charged, in the presence of numerous spectators, should be fined $25 for the offense, but that a citizen who shot a partridge, caught a fish, shod a horse, or sold a yard of cloth would be sufficiently punished by a fine of $10, shall the courts go to the absurd length of saying that this was class legislation, and that the Constitution had been violated? The act in question applies equally to all that class of persons who play baseball on the first day of the week, commonly called Sunday, where a fee is charged for such exhibition. It neither directly nor indirectly grants privileges or immunities to one citizen or class of citizens, or denies them to another. The graduation of penalties for offenses differing in their circumstances and surroundings is a matter wholly within the competence and discretion of the legislature, and in this case we discover no abuse of that discretion.

As a result of these views, we are of the opinion that the affidavit in this case was sufficient in form and substance; that the act approved April 4, 1885 (Acts 1885, p. 127; Burns's Rev. Stat. 1894, § 2087), is constitutional; and that it is not void for uncertainty.

The judgment is reversed, with instructions to overrule the motion to quash the affidavit, and for further proceedings in accordance with this opinion.

Rehearing denied.

KENTUCKY COURT OF APPEALS.

Samuel SMITH, *Appt.*,
v.
George L. ROBERTSON *et al.*

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

A contract for the services of an unlicensed stallion is invalid, so that no recovery thereon can be had under Stat. chap. 108, § 4201, making the owner liable to indictment and fine for failure to procure the license.

(April 27, 1899.)

APPEAL by plaintiff from a judgment of the Circuit Court for Fayette County in favor of defendants in an action brought to recover for the services of a stallion. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Webb & Farrell** for appellant.

Mr. **George Denny** for appellees.

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

It is substantially alleged in the petition in this action that in the year 1895 the plaintiff, Smith, was the owner of a stallion known as "Imported Deceiver," and that the defendants, George L. and Eva M. Robertson, were the owners of a chestnut mare, and that by an agreement between plaintiff and defendants said mare was bred to said stallion, and that by the terms of the said agreement defendants promised and agreed to pay plaintiff the sum of $150 for the services of said stallion, to be due and payable when said mare had a foal by said stallion; that upon the 3d of April, 1896, said mare produced a foal, the get of said stallion; and that the services of said stallion were worth the sum of $150, which sum the defendants promised to pay for a foal. The plaintiff claimed a lien upon said colt, and instituted this action to obtain a judgment against the defendants, and for an enforcement of their lien upon said colt. The first paragraph of the answer pleaded a defect of parties, alleged that the stallion Imported Deceiver was owned by Samuel Smith, S. C. Lyon, Nat. Pettit, and others, unknown to the defendants, and that plaintiff, Smith, owned only one-eighth interest in said horse; hence they prayed that plaintiff's petition be dismissed. In the second paragraph it was pleaded, in substance, that, when said colt got by said stallion was foaled, defendants should have an option either to give the owners of said stallion one-half interest in said foal at weaning time, or pay to the owners the sum of $150, and that they determined, instead of paying the $150, to give said plaintiff and his associates one-half interest in said colt, and so notified plaintiff about the 1st of May, 1896, and alleged that they were now willing and able to do so. In the third paragraph it is substantially alleged that the plaintiff nor any of his associates had paid any license fee in Jessamine county, where said stallion was during the season of 1895, and relied upon the statute in such cases made and provided in bar of plaintiff's right to recover. The court overruled the plaintiff's demurrer to the first and second paragraphs of the answer, but sustained the demurrer to the third paragraph. The reply may be treated as a traverse of the remaining paragraphs of the answer, and also showed a right of plaintiff to recover the $150 under an arrangement between himself and the other joint owners, providing the same could, in law, be collected. The rejoinder may be treated as a traverse of the reply. After the issues were

NOTE.—As to the effect of failure to procure a license for business on the validity of a contract therein, see *note* to Buckley v. Humason (Minn.) 16 L. R. A. 423; also Fairly v. Wappoo Mills (S. C.) 29 L. R. A. 215; Vermont Loan & T. Co. v. Hoffman (Idaho) 37 L. R. A. 509; and Randall v. Tuell (Me.) 38 L. R. A. 143.

fully made up, and proof taken, the court adjudged in favor of the defendants, and dismissed the petition of plaintiff, and from that judgment this appeal is prosecuted.

It is insisted for appellant that the burden of sustaining the agreement between the parties as to the option of defendants to give plaintiff one-half interest in the colt instead of paying $150 is upon the defendants, and that they have totally failed to sustain the defense by even a preponderance of the evidence. The question first to be disposed of is as to the correctness of the ruling of the court in sustaining the demurrer to the third paragraph of the defendant's answer; in other words, the main question for decision in this case is whether the owner of a stallion, who has not procured a license to stand same, can recover for the services of the stallion. It is not disputed but what the Kentucky statutes require license to be paid by all persons who stand stallions for hire; and it is further provided by law that, if a person is engaged in such business without license, he is liable to a fine of not less than $50 nor more than $1,000. But it is suggested that the statute in question is a statute for revenue, and not for any other purpose, and that a contract for the services of an unlicensed stallion may nevertheless be collected, although a penalty is denounced against the keeper of such stallion if he stands the same without license. This question is discussed in *Buckley* v. *Humason* (Minn.) 16 L. R. A. 423, *note*, in which the following from Mr. Benjamin is quoted with apparent approval: It is there stated: "First—That where a contract is prohibited by statute, it is immaterial to inquire whether the statute was passed for revenue purposes only or for any other object. . . . Secondly—That when the question is whether a contract has been prohibited by statute, it is material, in construing the statute, to ascertain whether the legislature had in view solely the security and collection of the revenue, or had in view, in whole or in part, the protection of the public from fraud in contracts, or the promotion of some object of public policy. In the former case the inference is that the statute was not intended to prohibit contracts; in the latter that it was. Thirdly—That in seeking for the meaning of the lawgiver, it is material also to inquire whether the penalty is imposed once for all, on the offense for failing to comply with the requirements of the statute, or whether it is a recurring penalty repeated as often as the offending party may have dealings. In the latter case, the statute is intended to prevent the dealing to prohibit the contract and the contract is therefore void; but in the former case such is not the intention, and the contract will be enforced." Section 4201, chap. 108, Ky. Stat. provides: "Any person who shall engage in any business, or sell or offer to sell any article on which a license is required before procuring the license, and paying the tax thereon as required by law, shall be deemed guilty of a misdeneanor and, on conviction, be fined not less than fifty nor more than one thousand dollars for each offense, unless otherwise specially provided." It will be seen from this statute that a person furnishing the services of an unlicensed stallion for hire or compensation would be liable to indictment, and subject to a fine for each offense. Each contract or service so rendered or performed would evidently be a separate offense, hence it seems that such action would bring the offending party within the rule announced above. In § 547, Bishop, Contr. it is said: "And the rule is that, when a statute forbids a particular business generally, or to unlicensed persons, any contract made in such business by one not authorized, or made with the view of violating the statute, is void. Within this principle is a sale of goods to be used in the business from one who has knowledge of the proposed use." And in § 549 it is said: "The law, for convenience, for adaptation to our infirmities, and, to some degree, from necessity, has, besides its doctrines of fundamental right, rules more or less technical, and a policy of the like sort. So it must refuse to enforce, or, in other words, it must hold void, contracts which violate such rules or policy. *A fortiori*, it cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law. So that, in short, all stipulations to overturn, or in evasion of, what the law has established; all promises interfering with the workings of the machinery of the government in any of its departments, or obstructing its officers in their official acts, or corrupting them; all detrimental to the public order and public good, in such manner and degree as the decisions of the courts have defined; all made to promote what a statute has declared to be wrong,—are void. If the court should enforce them, it would employ its functions in undoing what it was established to do. The act would be in the nature of suicide." In *Woods* v. *Armstrong*, 25 Am. Rep. 671, it is said: "Where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void nor expressly prohibit it." *S. C.* 54 Ala. 150. On page 675, 25 Am. Rep., a number of English authorities are referred to. *Law* v. *Hodgson*, 2 Campb. 147, was an action for the value of bricks smaller than the statutory dimensions, and the statute simply fixed a penalty for violation. The statute only declared that bricks shall be made of certain dimensions. Lord Ellenborough said: "The first section of this statute [17 Geo. III. chap. 42] absolutely forbids such bricks to be made for sale. Therefore the plaintiff, in making the bricks in question, was guilty of an absolute breach of the law; and he shall not be permitted to maintain an action for their value." *Brown* v. *Duncan*, 10 Barn. & C. 93, was an action on a guaranty

for sales of liquors, which were distilled without license under a statute which fixes a penalty. It was held that, these being mere revenue regulations, a breach did not render the act so illegal as to prevent a recovery for sales. The case was distinguished from the brick case on the ground that this statute was only to protect revenue, while the other was to protect public good. The same doctrine was announced in *Johnson* v. *Hudson*, 11 East, 180, in respect to the importation of tobacco. But in *Cope* v. *Rowlands*, 2 Mees. & W. 157, this distinction is overruled, the court saying that if a contract be rendered illegal, it can make no difference, in point of law, whether the statute which made it so has in view the protection of the revenue, or any other object. In *Drury* v. *Defontaine*, 1 Taunt. 136, Mansfield, Ch. J., said: "If any act is forbidden under a penalty, a contract to do it is now held void." The statute of New York forbids the transaction of business in the name of a partner not interested in the firm, and requires that the designation "Co." or "Company," shall represent an actual partner, and a violation of this statute is made a misdemeanor punishable by fine. Under this statute it was held that all contracts in violation of it were absolutely void. *Swords* v. *Owens*, 43 How. Pr. 176. To the same effect is the decision of *Hallett* v. *Novion*, 14 Johns. 273. Many other decisions to the same effect are found in the subsequent pages of the volume hereinbefore referred to. *Vanmeter* v. *Spurrier*, 94 Ky. 22, was an action brought by Spurrier and another on a note given to the Thompson & Edwards Fertilizer Company by Vanmeter and others, the consideration being commercial fertilizer sold and delivered in sacks to the purchaser. Two distinct grounds of defense are stated in the answer, which is also made a counterclaim. The second defense is that by reason of the noncompliance with the provisions of an act to regulate the sale of fertilizers in this commonwealth, and to protect agriculturists in the use of fertilizers, approved April 13, 1886, the note is void, and unenforceable. The statute required certain things to be done by the seller of fertilizers, and a further provision of the statute provided that any vendor of any commercial fertilizer who shall sell or offer for sale such fertilizers without first previously complying with the provisions of the act shall, upon indictment, and upon being found guilty, be fined $100 for each violation or evasion. It is further provided that the director shall receive, for analyzing the fertilizer and affixing his certificate, the sum of $15, etc. It was further provided that the director should pay all such fees into the treasury of the Agricultural or Mechanical College of Kentucky, to be used for the purpose of meeting the legitimate expenses of the station, etc. The court, in discussing the several questions involved, said: "It is admitted that the retail price of the fertilizers sold to appellants was worth over ten dollars per ton, and that no one of the packages had attached to it when sold the label, required by section 3 of the statute; and the main question, therefore, is whether the contract sued on is, by reason of such noncompliance with and disregard of the statute, void and unenforceable. It is too well settled for argument that a contract prohibited by statute will not, nor should be, enforced by the court. But whether a contract has been prohibited sometimes depends upon construction of such statute when not clear in meaning, and we will at present assume such is this case." The court then proceeds to quote from Benjamin on Sales, which substantially embodies the quotation herein made from 16 L. R. A. 423. The court then said: "Tested by either one of these rules, the statute in question would have to be construed as intended to prohibit the contract in case of noncompliance with, or breach of, its provisions. For the legislature had in view, when enacting it, not the security and collection of the revenue, even partly, but had in view the protection of the public from fraud in contracts for sale of fertilizers; and it is expressly provided in § 4, the fine shall be imposed for each violation or evasion of the act. In *Lindsey* v. *Rutherford*, 17 B. Mon. 248, the following proposition, stated in Chitty on Contracts, was referred to with approval: 'A contract is void if prohibited by statute, though the statute only inflicts a penalty, because such penalty implies a prohibition. If the contract be illegal, it makes no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object.' But it was nevertheless there held that contracts for sale and purchase of bills of exchange were not prohibited by the statute then under consideration, which required each person conducting the business of brokers or exchange dealers to obtain a license, under penalty of a fine; the court being of opinion the statute was intended to raise revenue, not to strike a blow at the business. But neither the conclusion in that case nor reason for it affects the question before us; for there is a marked difference between a statute the prime or sole purpose of which is to secure or raise revenue by a license tax and one enacted to protect the public against fraudulent sale of goods, or for other reason of public policy. . . . That a penalty implies prohibition in such case as this, though there be no prohibitory words in the statute, has been decided, not only by this court in *Lindsey* v. *Rutherford*, but by numerous courts in England, as well as in this country." The court then quotes with approval from the case of *Woods* v. *Armstrong*, heretofore referred to. From an early period of the history of this country persons desiring to stand a stud horse were required to obtain a license, and a penalty denounced against them for engaging in such business without license, and it can hardly be assumed that the sole purpose was to raise revenue, but manifestly one of the objects

was to encourage men to procure and stand a superior breed of horses by excluding owners of inferior stock from engaging in such business, unless they would in like manner procure a license; it being reasonably presumed that the owner of inferior stock would hardly be able to obtain sufficient custom to justify him in licensing his horse. In view of the authorities and reason heretofore given, we are of the opinion that no compensation can be recovered for the services of the stallion without his owner or keeper has procured a license as provided by law. This conclusion dispenses with the necessity of considering whether the testimony in this case sustains the finding of the court below upon the issues presented, for it clearly appears from the proof, as well as from the rejected pleading, that no such license had been procured licensing the stallion as required by law; hence it is immaterial whether the judgment of the court below was predicated upon a correct view of the law or not, its judgment being in fact correct, and in accordance with the law of the case.

The judgment is therefore affirmed.

LOUISVILLE TRUST COMPANY, Assignee, etc., of Myer Brothers, *Appt.*, v. P. A. GAERTNER.

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

1. **An assignee of a lease cannot avoid the statutory lien on his property** for rent by setting up the fact that the assignment was invalid because made without the consent of the lessor if the latter has acquiesced in it.

2. **The lien on the goods of an assignee of a lease,** created by Stat. §§ 2305, 2307, 2317, to the extent of one year's rent accruing after the assignee's interest begins, cannot be avoided by his assignee for creditors by a transfer of the lease.

(Du Relle and Guffy, JJ., and Hazelrigg, Ch. J., dissent.)

(April 28, 1899.)

APPEAL by plaintiff from a judgment of the Chancery Division of the Circuit Court for Jefferson County in favor of defendant in a proceeding to determine the extent of defendant's lien upon property of plaintiff's assignor. *Affirmed.*

The facts are stated in the opinions.

Messrs. **Samuel A. Lederman** and **Kohn, Baird, & Spindle** for appellant.

Mr. **C. B. Seymour,** for appellee:

The landlord's lien for rent against the goods of an assignee or under-tenant found on the leased premises is as extensive as the indebtedness of the tenant, and is not limited by the personal liability of the assignee or under-tenant.

Ky. Stat. §§ 2305, 2307, 2317; *Sutton* v. *Perkins*, 2 Ky. L. Rep. 233.

An assignee of a lease is a tenant.

Trabue v. *McAdams*, 8 Bush, 74.

A colorable assignment by an assignee of a lease will not defeat the landlord's lien on goods on the premises.

Craddock v. *Riddlesbarger*, 2 Dana, 209; *Lougee* v. *Colton*, 2 B. Mon. 115.

Neither *Trabue* v. *McAdams*, 8 Bush, 74, nor *Muldoon* v. *Hite*, 6 Ky. L. Rep. 663, relates to the landlord's lien; each of them relates solely to the personal liability of the under-tenant.

Mr. **Lewis N. Dembitz** also for appellee.

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

This case is before us upon an agreed statement of facts. In August, 1895, appellee, Gaertner, executed to one Rosenberg a written lease of a storehouse owned by him in Louisville, which was also signed by Rosenberg, for the term of two years from April 1, 1896. By the lease it was provided that the premises should not be underlet, or the term, in whole or in part, assigned, transferred, or set over, by the act of the lessee, by process or operation of law, or in any other manner whatever, without the written consent of the lessor, but that the lessee might sublet the building to a responsible party, to be used for the same or a similar business, who should be acceptable to the lessor, in which event the lessee was to remain liable on the lease until its expiration. In January, 1897, Rosenberg assigned the unexpired portion of his term to Myer Bros., and delivered his lease to them; and they took possession and occupied the property, claiming as assignees of the term, and remained in possession, paying the rent to Gaertner. On July 21, 1897, they made an assignment for the benefit of their creditors to the Louisville Trust Company. The assignment from Rosenberg to Myer Bros. was made in parol, and was not evidenced in any writing. It is also agreed that Myer Bros. were acceptable to the lessor. At the time of the Myer Bros. assignment the rent for June was due. On July 22, 1897, after the deed of assignment to the trust company, the company, for the purpose of protecting the assigned estate, and of avoiding any future liability for the rent of the leased property, assigned all its and its assignor's interest in the unexpired part of the term to one Kling, who accepted the assignment. That assignment is in writing. Gaertner gave no consent, written or oral, to either assignment, but continually looked to Rosenberg as tenant under the lease. The trust company claims that upon these facts the assigned estate is liable to Gaertner only for the rent due to August 1, 1897, which it has paid him. Gaertner claims that the estate is liable to him, not only for the rent due at the time of the assignment to the trust company, but for all the rents to become due thereafter, for the ten months to elapse before the expiration of the lease to Rosenberg, and that he has

NOTE.—On the question of the liability of an assignee of a leasehold for rent, see *note* to Bonnetti v. Treat (Cal.) 14 L. R. A. 151; also Woodland Oil Co. v. Crawford (Ohio) 34 L. R. A. 62, and *note* (as to oil and gas leases).

a prior lien upon the assets for all that rent. By a written agreement between Gaertner and the company, made before the sale of the stock of goods assigned, it was agreed that no distress warrant or attachment need issue for the rent of the premises, and that whatever lien Gaertner might have on the personalty should hold good on the proceeds. Gaertner filed proof of his rent claim with the trust company.

The question presented to the court for decision is whether the assignment by the trust company to Kling of the unexpired portion of the term operated to accomplish the avowed purpose of relieving the assigned estate from Gaertner's landlord's lien, which could have been asserted if no assignment had ever been made by the assignee of the term. The question thus presented is one of great interest, and has been elaborately and ably briefed.

It seems clear that the assignment by Rosenberg to Myer Bros. in violation of the terms of the lease, as it was made without the landlord's consent, was voidable only, and could be taken advantage of by the landlord only, by re-entry and declaration of forfeiture of the lease. 2 Taylor, Land. & T. § 492. It is equally clear from the record that if there be a difference between an assignment of a term, in whole or in part, and a subletting, this was an assignment; for it is stipulated in the agreed statement of facts that the remainder of the term was assigned. The original lessee had transferred his whole estate, therefore, and had no reversion, though he was still liable upon his covenant to pay the rent. There was no privity of contract between the assignee of the term and the lessor. It is insisted that, as assignee, he was liable only because of his possession, and so was only liable for covenants broken while he remained in possession of the property, and for such rents as accrued after he took possession. What effect does an assignment over by the assignee of a term have upon his liability for rents to become due thereafter? The rule, in the absence of statutory modification, is, thus stated by Taylor (vol. 2, § 452): "An assignee may always discharge himself from liability for subsequent breaches, in respect to rent as well as to other covenants, by assigning over, though it is done for the express purpose of getting rid of his responsibility, and although the second assignee neither takes possession nor receives the lease. And he may assign to a beggar, a *feme covert*, or to a person who is on the eve of quitting the country forever, provided the assignment shall be executed before his departure; and even although the assignee may receive from the assignor a premium as an inducement to accept the transfer. The same result follows, notwithstanding the assignment of the lease remains in the hands of the solicitor of the assignor, who has a lien for the expense of preparing it, or the lease contains a covenant not to assign. For the assignment destroys the privity of estate, which was the only ground upon which the assignee was liable; and though the tenant's liability on his covenant to pay rent may subsist during the continuances of the lease, there is no personal confidence reposed in the assignee of the lessee." The question presented, therefore, is, Has this rule been modified by statute, as to the property of the assignee on the premises?

The statutes, so far as material to this controversy, are as follows: "Rent may be recovered from the lessee or other person owing it, or his assignee or undertenant, or the representative of either, by the same remedies given in the preceding sections. But the liability of the assignee or subtenant shall only be for the rent accrued after his interest began." "A distress warrant or attachment for rent shall bind, and may be levied upon any personal property of the original tenant found in the county; and upon the personal property of the assignee or under-tenant found on the leased premises, and if the tenant has removed his property to another county the distress or attachment may be directed to such county." "If after the commencement of any tenancy a lien be created on the property upon the leased premises liable for rent, the party making or acquiring such lien may remove the property from the premises upon the following terms, and not otherwise; that is, by paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due; what is so paid and secured not being more altogether than a year's rent." "All valid liens upon the personal property of a lessee, assignee, or under-tenant, created before the property was carried upon the leased premises, shall prevail against a distress warrant or attachment for rent. If such lien be created whilst the property is on the leased premises, and on property upon which the landlord hath a superior lien for his rent, then to the extent of one year's rent, whether the same accrued before or after the creation of the lien, a distress or attachment shall have preference, and be first satisfied, provided the same is sued out in one hundred and twehty days from the time the rent was due." "Landlord shall have a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant, or under-tenant, owned by him after possession is taken under the lease; but such lien shall not be for more than one year's rent due or to become due, nor for any rent which has been due more than one hundred and twenty days." Ky. Stat. §§ 2305, 2307, 2314, 2316, 2317. Our statutes also provide as follows: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, is not to apply to this revision; on the contrary its provisions are to be liberally construed with a view to promote its objects." Id. § 460. Construing the sections above quoted under this rule, with a view to promote their object, we think it clear that they give the landlord a superior lien, for not exceeding one year's rent, due or to be-

come due, on all property of the tenant, subtenant, or assignee on the premises, subject to execution; the liability of the assignee or subtenant being only for the rent accrued after his interest began. Appellee therefore had a superior lien on all the property of appellant, as assignee of Myer Bros., on the premises, for one year's rent, due or to become due, at the time it executed the assignment of the balance of the term to Kling. They had no right to make any assignment of the lease without the written consent of the appellee, and it certainly was not the intention of the statute that the tenant could, by a violation of the lease, and without the consent of the landlord, devest him of his lien on the tenant's property for his rent, and thus defeat the entire purpose of the statute. Rosenberg had no right to assign his lease to Myer Bros.; but only the lessor could complain of this, and, he acquiescing in the assignment, Myer Bros. became his tenants. An assignee of a lease, accepting the assignment of it, takes it subject to all the covenants contained in it; and so Myer Bros., or appellant, as their representative, had no right to assign this lease to another. The law suffers no man to profit by the violation of his own contract, and it would be a plain denial of the purpose of these statutes to allow an assignee of a lease to defeat the lien secured by it to the landlord by a wrongful act of his own, and without the concurrence of the landlord. If, on the day before the assignment to Kling was made, appellee had taken out an attachment for the rent due or to become due under this lease, would it be contended that his attachment might be defeated by the assignment made to Kling on the following day? The plaintiff may defeat the lien of his attachment by his acts, but nothing that the defendant can do alone can have this effect. But an attachment, if taken out, would have added nothing to the efficacy of the landlord's lien. The statute gave him a lien, with or without the attachment, and the property subject to the lien could as well be withdrawn from the operation of the attachment as from the operation of the lien given by the statute, by the act alone of the assignee or subtenant. The doctrine that a lien is only an incident to a debt, and that where the personal liability is terminated the lien is gone, has no application to a statutory right like this. The landlord might be perfectly satisfied where his tenant assigned his term to another who filled the storehouse with goods, thus securing the rent; for, without regard to personal liabilities, he is given by the statute a superior lien on the goods for his rent, and it was never intended that after this was done the assignee could move out his goods at any time he pleased, and, by assigning the lease to a beggar, throw upon the landlord the entire loss of his rent. Appellee's lien on the personal property of the assignee or undertenant on the premises is simply a right *in rem* conferred by statute. Such rights often exist when there is no personal liability, as on the get of a stud for the services of the horse, or on the property of a married woman in favor of a mechanic before our enabling acts. On the day that Myer Bros. made the deed of assignment to appellant, appellee had a lien on the stock of goods for a year's rent, due or to become due. By that deed Myer Bros. created a lien on the property in favor of all their creditors. But this lien so created on the property in the hands of appellant was by the express provisions of § 2316, quoted above, subject to the lien of appellee; and appellant who was trustee for the creditors, and charged by law (Ky. Stat. § 74) with the duty of applying the proceeds of the property first to the discharge of the liens on it, could not by its sole act, without his consent, destroy appellee's lien, when the statute required it to be paid before other claims.

Judgment affirmed.

Du Relle, J., dissenting.

I earnestly dissent from the opinion of the majority. This case is before us upon an agreed statement of fact, which, with the legal questions presented, is fully set forth in the majority opinion. There was no privity of contract between the assignee of the term and the lessor. As assignee, he was liable because of his possession, and was liable for covenants broken only while he remained in possession of the property, and for such rents only as accrued after he took possession. 2 Taylor, L. & T. § 449. He bore the burden so long as he enjoyed the benefit. What effect does the assignment over by the assignee of a term have upon his liability for rents to become due thereafter? The rule, in the absence of statutory modification, is given in the majority opinion, as stated by Taylor (vol. 2, § 452). To the same effect, see Wood, Land. & T. p. 546. It does not appear to be contended that this doctrine is changed, as to personal liability of the assignee over, by the Kentucky statute of landlord and tenant, but that the statute fixes upon his goods a lien, to the extent of the personal liability of the original lessee, within the limit of a year, as fixed by the statute. The statutes involved are found in §§ 2305, 2307, and 2317 of the Kentucky Statutes, which are as follows:

"Sec. 2305. Rent may be recovered from the lessee or other person owing it, or his assignee or under-tenant, or the representative of either, by the same remedies given in the preceding sections. But the liability of the assignee or subtenant shall only be for the rent accrued after his interest began."

"Sec. 2307. A distress warrant or attachment for rent shall bind, and may be levied upon any personal property of the original tenant found in the county; and upon the personal property of the assignee or undertenant found on the leased premises, and if the tenant has removed his property to another county, the distress or attachment may be directed to such county."

"Sec. 2317. A landlord shall have a superior lien on the produce of the farm or premises rented, on the fixtures, on the

household furniture, and other personal property of the tenant, or under-tenant, owned by him, after possession is taken under the lease; but such lien shall not be for more than one year's rent due or to become due, nor for any rent which has been due for more than one hundred and twenty days. And if any such property be removed openly from the leased premises, and without fraudulent intent, and not returned, the landlord shall have a superior lien on the property so removed for fifteen days from the date of its removal, and may enforce his lien against the property wherever found."

The remedies referred to in § 2305 are the remedies by distress and landlord's attachment.

It is urged on behalf of appellee that, upon the theory that Myer Bros. were assignees of the term, they became the tenants upon coming into possession. Says the counsel for appellee upon this subject: "An assignee of a lease is a tenant, to all intents and purposes. The original lessee may still be liable upon his covenant of payment, while the assignee is liable by reason of his occupation; but the former is not a tenant after he has assigned and left possession, while the assignee in possession is a tenant," —referring to Taylor, Land. & T. § 16. And again: "The assignee comes at once into privity with the landlord, and while he remains owner of the term under the assignment he is liable on all the covenants of the lease. 'An assignee is personally liable to the lessor upon all covenants which run with the land, the premises also remaining liable to a distress by the latter for the rent.' Id § 109, and authorities quoted in note 6." This is entirely true, as I think, and entirely in accordance with the doctrine quoted from Taylor. The assignee in possession is a tenant, in that he holds the land. But he holds it, not under contract with the owner, and has no privity of contract with him, but only privity of estate, which, being terminated, his character of tenant ceases coterminously with his possession of the property. It is sought, however, on behalf of appellee, by establishing the proposition that the assignee is a tenant, to subject his goods to a lien for rent, coextensive with the liability of the original lessee under his contract, subject only to the limitation that it shall not extend beyond rent for one year. It is conceded by both sides that the remedy by distress in Kentucky is not in any wise similar to the common-law right of distraint, but is purely statutory, in that it gives a lien upon, and right of sale of, the goods of the tenant; and this, in some instances, independent of the continuation of the relation of landlord and tenant. Conceding this to be true, it follows that, the lien being given independently of the contract rights existing between the parties, and the remedy for its enforcement being an extraordinary and frequently oppressive one, the statute must be strictly construed, and cannot, by implication, be extended beyond the plain legislative intent. This has been frequently held in this court. *Gedge* v. *Schoenberger*, 83 Ky. 92, and *Hutsell* v. *Deposit Bank*, 19 Ky. L. Rep. 1481, 39 L. R. A. 403. "It is no mere remnant of the old common-law right," says counsel for appellee, "but it exists by virtue of the act of 1811. 2 Morehead & B. Ky. Stat. 1358."

Now to consider the statutes: Section 2305 gives a remedy by distress or attachment against the lessee or other person owing it, or his assignee or under-tenant, or the representative of either, providing that the liability of the assignee or subtenant shall only be for the rent accrued after his interest began. Section 2307 provides what property shall be subject to levy, and under what circumstances. But neither of these sections in any wise refers to the liability to secure which the lien is given, or alters such liability of person or goods from that which existed under the contract, or, at common law, arose out of the relations of the parties. It has never been held that the property of the subtenant was liable for rent beyond the term of his tenancy. Section 2317 gives the landlord a superior lien upon the property of the tenant or under-tenant, but provides that such lien shall not be for more than one year's rent, due or to become due. It seems to be contended that this gives the landlord, by implication, a lien for one year's rent. But while it is generally true that the expression of one thing is to be construed as the exclusion of others, it does not always follow that the converse of the rule is true. In Black, Interpretation of Statutes, it is said (p. 149): "It is sometimes said that the converse of this rule is equally available in statutory construction; that is, that the express exclusion of one thing will operate as the inclusion of all others. Thus, if a statute explicitly provides that a court, in certain cases, shall not impose a fine of less than $100, this implies the power to impose a fine of $100 or more. But this inversion of the rule is to be applied with even greater caution than the rule itself. We should not infer the inclusion of one thing from the exclusion of another, unless such an inference is very clearly in accordance with the intention of the legislature, or unless it is necessary to give the statute effect and operation. Particular care should be observed in resisting the conclusion that the express shutting out of one thing will necessarily let in its opposite." And in the case at bar it would seem clear—assuming that counsel for appellee is correct in his contention that an assignee of a term is included under the word "tenant" in the section mentioned—that the lien given extends for rent not to exceed one year, for and during the continuance of the term of the person whose goods are to be subjected to its payment. The term of the original tenant extends until the expiration of his lease. The term of the assignee extends only until his relation of tenant, existing solely by virtue of privity of estate, shall cease; and that ceases upon his assignment of his assigned term. This conclusion is fortified by the reasoning in *Trabue* v. *Mo-*

Adams, construing an exactly similar statute in 8 Bush, 75, where the lessees of mines had assigned the benefit of their lease to one McAdams. In a suit for the rent, McAdams claimed that he had assigned over the term assigned to him. Said this court, through Judge Lindsay: "McAdams, not only by express agreement but by operation of law, became the assignee of said lease, and thereby undertook the responsibilities of an assignee of an unexpired term. . . . Nor does his liability depend upon personal possession of the premises. By taking the transfer he was notified of the terms of the lease, and thereby accepted them, and undertook their performance. Nor could he discharge the undertaking, or relieve himself from liability as assignee, by anything short of an actual, absolute transfer or assignment of the entire unexpired term. Such an assignment, he insists, he did make to Looney; but, when the testimony in the case is carefully scrutinized, it does not, as we think, admit of any such conclusion." And in 6 Ky. L. Rep. 663 (*Muldoon* v. *Hite*), it was held by the superior court that the assignee of a lease may always discharge himself from any liability for subsequent breaches, both as regards rents and other covenants, by assigning over, even though it be done for the express purpose of getting rid of his responsibility. These cases were apparently cases where the personal liability alone was sought to be enforced. But the reasoning of the *McAdams Case* is extremely persuasive; and I am clearly of opinion that the goods of the assignee are not liable for rent to become due after the expiration of the assignee's tenancy of the property, and that this may be terminated by an assignment over.

It is claimed that Myer Bros. were subtenants, and that there is no real difference in legal liability between assignees and subtenants. The distinction seems to me, however, to be well marked. 2 Taylor, Land. & T. §§ 448, 449, and 1 Taylor, Land. & T. § 109. Assuming the doctrine laid down by Judge Lindsay in the *Trabue* v. *McAdams Case*, 8 Bush, 75, to be correct.—and it has never been questioned in this state,—we have, or may have, three classes of persons to whose property the lien given by the statute may be held to attach, *viz.*, a tenant, the assignee of a term, or a subtenant. Each has a liability,—the original tenant, by virtue of his covenant; the assignee and the subtenant, so far as the landlord is concerned, by virtue of their privity of estate. The statute gives a lien, in general terms, upon the goods of each of them for rent. As against the tenant, clearly, this lien applies to and secures only the rent "due or to become due" from him, with the limitation that it shall not exist for rent due for more than one hundred and twenty days, nor for more than one year's rent due or to become due. If his lease is by its terms to terminate at the expiration of a month, it cannot be contended that the landlord has a lien for a year's rent to become due. If, by its terms, his lease is terminable upon thirty days' notice, can it be contended that the landlord has a lien, to be enforced by attachment, for a year's rent to become due? Yet that is the logic of the majority opinion, for the assignee of the term, whose term is conceded to be terminable at any moment when he may assign to someone who will accept the assignment, whose position of tenant or holder of the property is thus terminable, may, under this statute, be held for a year's rent thereafter to become due, not from him, but from the man who contracted to pay it. And so, applying the doctrine to the case of a subtenant, one who holds a single storeroom in a large house, under a sublease which by its terms is to end in a month, must, under the majority opinion, be held, so far as his goods are concerned, liable for a year's rent for the entire property; and this was without any pretext that any of such rent, except one month's rent of the limited part of the property which he holds, is ever due, or to become due from him. Where a statute, in general terms, gives a lien for rent against the property of three distinct classes of persons, the fair, the just, and the logical rule of construction would, it seems to me, be to hold that the lien given upon the goods of any one of the three classes mentioned should attach to his goods to secure and compel the payment of the liability for which he was responsible, and not for a liability incurred by someone else. With a fair, reasonable, and just application of the statute confronting it, the majority of the court has chosen to apply the statute in a manner which may, and undoubtedly will, work manifest injustice. The construction for which I have contended could work injustice to no one. It would hold the assignee or the subtenant liable for everything they had ever agreed to pay to anybody, and could work no injustice to the landlord; for he would get, or could get, everything which had ever been contracted to be paid to him by anyone. If he desired to hold his original tenant, there is no obligation upon him to execute a release. If the original tenant, being insolvent, undertook to remove his goods, they could be subjected to the landlord's claim by distress warrant or landlord's attachment. And, in addition to these rights, he would be entitled to a remedy against the goods of the assignee and the goods of the subtenant for every cent which could be legally or justly demanded of them.

The majority opinion lays stress upon §§ 16, 17, chap. 21, of the General Statutes (now to be found in § 460, Ky. Stat.), as to the construction to be given statutes in derogation of the common law. This statute, which has in part been held merely declaratory of the common law, in so far as it provides that words and phrases shall be understood according to the common and approved use of language (*Bailey* v. *Com.* 11 Bush, 688), has been frequently referred to as authorizing the court to apply a somewhat more liberal construction than prevailed at the common law, in order to effect the intent of the legislature. When the in-

tent is clear from the language of the statute, that purpose is to be carried out by the courts, although the language used may be inapt. But it does not authorize the court to assume a purpose not deducible from the language of the statute, and then to effect that imaginary purpose by applying the language to a state of facts not within its terms, as well as to the condition to which it is clearly applicable.

One other comment I desire to make upon the majority opinion: It concedes that the assignment of the lease in violation of its terms could be taken advantage of by the landlord by re-entry, and declaration of forfeiture of the lease, only, and authority is referred to in support of this proposition. But, after so holding, the opinion, in its conclusion, holds that as the terms of the lease forbade an assignment, and as Myer Bros., by accepting the assignment, took it subject to its covenants, they had no right to assign their lease, because, says the opinion, "the law suffers no man to profit by the violation of his own contract, and it would be a plain denial of the purpose of the statutes to allow an assignee of a lease to defeat the lien secured by it to the landlord by a wrongful act of his own, and without the concurrence of the landlord." That is to say, as against the assignee of a lease the landlord has a higher right than he has against the original lessee. Against the lessee, the landlord can only re-enter and forfeit the lease. Against the assignee, he can impose an additional penalty, by subjecting the assignee's goods to the payment of another's obligation. The judgment, in my opinion, should be reversed.

Hazelrigg, Ch. J., and **Guffy**, J., concur in this dissent.

City of NEWPORT *et al.*, *Appts.*,
v.
COMMONWEALTH of Kentucky.

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

1. **The appearance of a city to an amended petition** making it a defendant in an action originally brought against an alleged waterworks corporation which had no existence gives jurisdiction as if the petition was originally filed against the city.
2. **A municipal corporation may be taxed for its franchise** to operate waterworks, as in respect to them it occupies the position of a private corporation.
3. **A decision as to the taxes of one year is not res judicata** as to the validity of taxes for subsequent years, as the causes of action are distinct and different, though they may be similar.

(*Paynter, J., dissents.*)

(April 26, 1899.)

APPEAL by defendants from a judgment of the Circuit Court for Franklin County requiring defendant to pay taxes on its waterworks. *Affirmed.*

The facts are stated in the opinion.

Mr. **Horace W. Root** for appellants.

Messrs. **W. S. Taylor** and **M. H. Thatcher** for the Commonwealth.

Du Relle, J., delivered the opinion of the court:

The secretary of the Newport Waterworks made a verified statement, as required by § 4078, Ky. Stat., in order for the board of valuation and assessment to determine the value of its franchise for taxation for the year 1894, upon which statement that board proceeded to value and assess the corporate franchise of the Newport Waterworks. Suit was brought in the Franklin circuit court for the taxes of that year, alleging that the Newport Waterworks was a corporation having and exercising privileges and franchises not allowed by law to natural persons. Summons having been served upon the president and chief officer of the board of waterworks trustees, there were filed a demurrer, a special demurrer for want of jurisdiction of the defendant, the Newport Waterworks, and an answer, in which the Newport Waterworks alleged that there did not and never had existed a corporation of that name, and denied that it was a corporation, or was organized or doing business as such. A few days after the filing of these pleadings, and before they were acted upon, the commonwealth amended its petition, making the city of Newport a party defendant, alleging that it was a municipal corporation, a city of the second class; that it owned and operated the Newport Waterworks; that, by the terms of its charter, it was authorized to, and did, own and operate the waterworks, and charge tariff rates for water, as other companies; that the waterworks were not used by the city for governmental purposes, but as a private enterprise, the accounts thereof being kept distinct and independent of the governmental affairs of the city, all citizens who used the water being charged the regular tariff rate; that the city, so far as the waterworks and waterworks property were concerned, was engaged in the business of an ordinary water company, operating the works for profit; that, while not a corporation, the Newport Waterworks was used and operated as a water company, and had a secretary, duly elected by the city of Newport,

NOTE.—The above case is a novel one so far as it holds a municipal corporation to be taxable for its franchise to operate waterworks.

The doctrine that a city operates such waterworks in its private capacity is not sustained in Springfield F. & M. Ins. Co. v. Keeseville (N. Y.) 30 L. R. A. 660, where water rents are held to be only a mode of taxation and part of the general scheme of raising revenue to carry on the work of government.

That such waterworks are clothed with a public trust, see Huron Waterworks Co. v. Huron (S. D.) 30 L. R. A. 848.

45 L. R. A.

the owner of the property, and duly selected as such secretary by the commissioners of the waterworks, who had theretofore been selected as such commissioners by the city, as provided in its charter; and that by said secretary the report to the board of valuation and assessment was made. Subsequently the city entered its objection to the filing of the amended petition, and moved to set aside the filing, on the ground that neither at the time of the institution of the action, nor before nor since, was there any such defendant or corporation as the Newport Waterworks, and therefore there was no action commenced, or in being, to which the amendment could be made. This objection, and the demurrer to the petition, were overruled, and a judgment rendered, which was afterwards, by agreement, set aside, and an answer filed by the city of Newport pleading to the merits. An agreed statement of facts was filed, the case submitted, and judgment rendered against the city for the tax.

It is first urged that it was error to permit the amended petition to be filed, making the city of Newport a party defendant, upon the ground that there was no action pending against any natural or artificial person, and therefore nothing to be amended; that an amendment presupposes a real action or proceeding already pending in court; that, in this case, there was nothing to which an amendment could go, because there was no petition stating, or attempting to state, a cause of action against any real person, natural or artificial; and that the original petition was a nullity. It is further urged that this case is not one of misnomer, or of a suit against a real person by a wrong name, or against one person erroneously sued under the name of another,—in which cases it seems to be conceded that an amendment might be made, under the authority of § 134 of the Civil Code of Practice, and the cases of *Heckman* v. *Louisville & N. R. Co.* 85 Ky. 631, and *Louisville, N. & G. S. R. Co.* v. *Hall*, 12 Bush, 131. Upon the other hand, it is urged on behalf of the commonwealth that as the city, by its own officers, caused the report for franchise tax to be made in the name of the Newport Waterworks, and the waterworks were distinct in management from the city government, being controlled by commissioners selected by the city, and by whom water rates were fixed, the waterworks were, in effect, a quasi corporation, or a company or association, within the meaning of §§ 4077, 4078, Ky. Stat. But, without going into that question, it seems to us that the amendment and the original petition may be considered together as an original petition against the city of Newport, to which the city entered its appearance without reservation. Nor does the case of *Houston* v. *Kidwell* (Ky.) 12 Ky. L. Rep. 386, cited by counsel for appellant, seem to us to be in conflict with this view. That was an action for a new trial. The petition was erroneously dismissed. Afterwards an amended petition was filed alleging the discovery of additional evidence, but which was merely cumulative. The judgment dismissing the original petition was not appealed from, and it was held that the amended petition could not be treated as a petition, for the reason that the relief sought was *res judicata* by the final judgment on the first petition, from which no appeal had been taken. Nor does the citation from Newman, Pl. & Pr. p. 288, apply. That refers to a case where the wrong person brings an action for a liability existing, but existing in favor of another person than the plaintiff. And, while it is there said that "the foregoing rules apply, for the most part, equally to a mistake in the name of the defendant as of the plaintiff," that does not apply to a case like this, where the original petition is good upon its face, but a mistake has been made in the name of the party upon whom the liability rests, as the owner of specific, described property. In such case, there would seem to be little difference whether the owner was sued originally by the name of another existing person (as in the *Heckman's Case*, 85 Ky. 631, and *Hall's Case*, 12 Bush. 131), or was sued by the name of a nonexistent person. The question whether the city might have taken advantage of the mistake by special entry of its appearance and dilatory pleading is not here presented, as it appeared without reservation. The answer presents several defenses: First. That the city was authorized, by act of the legislature, to build and operate a waterworks system, and has built such system, and operates it through a board styled the "Commissioners of Waterworks," having issued $300,000 of bonds, $708,000 of which are still outstanding; that it exercises no right or privilege with respect to its waterworks which a natural person might not do; that its waterworks are situated within its corporate limits, or upon its own land outside the limits; that the report made by the secretary of that board was erroneous; that, including the interest upon the bonded debt created to build and operate the waterworks, the expense of operation was more than $35,000 in excess of the actual receipts; that the waterworks department of the city is not a paying institution, and its actual receipts in any year since the act authorizing it to be built have not been sufficient to meet both its operating expenses and the interest upon the bonds issued to build it, but that the city, by the annual levy and collection of a tax, meets and pays off the interest and bonds of the waterworks falling due in each year; that it will not be self-sustaining for many years to come; and that its tangible property used in connection with the waterworks system was, in the year 1894 and subsequent years, assessed by the state for taxation, and taxes thereon paid. Second. That the city exercises no special or exclusive privileges or franchises not allowed by law to natural persons, with respect to its waterworks; that the works are used for governmental purposes, and not as a private enterprise; that the accounts of the waterworks are not kept distinct and independent of the governmental affairs of the city; that it is

not engaged in the business of an ordinary water company, and that the waterworks are not a private enterprise, operated for profit. Third. That, by an act adopted March 8, 1878, it was provided that the waterworks should be exempt from county and state taxation so long as it should be unproductive: and that it has been unproductive since its establishment. Fourth. That the imposition of a franchise tax is in violation of the state Constitution, and also in violation of subsection 1, § 10, art. 1, of the Federal Constitution, prohibiting the passage of a law impairing the obligation of contracts, for the reason that, at the time of the issuance of the bonds, there was no franchise tax authorized to be collected from the city on account of the waterworks system, and the bondholders have a vested right to the bonds free from such a tax. Fifth. That the liability of the city to a franchise tax is *res judicata*, by a judgment rendered in a suit by the commonwealth against the Newport Waterworks and the city of Newport for a franchise tax, on account of the city's ownership and operation of the waterworks, for the year 1893, under the same law under which the present action was instituted; the subject-matter of that suit being identical with the subject-matter of the case at bar, except that in that action the suit was to collect the tax for the year 1893, and the present suit is for the year 1894. As to the fourth ground, it is sufficient to say that the bondholders were not parties to this proceeding, and that, so far as we are informed, it has never been held that the fact that no tax was levied upon the property at the time of its acquisition had the effect to prevent the imposition of a tax thereon in subsequent years. The claim of exemption under the act of 1878 cannot be sustained, as it is not claimed that any contract right existed thereunder, and the exemption thereby given is repealed by the present Constitution.

The first and second defenses present the question, in substance, whether a municipal corporation can be subject to a franchise tax. It seems, under the case of *Owensboro* v. *Com., Stone* (Ky.) 20 Ky. L. Rep. 1281, 44 L. R. A. 202, that the waterworks might be exempt from taxation as public property used for public purposes, under § 170 of the Constitution, if operated solely for the purpose of extinguishing fires, cleaning the streets, and the like, which, under the opinion in that case, would be deemed governmental purposes; and that, if the tangible property held and used for that purpose would not be taxable, neither would the city be taxable on a franchise to so operate and use it. Is the case altered by the fact that the city, while operating the waterworks for the convenience of its people, makes a charge against them for furnishing them with water? In the case of *Com.* v. *Makibben*, 90 Ky. 384, it was held by this court that the power granted to the city of Newport to operate its waterworks was not granted as necessary to carrying on its municipal government as a political power, but merely as a private corporation for the convenience or profit of its citizens, and therefore not only taxable by the commonwealth, but not to be constitutionally exempted from taxation. Said the court, through Judge Bennett: "But may a city be treated as a private corporation in the exercise of powers not necessary to carrying on its municipal government as a political power? We have heretofore said that it may be so treated. We have also said that its property necessary to carrying on its municipal government as a political power is not subject to state taxation; but if it is not necessary for such purpose then it must be treated as the property of a private corporation, and is subject to state taxation, unless it is expressly exmpted in consideration of public services,"—referring to *Louisville* v. *Com.* 1 Duv. 298, 85 Am. Dec. 624, and *Barbour* v. *Louisville Bd. of Trade*, 82 Ky. 649. In the same opinion, the court quoted, with approval, as follows, from *Bailey* v. *New York*, 3 Hill, 531, 38 Am. Dec. 669, in which case it was decided that the city, in erecting waterworks, acted in its private, not public, character: "But the distinction is quite clear and well settled, and the process of separation practicable. To this end regard should be had not so much to the nature and character of the various powers conferred as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." So, in *Covington* v. *Com.* 19 Ky. L. Rep. 105, it was held, in an opinion by Chief Justice Lewis, that the waterworks of the city of Covington could not, under the Constitution, be exempted by special statute from taxation,—referring to *Clark* v. *Louisville Water Co.* 90 Ky. 515, in which the same question was decided. It seems, therefore, to be well settled that the tangible property used for waterworks purposes is subject to taxation; and that the municipality, as to it, occupies the position of, and is to be treated as, a private corporation. Section 4077, Ky. Stat., which requires a franchise tax to be paid by certain enumerated companies, includes water companies in the list of companies required to pay such tax, and also requires such tax to be paid by "every other like company, corporation, or association." And § 4082, Id., provides that "whenever any person or association of persons not being a corporation nor having capital stock, shall, in this state engage in the business of any of the corporations mentioned in the 1st section of this article [§ 4077], then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property em-

ployed therein, shall be deemed and treated as the capital stock of such person or association of persons for the purpose of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation." The three sections (4077, 4078, and 4082), taken together, clearly indicate the intent of the legislature that no corporation, company, association, person, or aggregation of persons should be permitted to engage in any of the businesses enumerated in § 4077, without thereby being required to make report to the board of valuation and assessment, and becoming subject to the so-called franchise tax. Under the doctrine laid down in the cases referred to, the municipality occupies, as to its waterworks, the same position as would a private corporation owning such works. It follows, inevitably, therefore, from that doctrine, that not only is the tangible property used by the city for waterworks purposes taxable by the commonwealth as nonmunicipal and private property, but that, as to that property, it is subject to a franchise tax, and must make report therefor, as required in § 4078.

The only question remaining for decision is upon the plea of *res judicata*. The plea in this case avers that the subject-matter of the former suit was identical with that involved in this action, and that the facts were the same in both actions, except that the former action attempted to collect a tax for the year 1893 and the present action was attempting to collect a tax for the year 1894; that said action was tried upon its merits, and a judgment rendered by the circuit court dismissing the plaintiff's petition. A copy of the judgment was filed as part of the answer, and it was further averred that the judgment had never been reversed or modified, and no appeal had ever been taken, but that it had become final and conclusive. The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue, decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of those promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed *in invitum*. The taxpayer does not agree to pay, but is forced to pay; and the right to litigate the legality of a tax upon all grounds must, of necessity, exist, regardless of former adjudications as to the validity of a different tax. In *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S. 314, 38 L. ed. 456, the supreme court held: "A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit, upon the principle stated in *Cromwell* v. *Sac County*, 94 U. S. 357, 24 L. ed. 199. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. . . . The same principle was reaffirmed in *Nesbit* v. *Riverside Independent Dist.* 144 U. S. 610, 36 L. ed. 562, and in *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 279, 302, 36 L. ed. 972, 981. In the case of *Davenport* v. *Chicago, R. I. & P. R. Co.* 38 Iowa, 633, 640, the supreme court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the state from collecting the taxes for a subsequent year; each year's taxes constituting a distinct and separate cause of action. 'The cases,' said the court, 'are unlike those where two causes of action (as, two promissory notes) forming the subject-matter of successive actions between the same parties, both growing out of the same transaction, in which a defense set up in the first suit, and held good, will conclude the parties in the second. . . . Taxes of separate years do not, in any just sense, grow out of the same transaction. They are like distinct claims on two promissory notes, made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties.' It could never be tolerated that the state should be forever barred in its collection of taxes by an erroneous decison." 152 U. S. 314-316, 38 L. ed. 456. In *Lake Shore & M. S. R. Co.* v. *People*, 46 Mich. 208, a suit for taxes, there had been a decision adverse to the validity of the taxes for certain previous years, but the court held that the result of a suit for the taxes of particular years is not *res judicata* in subsequent suits between the same parties for taxes of other years, and the decisions upon legal questions arising in the first case are important only as precedents. Said Chief Justice Marston, delivering the opinion: "The decree in the Wayne circuit would not prevent the state from claiming and seeking to recover taxes accruing subsequent to the years or taxes then passed upon. This is a new controversy, for a new cause of action, and in which some of the legal questions then passed upon are again raised, and the decision of the court thereon is of no importance, except as a precedent. In this case, it is not conclusive. Such was the view of Mr. Justice Campbell upon a similar question in the case in 9 Mich. 448 [*Michigan S. & N. I. R. Co.* v. *Auditor General*], already referred to, and, as that case is reported, there does not seem to have been any diversity of opinion on this point. The parties are bound in so far as regards the subject-matter then involved, but are at liberty to raise anew the same legal questions in a case arising subsequently, even although the facts may be substantially alike in other respects. The principle is that a party shall not be twice vexed for the same cause; but this is not the same cause

but one arising since then, and the state is not in this case seeking to recover any portion of the taxes the collection of which was restrained in that case." We do not think the plea of *res judicata* avails in this case. As stated in 21 Am. & Eng. Enc. Law, p. 227, the rule is: "To make a matter *res judicata* there must be a concurrence of the four conditions following, namely, first, identity of the subject-matter; second, identity of cause of action; third, identity of persons and parties; fourth, identity in the quality of the persons for or against whom claim is made." The taxes for the subsequent year constitute a new cause of action, it may be, similar to the cause which was adjudicated, but a distinct and different cause. The rulings of the court upon the legal questions involved, if rendered by this court, are authority here, to the extent, and no further, that like decisions would be, in a suit between different parties. In our opinion, it would be against public policy to hold that a judgment of a circuit court upon a question of taxation is forever binding upon this court, not only as to the taxes there in litigation, but also as to taxes for all subsequent years, merely because counsel for the commonwealth failed to bring the question here. Such a ruling would seem to be open to the objection that it would hold the commonwealth bound by the laches of its officer. The decision of the circuit court as to the taxes of 1893 is not binding upon this court as to the taxes for subsequent years.

It follows, therefore, that *the judgment must be affirmed.*

Paynter, J., dissents.

Subsequently, on June 3, 1899, **Du Relle, J.,** handed down the following additional opinion:

The original opinion in this case, prepared by direction of the court, correctly set forth the views of the majority of the court. It did not fully state the views of the minority upon the question of *res judicata*. When the petition for rehearing was filed, the minority took the position that the opinion should be so extended as to rest the decision upon a doctrine in which all could unite, and not decide, or appear to decide, a question not necessarily raised by the record, and upon which the members of the court are not in harmony. The majority, however, have decided to adhere to the opinion as originally delivered, and the views of the minority upon this question are here presented.

The plea of *res judicata* in this case avers that the subject-matter of the former suit was identical with that involved in this action; that the facts were the same in both actions, except that the former action attempted to collect a tax for the year 1893, and the present action was attempting to collect a tax for the year 1894; that the former action was tried upon its merits, and a judgment rendered by the circuit court dismissing the plaintiff's petition, a copy of the judgment being filed as a part of the answer. It was further averred that the judgment had never been reversed or modified, and no appeal had ever been taken, but that it had become final and conclusive. It will be observed that this plea does not show upon what ground the court based the judgment relied upon as *res judicata*, nor does the judgment itself show on what ground it was based. Giving the fullest effect to the pleading, and assuming, as we must, under the averment that the subject-matter of the former suit was identical with the subject-matter of this, that the same defenses were pleaded in that case as in this, and that the court decided that case upon the merits, and dismissed the petition, it still does not appear whether the petition in that case was dismissed because the court held that there was a contract exemption from taxation in favor of appellant, because it held that a municipality could not be subjected to a franchise tax with respect to its use of any of its property, or because it held valid some one of the other defenses pleaded in this action, and presumably pleaded in that. It therefore becomes necessary for us to consider whether the doctrine of *res judicata* is applicable to all of the defenses pleaded; for, if inapplicable to one, as that defense may, for all that appears in the answer, have been the one upon which the former case was decided, we must apply the maxim *Fortuis contra proferentem*, conclude that that was the defense upon which the case was decided, and hold the pleading insufficient.

This brings us to consider the question whether *res judicata* as to the validity of a tax for one year can apply in a suit for a tax for another year. The authorities, in general, are to the effect that when, in a court of competent jurisdiction, upon a proper issue, a contract out of which several distinct promises to pay money arose has been adjudged invalid in a suit upon one of those promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of the contract. They are imposed *in invitum*. The taxpayer does not agree to pay, but is forced to do so; and the question is whether the judgment of a court fastening one such burden upon the citizen estops him to contest the validity of a similar burden thereafter sought to be imposed upon him, and, on the other hand, whether the refusal of the court to impose such a burden estops the government from thereafter asserting a similar right against that citizen. And, in considering this question, we shall consider it on the theory that there is no question of contract involved, but that the question arises solely upon the legality of the tax, as in a case where the question is upon the constitutionality of the law, or as to whether the property sought to be taxed is embraced by the law.

In *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S. 314, 38 L. ed. 456, the Supreme Court held: "A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior

suit the decision of the court upon that question might raise an estoppel in another suit, upon the principle stated in *Cromwell v. Sac County*, 94 U. S. 357, 24 L. ed. 199. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. . . . The same principle was affirmed in *Nesbit v. Riverside Independent Dist.* 144 U. S. 610, 36 L. ed. 562, and in *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 302, 36 L. ed. 972, 981. In the case of *Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 633, 640, the supreme court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the state from collecting the taxes for a subsequent year, each year's taxes constituting a distinct and separate cause of action. 'The cases' said the court, 'are unlike those where two causes of action (as two promissory notes) forming the subject-matter of successive actions between the same parties, both growing out of the same transaction, in which a defense set up in the first suit, and held good, will conclude the parties in the second. . . . Taxes of separate years do not, in any just sense, grow out of the same transaction. They are like distinct claims on two promissory notes, made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties.' It could never be tolerated that the state should be forever barred in its collection of taxes by an erroneous decision." 152 U. S. 314-316, 38 L. ed. 456. But in *New Orleans v. Citizens' Bank*, 167 U. S. 396, 42 L. ed. 210 *et seq.*, in an elaborate opinion, the supreme court, while admitting that in the *Keokuk Case* the opinion, *arguendo*, discussed the question of whether a judgment against the validity of a tax for one year would be a bar to a suit for taxes for a subsequent year, held the expressions of the court used in argument in that case to be *dictum*, and distinctly decided that "the estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies." And again, on page 398, 167 U. S., and page 211, 42 L. ed.: "It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

The language used in the case of *Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 633, has been greatly qualified, if not repudiated, by the same court, in *Goodenow v. Litchfield*, 59 Iowa, 226, where the court said: "The question whether the estoppel is effectual will depend upon the issues in the two actions. If the right to recover and defense thereto are based upon precisely the same ground, why litigate again a question that has been determined? In such case the very right of the matter has been determined by a court of competent jurisdiction."

Upon the other hand, in *Lake Shore & M. S. R. Co. v. People*, 46 Mich. 208, a suit for taxes, there had been a decision adverse to the validity of the taxes for certain previous years, but the court held that the result of a suit for the taxes of particular years is not *res judicata* in subsequent suits between the same parties for taxes of other years, and the decisions upon the legal questions arising in the first case are important only as precedents. Said Chief Justice Marston, delivering the opinion: "The decree in the Wayne circuit court would not prevent the state from claiming and seeking to recover taxes accruing subsequent to the years or taxes then passed upon. This is a new controversy, for a new cause of action, and in which some of the legal questions then passed upon are again raised, and the decision of the court thereon is of no importance except as a precedent. In this case it is not conclusive. Such was the view of Mr. Justice Campbell upon a similar question in the case in 9 Mich. [*Michigan, S. & N. I. R. Co. v. Auditor General*, 9 Mich. 448], already referred to, and, as that case is reported, there does not seem to have been any diversity of opinion on this point. The parties are bound in so far as regards the subject-matter then involved, but are at liberty to raise anew the same legal questions in a case arising subsequently, even although the facts may be substantially alike in other respects. The principle is that a party shall not be twice vexed for the same cause; but this is not the same cause, but one arising since then, and the state is not, in this case, seeking to recover any portion of the taxes the collection of which was restrained in that case." In *State v. Bank of Commerce*, 95 Tenn. 222, it was held that a judgment adverse to a claim for taxes for one year constituted no bar to a suit for taxes of a subsequent year; and in the recent case of *Union & P. Bank v. Memphis*, 101 Tenn. 154 (decided April 2, 1898), the same court, through Judge McAlister, said: "Again, we think the plea of *res judicata* in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. Since this is not a Federal question, we decline to follow the ruling in *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, in which it was held, by a majority opinion, that a judgment in a tax case is as

conclusive of the taxes of other years as it is of the taxes for the years actually involved. In *State* v. *Bank of Commerce*, 95 Tenn. 231, we said: 'These suits being for other years than those sued for in the *Farrington Case* [*Farrington* v. *Tennessee*, 95 U. S. 686, 24 L. ed. 560], that decision is not as an adjudication conclusive of the present case.'"

We do not think that the plea of *res judicata* avails in this case. The power to tax is a high governmental power, exercised against the will of the person taxed, and, in our opinion, a decision as to one cause of action arising under a tax statute is no more binding upon the government or the citizen than the construction of a penal statute would be in a second prosecution against the same person for an offense exactly similar. The former adjudication would, in such case, have weight as a precedent, but would not bind the parties by way of estoppel. The rulings of the court upon the legal questions involved are authority here to the extent, and no further, that like decisions would be in a suit between different parties as matter of public policy, and upon grounds of public necessity, we think the principle of *res judicata* ought not to be applied to questions of taxation, where the state is exercising its sovereign power. We concur, therefore, in the conclusion reached by the majority, that this court cannot follow the doctrine held by the supreme court in *New Orleans* v. *Citizens' Bank* to its full extent. But whether the state is bound by a former adjudication that there exists a contract exemption from taxation, or as to the construction of such contract, is a question not necessarily involved here, and to the decision of which it may be that different principles apply. There would seem to be an essential difference between the commonwealth exercising the highest of its sovereign powers,—a power necessary to its very existence,—and the same commonwealth, its sovereignty laid aside, binding itself as a mere corporate entity by a sealed instrument. But it is not, in our judgment, necessary to go into this question, nor even to decide that there is a difference. We think the opinion should be extended upon the lines here indicated.

Hazelrigg, Ch. J., and **Burnam, J.**, concur in this separate opinion.

LOUISIANA SUPREME COURT.

LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY
v.
BOARD OF ASSESSORS *et al.*, *Appts.*

(51 La. Ann. 1028.)

***1. Taxes imposed on a nonresident,** whose property is not in the state, are null, as tax laws can have no extraterritorial effect.

2. Debt due to a nonresident (still in nonconcrete form) has its situs at the domicil of the creditor, and not at the domicil of the debtor.

(January 9, 1899.)

APPEAL by defendants from a judgment of the Civil District Court for the Parish of Orleans canceling an assessment upon credits of the plaintiff for the year 1897. *Affirmed.*

The facts are stated in the opinion.

Messrs **Francis C. Zacharie** and **James J. McLoughlin** for appellants.

Messrs. **Saunders & Miller** and **E. W. Huntington** for appellee.

*Headnotes by BREAUX, J.

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

Plaintiff brought this suit to have the assessment of its "credits" canceled for the year 1897. Plaintiff was assessed for money loaned on interest, all "credits," and all bills receivable for money loaned or advanced, or for goods sold, and all "credits" of any description. We understand that the issues now relate to the assessment of "debts" that were due for premiums, and that the other items of property assessed do not give rise to any question for our decision.

The plaintiff corporation has no domicil in this state, but it has a resident board of directors, a resident secretary, and an assistant secretary. The latter is secretary of the board, but not of the company. They are an advisory board to the home board. The resident secretary, it appears, manages the business, and renders his accounts, and makes remittances to plaintiff. The company complied with the requirements of act No. 245 of 1897, by opening an office in this state for the purposes stated in the article of the Code. The position of plaintiff is that credits due the company for uncollected premiums are only taxable at the domicil of the company. This is controverted by the defendants, who urge, in substance, that the plaintiff's "credits" fall within the grasp of the revenue law adopted in 1890, taxing the property of nonresidents.

The whole theory of taxation, under the Constitution of 1879, which governs in this case, was based on the idea that the taxes were a property tax, and that the property

NOTE.—For taxation of the property of nonresidents, see also Wells, F. & Co.'s Express v. Crawford County (Ark.) 37 L. R. A. 371; Buck v. Miller (Ind.) 37 L. R. A. 384; Schmidt v. Failey (Ind.) 37 L. R. A. 442.

As to situs for purpose of taxation of debts evidenced by notes and mortgages, see Boyd v. Selma (Ala.) 16 L. R. A. 729, and *note;* also Holland v. Silver Bow County Comrs. (Mont.) 27 L. R. A. 797.

assessed should be seized and sold to satisfy the taxes for which it was assessed. The old method of recovering taxes by suit against the debtor was abolished, and in its place the Constitution ordained that the property assessed should be seized and sold for the taxes. No great difficulty should now arise in assessing and collecting the taxes on every item of property stated in the revenue act as subject to taxation.

Now, as to debts: A mere debt—a promise to pay—has no value within the limits of the state, if it be due to one not domiciled in the state. Its value is at the domicil of the creditor, where it has its situs. It is not property, save at the domicil of the creditor. If assessed and sold for taxes, we are inclined to think that the title would be greatly wanting in essentials to a perfect legal title. If treated and considered as a license tax for carrying on business, collection may be effected perhaps, but that would only prove that the proposition is correct; for a license tax is not a property tax. The opinion from which we will quote in a moment is broader in its scope than needful to sustain our view. The facts in that case are that an attempt was made to tax foreign creditors. The court decided against it, and held that the debts owed by individuals are not property of the debtor in any sense; that they are promises, obligations, duty, and only possess value in the hands of the creditors, where they are property, and in whose hands they may be taxed. To call debts property of the debtors is a misuser of terms. Debts have no situs separate from the domicil of the creditor. This principle might be supported by citations from numerous adjudications, but authorities could not add to the manifest truth. Justice Field, organ of the court in *Cleveland, P. & A. R. Co.* v. *Pennsylvania*, 15 Wall. 300, 21 L. ed. 179. This question of taxing "credits" was considered by Mr. Cooley. He, in language not ambiguous, gives it as his opinion that debts owing to foreign creditors by individuals are not taxable at the domicil of the debtor. Cooley, Taxn. p. 15. Upon the same subject, we extract from the book of another commentator: "A debt not evidenced by negotiable paper, according to our view, may be taxed at the residence of the debtor; according to another view, at the residence of the creditor." "The weight of authority sustains the latter view." Burroughs, Taxn. p. 41. "The situs of the debt is the creditor's domicil." Wharton, Confl. L. § 80. Debts "have no other situs than the residence of their holders and owners." Desty, Taxn. p. 326. The decisions of this court have repeatedly held that "credits" have their situs at the domicil of the creditor, as will be seen by the following extracts: "The tax collector affirms the validity of the tax on the ground that § 10 of act 98 of 1886 directs that movable property shall be assessed in the parish where it is located. This applies to tangible movables, but not to incorporeal rights generally, which follow the person of the owner, and are not susceptible of physical location. It is well settled that the situs of a debt, as property, is at the domicil of the creditor,"—citing *Murray* v. *Charleston*, 96 U. S. 433, 24 L. ed. 760; *Cleveland, P. & A. R. Co.* v. *Pennsylvania*, 15 Wall. 300, 21 L. ed. 179; and Cooley, Taxn. p. 15. Justice Fenner was the organ of the court in the case from which we have just quoted. *Meyer* v. *Pleasant*, 41 La. Ann. 646. It is well to bear in mind that, under the revenue law of 1886, "debt" was included as property subject to taxation. This decision was rendered in June. In December of the same year, Justice Poche, as the organ of the court, in *Barber Asphalt Paving Co.* v. *New Orleans*, 41 La. Ann. 1015, said: "In the case of *Meyer* v. *Pleasant*, 41 La. Ann. 645, hereinabove referred to, it was held, in harmony with settled jurisprudence, that the situs of a debt is at the domicil of the creditor." Also: "And, on that subject, it is beyond question the right of a corporation, as well as of a natural person, to have a legal domicil, and that domicil is in the state where it was incorporated. With the leave of other states, a corporation can extend its operations to other states, but it does not thereby acquire a new domicil in every state in which it does business. It retains the domicil of its birth, and, like natural persons, it is at that domicil that its obligations for, and its liability to, taxation for debts, or other incorporeal rights which it owns, must be tested and settled,"—citing *Baltimore & O. R. Co.* v. *Koontz*, 104 U. S. 11, 26 L. ed. 644, and *Yuba County* v. *Pioneer Gold Min. Co.* 32 Fed. Rep. 183. Again, the court in that case, in substance, says that the corporation was a foreign one, and continued as a foreign corporation, without any change in its status growing out of its compliance with article 236 of the Code. The question came up again in 1892. Justice Fenner, whose opinion is entitled to great weight, particularly in view of the fact that he had considered the question in *Meyer* v. *Pleasant*, cited 41 La. Ann. 645, was the organ of the court, and said: "There is no doubt of the legislative power to modify the rule of comity *mobilia personam sequuntur* in many respects. Movables, having an actual situs in the state, may be taxed there, though the owner be domiciled elsewhere. Even debts may assume such concrete form in the evidences thereof that they may be similarly subjected when such evidences are situated in the state, as in the case of bank notes, . . . bills of exchange, or bonds. But as to mere ordinary debts, reduced to no such concrete forms, they are not capable of acquiring any situs distinct from the domicil of the creditor, and no legislative power exists to change that situs, so far as nonresident creditors are concerned. As said by the Supreme Court of the United States: 'To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts, belongs to the creditors to whom they are pay-

able, and follows their domicil wherever they may be. Their debts can have no locality separate from the parties to whom they are due.'" *Railey* v. *Board of Assessors*, 44 La. Ann. 769. In the case of *Clason* v. *New Orleans*, 46 La. Ann. 1, this court said: "Under the principles enunciated in those cases, the fact that the plaintiff has a resident clerk acting for it in the city of New Orleans, and that it has an office and pays a license there, is unimportant. For the purpose of a determination of the issue involved herein, we have to deal with the plaintiffs as nonresidents, and, in so dealing with them, we are of the opinion that the judgment of the lower court is correct." The court in this case held, substantially, that the credit owing to a foreign firm is not subject to taxation. In *State, Mechanics & L. Ins. Co.*, v. *Board of Assessors*, 47 La. Ann. 1545, the court held: "But it has never been decided that tangible personal property could not be assessed at the owner's domicil, notwithstanding its actual situs was abroad, in some other state or country,"—a proposition not before us at this time. If it were, it would meet with our entire approval. There is no question here of the situs of personal property which has a visible existence, as stated in the case from which we have quoted. This was not a case involving a "mere ordinary debt" as subject to taxation. The other cases decided by this court, subsequent in date, made no question of the right to assess tangible movables. The court said in one of the cases: "The defendants cite the case of *Clason* v. *New Orleans*, 46 La. Ann. 1, to sustain their contention. The decision in *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors*, 44 La. Ann. 760, 16 L. R. A. 56, is of more direct application." The decision gave full recognition to the exception from taxation here of debts due the foreign corporations, but maintained the assessment on the cash of the company necessary here for its business purposes. The principle of the decision in *Bluefields Banana Co.* v. *New Orleans Bd. of Assessors*, 49 La. Ann. 43, applies to this case.

We cannot hold that cash thus liable to taxation is exempted. There is no question in the case before us for decision of cash, which is undeniably a tangible, movable subject of taxation.

The defense urges that the doctrine *mobilia sequuntur personam* is subject to so many exceptions that it can be applied only in the simplest cases,—a proposition to which we have not the least objection to offer. It is unquestionably true. None the less it does not apply in the following case: Let us suppose, if a person domiciled in England binds himself to insure an owner of property who has a domicil in this state, on condition that the owner pays him an amount fixed within a stipulated time, the promise of the assured to pay for this insurance would not be subject to taxation in this state. For the same reason, the assured's promise to pay in the case now before us for decision is not subject to taxation here.

The defense also urges that the decisions of *Meyer* v. *Pleasant*, 41 La. Ann. 646, and *Barber Asphalt Paving Co.* v. *New Orleans*, 41 La. Ann. 1015, do not sustain subsequent decisions, because, under the tax acts of 1886 and 1888, there were no provisions in conflict with the doctrine *mobilia sequuntur personam*. In a former law, i. e., law of 1886, all "credits" were subject to taxation due by any "person, company, association, or corporation in and out of this state," and all "credits" held, controlled, or administered by "agents" and others in this state. Section 1 of the act, as in the act of 1890. The revenue law enacted in 1888 is substantially the same, and was not less broad than the act of 1890. The law, requiring "debts" owed by the foreigners to be assessed for taxation, as we take it, was intended for all such debts as are evidenced by note or by mortgage, or that are in such other concrete form as to render it possible to subject them to taxation under the present laws. No attempt has been made since the cited decisions were rendered to localize "debts," or "open accounts," such as those upon which the taxes are now claimed. The state of Louisiana possesses jurisdiction for purposes of taxation under present laws, over bonds owned by corporations actively engaged in business within the state, without regard to the owner's demands; also, judgments,—such bonds and judgments being in themselves property which may have a situs away from the owner's domicil. As to "open accounts" with a foreign company, for such protection as it may offer, the law to date has not localized them so as to render it possible to assess them here and sell them for taxes. While it may be that a domicil in the state as to these accounts may well be required as a condition precedent to a foreign company's business in the state, they cannot, in our view, be assessed here as foreign "credits," under the wording of the present law.

We have reviewed the decisions of the Supreme Court of the United States of date comparatively recent, which the defense contends shows a change in the jurisprudence since the decision rendered in 15 Wall., before cited. We found in the first case reviewed that the company sought to be taxed was a corporation created by the commonwealth of Kentucky for the purpose of erecting a railroad bridge, with its approaches, over the Ohio river, between the city of Henderson, in Kentucky, and the Indiana shore. The court held that the tax in controversy was nothing more than a tax on tangible property of the company in Kentucky, consisting of tax franchise. The company was a Kentucky company, and, under the revenue law of the state, tax is levied on the home company, i. e., "on all property of corporations organized under the laws of the state whether such property be in or out of the state, including the intangible property of such corporations," which property,—that is, the intangible property,—whether situated in or out of the state, shall