of the Hargrave & Comfort ditch to extend it 500 or 600 feet over the northwest quarter of section 20, now the land of Cook, the better to facilitate the obtaining of their water, we do not deem it proper, upon this appeal, to do more than point out that, while an appropriator of water upon government land retains his rights when the land passes into private ownership, by virtue of the confirmatory statutes of the United States (14 Stat. at L. 253; 16 Stat. at L. 218), and while in the exercise of these rights he may change the point of diversion to another place upon the servient tenement, he is nevertheless limited in so doing to the exigencies of the situation, and has no right to make such change arbitrarily and at will. He may do so when, under certain circumstances, it is required to enable him to take the amount of water to which he has ownership, but then only when "others are not injured by the change." Civ. Code, § 1412. His rights are the rights of the grantee of an easement, and extend, in the matter of changing the point of diversion, no further than the boundaries of the servient tenement; and even when entering upon this he is under obligation only to make reasonable changes with reasonable care, and also to repair, so far as possible, whatever damage his labors may have occasioned. Gale & W. Easem. 235. As to lands other than those subject to his easement, and as to other claimants and owners, he can make no change at all which injuriously affects them or their rights. *The order appealed from is affirmed.*

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

PENNSYLVANIA SUPREME COURT.

City of WILKES BARRE
v.
F. V. ROCKAFELLOW
and
John Welles HOLLENBACK *et al.*, *Appts.*

(171 Pa. 177.)

(October 7, 1895.)

1. A city treasurer who borrows money in his custody from sinking fund commissioners who have the power to invest it holds the money as a debtor, rather than as an officer; and the sureties on his bond are not liable for his repayment of the money, but only for his care of the security held by him.

2. An offer to prove that a city treasurer borrowed money in his custody from the officers who had power to invest it, and that he paid interest upon it, and that the city council approved reports showing the receipt of such interest, should not be rejected in an action against his sureties because it does not undertake to set forth what action was taken before loaning the money.

3. Interest paid to himself as city treasurer by such officer, on money which he had borrowed from a fund in his custody, is held by him as treasurer, and his failure to pay it over to his successor is a breach of his official bond.

4. The promise to pay interest on balances in favor of the city, made by a banker to induce his election by the council as city treasurer, is against public policy and is incapable of enforcement.

5. Money is not loaned to a city treasurer who is also a banker, so as to relieve his sureties from liability for it, by his invalid promise, made to induce his election, that he will pay interest on the balances in favor of the city.

6. Transcripts showing entries by a treasurer upon his books are not conclusive, but only prima facie, evidence, against his sureties, that he is liable for the sums with which he has charged himself.

APPEAL by defendants Hollenback *et al.* from a judgment of the Court of Common Pleas for Luzerne County in favor of plaintiff in an action brought to enforce the alleged liability of the parties to the bond of Rockafellow as city treasurer. *Reversed.*

The facts are stated in the opinion.

Messrs. **F. W. Wheaton, S. J. Strauss, G. R. Bedford,** and **H. W. Palmer,** for appellants:

Any course of dealing between the party guaranteed and the principal in a bond entered upon, either before the bond is executed or afterwards, which changes the contract or the relations which the sureties suppose themselves to guarantee, relieves the sureties if they are not parties to the alteration.

American Teleg. Co. v. *Lennig*, 139 Pa. 594; *Bensinger* v. *Wren*, 100 Pa. 500; *Nesbitt* v. *Turner*, 155 Pa. 429.

Mere noncommunication of circumstances affecting the situation of the parties, material for the surety to be acquainted with and within the knowledge of the person obtaining a surety bond, is undue concealment, though not willful or intentional or with a view to any advantage to himself.

Railton v. *Mathews*, 10 Clark & F. 934; *Owen* v. *Homan*, 3 Macn. & G. 378; *Wayne* v. *Commercial Nat. Bank*, 52 Pa. 343; *Franklin Bank* v. *Cooper*, 36 Me. 179, 39 Me. 542; *Lancaster County Bank* v. *Albright*, 21 Pa. 228; 2 Am. Lead. Cas. Hare & W.'s notes, 478–480.

The same rules of contract are applicable where the sovereign is a party, as between individuals.

Hunter v. *United States*, 30 U. S. 5 Pet. 185, 8 L. ed. 91.

These principles apply to official bonds.

Lafayette v. *James*, 92 Ind. 240, 47 Am. Rep. 140; *Berkis County Comrs.* v. *Ross*, 3 Binn. 520; *Sharp* v. *United States*, 4 Watts, 21,

NOTE.—While previous cases may have in some degree involved the questions here presented, it is believed that the above case is the first that clearly presents them.

As to liability of officers for interest, see People v. Walsen (Colo.) 15 L. R. A. 456, and *note*; also State v. McFetridge (Wis.) 20 L. R. A. 223.

See also 32 L. R. A. 223; 33 L. R. A. 585; 36 L. R. A. 746.

28 Am. Dec. 676; *Fertig* v. *Bucher*, 3 Pa. 308; *Grim* v. *Jackson Twp. School Directors*, 51 Pa. 219; *Com.* v. *Toms*, 45 Pa. 408; *Com.* v. *West*, 1 Rawle, 31.

Sureties on official bonds are presumed to undertake only for performance as prescribed by law.

Cannell v. *Crawford County*, 59 Pa. 196; *Com.* v. *West*, 1 Rawle, 31; *United States* v. *Boyd*, 40 U. S. 15 Pet. 187, 10 L. ed. 706; *United States* v. *Tingey*, 30 U. S. 5 Pet. 115, 8 L. ed. 66; *United States* v. *Giles*, 13 U. S. 9 Cranch, 212, 3 L. ed. 708; *Smith* v. *United States*, 69 U. S. 2 Wall. 219, 17 L. ed. 788; *Pickering* v. *Day*, 3 Houst. (Del.) 474, 95 Am. Dec. 291; *Litchfield Union Guardians of the Poor* v. *Greene*, 1 Hurlst. & N. 884.

Where a creditor does an act injurious to the surety, the latter is discharged.

2 Am. Lead. Cas. Hare & W.'s notes, 373; Brandt, Suretyship, § 345.

The duty of the treasurer was to keep the city's money separate and distinct from all other funds. So long as the fund was in his hands, he was bailee to the government.

Farrar v. *United States*, 30 U. S. 5 Pet. 373, 8 L. ed. 159.

One who has enjoyed the advantage of a contract cannot repudiate it as *ultra vires*.

Oil Creek & A. R. R. Co. v. *Pennsylvania Transp. Co.* 83 Pa. 160; 2 Dill. Mun. Corp. 3d ed. § 936.

The performance of an illegal agreement may nevertheless give rise to a contract which the law will enforce, and the creditor may consequently exonerate the surety by receiving the consideration for a promise which was made on Sunday, and therefore void.

Uhler v. *Applegate*, 26 Pa. 140; 2 White & Tudor, Lead. Cas. in Eq. 1913.

The fact that the investment may have been unlawful does not change the fact that the investment was made; and as the investment was made, and continued, this money was not in the city treasurer's hands as such at the beginning of the bond year in suit, nor during that year. The fact may be shown in relief of sureties.

Com. v. *Reitzel*, 9 Watts & S. 109; *Manufacturers' & M. Sav. & L. Co.* v. *Odd Fellows' Hall Asso.* 48 Pa. 446; *Porter* v. *Stanley*, 47 Me. 515; *Ohning* v. *Evansville*, 66 Ind. 63.

Where one of two persons must suffer, he who gave the opportunity for wrongdoing, who connived at it, or who accepted the benefit knowingly, must accept the disadvantage.

Story, Eq. § 387.

Money that did not come into the treasurer's custody during the bond year is not chargeable against the sureties.

Farrar v. *United States*, 30 U. S. 5 Pet. 373, 8 L. ed. 159; *United States* v. *Boyd*, 40 U. S. 15 Pet. 187, 10 L. ed. 706; *United States* v. *Giles*, 13 U. S. 9 Cranch, 212, 3 L. ed. 708; *Com.* v. *Reitzel*, *supra*; *Mutual Bldg. & L. Asso.* v. *McMullen*, 1 Pennyp. 431; *Manufacturers' & M. Sav. & L. Co.* v. *Odd Fellows' Hall Asso. supra*; *Com.* v. *Baynton*, 4 U. S. 4 Dall. 282, 1 L. ed. 834.

That the treasurer in his reports charges himself with it and with interest allowed by him upon it, is not conclusive on the sureties.

Stephen, Ev. art. 17; 1 Greenl. Ev. § 187; *Com.* v. *Reitzel*, *supra*.

Where the matter complained of is an independent and positive alteration of the course of official duty, or of the contract which the surety supposes himself to make, whether it is done before the bond is executed or afterwards, it discharges the surety.

Smith v. *United States*, 69 U. S. 2 Wall. 219, 17 L. ed. 788; *State* v. *Craig*, 58 Iowa, 238; *State* v. *McGonigle*, 101 Mo. 353, 8 L. R. A. 735; *Hagler* v. *State*, 31 Neb. 144; *White* v. *East Saginaw*, 43 Mich. 567; *Newark* v. *Dickerson*, 45 N. J. L. 38.

The payment or report of interest to the city council during the bond year was notice to the city that the money was used to earn interest, and whether the money was so used by the treasurer or by some person unknown, if the council took no step to disapprove, but permitted it to continue, and accepted for the city the proceeds, the bondsmen, being ignorant, would be released from liability.

Pittsburgh v. *Grier*, 22 Pa. 55, 60 Am. Dec. 65; *Humphreys* v. *Armstrong County*, 56 Pa. 204; *Norristown* v. *Moyer*, 67 Pa. 355; *Allegheny City* v. *McClurkan*, 14 Pa. 81; *Bohan* v. *Avoca*, 154 Pa. 404.

Messrs. **John McGahren, William S. McLean,** and **Alexander Farnham** for appellee.

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

This is an action upon an official bond. The principal obligor allowed judgment to go by default. The sureties made defense, and raised on the trial some questions that, so far as we have been able to discover, have not been passed upon in the form in which they now appear.

It seems that F. V. Rockafellow was elected treasurer of the city of Wilkes Barre for twenty-one years, consecutively. His last election took place in April, 1892, and he gave the bond now sued on soon after. During all this time he was a banker, in good financial standing, doing business in Wilkes Barre. In February, 1893, his bank suddenly closed its doors. Its liabilities proved to be large, and its assets practically nothing. He made a general assignment for the benefit of his creditors, but his assigned estate realized less than 7 per cent on his liabilities. His indebtedness to the city, as treasurer, was ascertained to be $51,743.01. It was made up of four items, *viz.*, the sinking fund of the city, and between $4,000 and $5,000 of interest thereon, the ordinary or current funds of the city, and a considerable sum allowed as interest on the balance due upon this account.

The position of the sureties is that their undertaking is to be responsible for their principal as an officer, and not as a banker or borrower; the condition of the official bond being that their principal, "treasurer of said city of Wilkes Barre, shall faithfully discharge the duties of his said office, and pay over and safely deliver into the hands of his successor all moneys, books, accounts, papers, and other things" belonging to the city, which he shall hold as such officer. They allege that he held no part of the $51,743.01 found due from him, when his bank closed its doors, as a city treasurer, but as a borrower, and that the city has,

for that reason, no claim upon them for any part of its loss. The position of the city, on the other hand, is that the entire amount demanded belonged to the city, and was in the hands of the city treasurer as its lawful custodian. The assignments of error all relate to some phase of this general controversy, and will be sufficiently considered by determining the relation of F. V. Rockafellow to the four items into which the plaintiff's demand is divisible. The general rule is that the liability of both principal and sureties in an official bond must be measured by the terms of the instrument. The terms must receive a reasonable construction, and, if there has been no violation of official duty, there has been no breach of the condition for which the sureties can be required to account. It follows, necessarily, that for an extraofficial act or undertaking of the principal the sureties cannot be held responsible. 2 Am. & Eng. Enc. Law, 467*b*. And if the ordinary course of official action is departed from, for the benefit and at the instance of the party to whom the bond is given, and loss results, the sureties are not, in law or morals, responsible for such loss, unless they assented to the departure from the ordinary course of official action which made the loss possible. *Rogers* v. *The Marshal*, 68 U. S. 1 Wall. 644, 17 L. ed. 714; *Skinner* v. *Wilson*, 61 Miss. 90. What was the official duty of the city treasurer? Simply to act as custodian of the funds belonging to the city. As to the sinking fund, it is clear that he had no power to invest it or use it in any manner, except under the direction of the sinking-fund commissioners. They had power, under the ordinance, to invest the funds under their control, subject to the approval of the council, and it was made their duty to report annually the condition of the sinking fund and its securities to the council. The eleventh section of the same ordinance provides that "the treasurer of the city shall be the custodian of the moneys and securities of the sinking fund, subject to the inspection and order of said commissioners." As the commissioners had power to invest the sinking fund in such securities as the council should approve, they had, of course, power to lend it to the person who had the custody of it as an officer. When they did this, the money was no longer in the treasury, but the security taken for its return stood in its place. The treasurer, as such, held the security. The individual borrower held the money, not as an officer, but as a debtor to the city. The sureties would, in that case, be liable for the care of the security held by their principal, or city treasurer. They would not be liable for the payment of the money borrowed by him from the sinking-fund commissioners, because that was a personal debt, for the collection of which the creditors would be compelled to look, as in the case of any other loan, to the solvency of the borrower, and the securities given at the time the loan was made. When asked to pay the personal debts of their principal, the sureties may well reply: It was the official conduct, not the personal solvency, of the treasurer for which we engaged to be responsible. If he has been guilty of a breach of official duty, for that we are liable as sureties upon his official bond; but we have no concern with his personal debts. Now, the defendants offered to prove at the trial that Rockafellow borrowed the money in the sinking fund from the sinking-fund commissioners at 4 per cent per annum; that he held it under this arrangement for eight years before the bond sued on was given, and paid the interest regularly at the rate agreed upon. They also offered to prove, in connection with this offer, that each year the commissioners reported the receipt of the interest from him to the city council, and their reports were approved. The learned judge rejected this offer, for the reason that it did not undertake to set forth "what action was taken, either by the council or the sinking-fund commissioners, before the loaning of the money." But if the fact was as alleged, that, without the knowledge of the sureties, their principal had been turned from a mere custodian of public moneys into a borrower of them, by the action of the municipal officers, and the money subjected to all the risks of loss incident to its being mingled with the funds of the borrower, and used in his private business, the sureties had a right to show it; and if they did show it, then on the commonest principles of justice they had a right to defend as to so much of the plaintiff's claim. What difference could it make to the sureties whether the proceedings were strictly formal, so long as they resulted in the loss of the money, and were taken by those who had a right to invest it. Suppose the loan had been made to some other person, upon whose failure it was lost, and that in the treasury there was found the borrower's note, taken by the commissioners. Would the sureties, if sued, be compelled to show that every step taken by the sinking-fund commissioners had been regularly entered on their records, and had been in exact compliance with the law, before they could set up the fact that the money had been taken out of the treasury by those who had the right to invest it? Unless there was some breach of official duty on the part of the treasurer in parting with the money, neither he nor his sureties could be held for its loss because the commissioners had made a bad loan. If they had the power to make the loan, and did make it, they took the money out of the treasury for investment, and the treasurer no longer held it as the custodian. This offer should have been received. Whether the evidence would have supported it we cannot determine, but the defendants had a right to make the showing offered if it was in their power. It was, in effect, an offer to show that the sinking fund had been invested, and had not been in the treasury for more than eight years. The sinking-fund commissioners might be liable to the city for a loss resulting from their neglect of duty, but the defendants are not their sureties, and have no concern with that question.

The interest on the sinking fund stands on quite different ground. If Rockafellow, as a banker, had borrowed of the sinking-fund commissioners, the money which Rockafellow, as city treasurer, had in his custody, and had paid interest on it regularly, as alleged, for eight years, the interest, having been paid by him as borrower to himself as city treasurer, was as to himself and his sureties, in the treas-

ury. For this he was liable to account. His failure to pay it over to his successor was a breach of his official duty, and for such breach of official duty his sureties were liable on their bond. They were liable, not because it was interest due from him to the city, but because it was interest received by him as city treasurer from a borrower from the sinking-fund commissioners. It was income derived by the commissioners from an investment of the sinking-fund money, paid to the treasurer as the proper receiving officer and custodian of all uninvested money belonging to the city. If the money was not, in fact, lent to Rockafellow, then he was not liable to interest; for, as city treasurer, his duty was to hold the money subject to the orders of the proper officers, and he had no right to use it. His duty was simply to pay over, when legally required so to do, what he had received by virtue of his office; and for the discharge of this official duty his sureties were liable. When this duty was discharged their liability was at an end. Either he held the sinking fund as treasurer, or he had borrowed it as a banker. The rejected evidence, if it had sustained the offer, would have settled this question, and the extent of the liability of the defendants as to this part of the plaintiff's claim.

The remaining question relates to the general funds of the city, and the effect of the agreement by Rockafellow to pay interest at the rate of 3 per cent on balances in favor of the city. It does not appear that there was, as to this money, any agreement entered into. Some member of the city council, in naming another candidate, stated that the person named by him would, if elected city treasurer, pay interest at the rate of 3 per cent on the balance in favor of the city. Another member said, if Mr. Rockafellow was re-elected, he would do as well by the city as any one else. The election then took place and resulted in the choice of Mr. Rockafellow by a decided majority. The relation of borrower and lender was not created by these statements. It does not seem to have been contemplated. The balance would be constantly shifting in amount. The treasurer was to be prepared at all times to honor the warrants of the proper officers, and upon the surplus of receipts over disbursements, as balances were struck from time to time, interest was to be allowed. This agreement, if made, did not amount to a loan of any particular sum of money by the city council to the treasurer, but was in the nature of a premium demanded from him as the price of the office. It was a premium for which he was not liable, which he could not be compelled to pay if he had taken defense to it, and for which the sureties are not liable. The agreement, if made, was against public policy, and is incapable of enforcement. If, as we incline to think, he was not a borrower of the money of the city, but was to hold the money subject at all times to the call of the proper municipal officers, his duty and his sureties' undertaking on his behalf, are discharged by the payment of the amount of money that came into his hands as treasurer, regardless of any promise to pay interest, or a premium in any other form, for the privilege of holding the office. The promise to pay interest as the price of an election to the office of treasurer has no valid consideration to support it. It is a promise that we cannot recognize as binding on him who made it. *A fortiori* is it without binding effect on the sureties upon an official bond.

It is contended that, as the law requires the city treasurer to keep accounts of his receipts and disbursements of the revenues of the city, and to make at stated intervals transcripts of these accounts for the information of the municipal government, the transcripts so made should be held to be conclusive upon him and his sureties as to the amount of public moneys received by him. This is putting the effect of the entries by the treasurer upon his books too strongly. They should be held to make a case, prima facie, against him and those who are in privity with him. They cannot, however, preclude the defendants from showing that the items, or some of them, have been erroneously entered,—that their principal was mistaken in his view of his own liability, or was disposed unfairly to make them responsible for sums of money for which no recovery could otherwise be had against them. Their liability is limited, as we have seen, by the terms of the bond, to a breach of official duty. If it was not the duty of the treasurer to pay, as such, the price demanded from him as the consideration of his appointment, his failure to pay it was not a breach of official duty, and therefore not a breach of his official bond. By the simple device of charging himself with that for which he was not liable, he could not shut the mouths of his sureties, or estop them from alleging the truth in their own behalf. The interest, whether it be treated as an exaction the law does not authorize, or a price demanded for the office, must be struck out, so far as it relates to the general funds of the city. So far as the facts now appear, we see no reason why the sureties should not be held liable for the general funds of the city. This disposes of the questions raised on this record.

The assignments of error are sustained, so far as they relate to the questions now considered, *the judgment is reversed*, and a writ of venire facias de novo awarded.

Mitchell, J., dissents from so much of this opinion as holds that plaintiff cannot recover interest on balances of general account.

COMMONWEALTH of Pennsylvania, *Appt.*,
v.
George E. PAUL.

(170 Pa. 284.)

A ten-pound package of oleomargarine put up by a nonresident manufacturer

NOTE.—The decision in Com. v. Schollenberger (Pa.) 22 L. R. A. 155, is here followed and approved, to the effect that packages for retail trade cannot be protected as original packages of interstate commerce against the exercise of state police power. As intimated in the footnote to that case, the Pennsylvania court was the first to decide this point, and up to the present time it remains untouched by courts of the United States and of other states.

See also 35 L. R. A. 844; 39 L. R. A. 484.

and sent into the state for sale at retail to an individual consumer, and thus sold by an agent for use as food, is not an original package the sale of which is protected against state laws by the Constitution of the United States.

(October 7, 1895.)

APPEAL by the Commonwealth from a judgment of the Court of Quarter Sessions for Philadelphia County acquitting defendant of the charge of selling oleomargarine contrary to the provisions of the statute. *Reversed.*

The facts are stated in the opinion.

Messrs. **A. Morton Cooper, Carroll R. Williams,** and **George S. Graham,** District Attorney, for appellant:

Defendant places himself clearly within the ruling of *Com.* v. *Schollenberger*, 156 Pa. 201, 22 L. R. A. 155, 4 Inters. Com. Rep. 488 (1893).

While Congress has the power to regulate commerce under section 8 of article 1 of the Constitution, the states may validly "affect" commerce in two ways:

(1) In the exercise of their inherent and inalienable police power.

(2) Under the taxing power.

Munn v. *Illinois*, 94 U. S. 135, 24 L. ed. 87.

The states did not at the formation of the Union, and cannot by any means or process, surrender the police power inherently existing in them.

Gibbons v. *Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Wilson* v. *Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245, 7 L. ed. 412; *United States* v. *Dewitt*, 76 U. S. 9 Wall. 41, 19 L. ed. 593.

The scope of the police power has never yet been clearly defined, but it has never been doubted that the right of the state extends to the protection of the health of its citizens.

Bowman v. *Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694; *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237; *Kimmish* v. *Ball*, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407; *New York* v. *Miln*, 36 U. S. 11 Pet. 102, 9 L. ed. 648.

The act under which defendant below was convicted is a health law.

Powell v. *Pennsylvania*, 127 U. S. 678, 32 L. ed. 253.

If the state, as a police measure, can restrict interstate commerce as to time, it may, upon principle and precedent, restrict as to use.

Hennington v. *State*, 90 Ga. 396, 4 Inters. Com. Rep. 413.

Although a state is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government.

License Cases, 46 U. S. 5 How. 577, 12 L. ed. 299; *Wilkerson* v. *Rahrer*, 140 U. S. 545, 35 L. ed. 572; *Stone* v. *Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

The state may validly impose a license tax or fee, and such action is not a regulation of commerce.

License Tax Cases, 72 U. S. 5 Wall. 462, 18 L. ed. 497; *Osborne* v. *Mobile*, 83 U. S. 16 Wall. 479, 21 L. ed. 470; *Ward* v. *Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Ficklen* v. *Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79.

If the business of a dealer selling for a principal residing in another state be in effect an occupation differing materially in no respect from that of a local dealer in the same class of goods, the state may regulate the occupation.

Com. v. *Schollenberger*, 156 Pa. 201, 22 L. R. A. 155, 4 Inters. Com. Rep. 488 (1893); *Woodruff* v. *Parham*, 75 U. S. 8 Wall. 123, 19 L. ed. 382; *Ficklen* v. *Shelby County Taxing Dist.* 145 U. S. 21, 36 L. ed. 606, 4 Inters. Com. Rep. 79; *License Cases*, 46 U. S. 5 How. 599, 12 L. ed. 299; *Munn* v. *Illinois*, 94 U. S. 125, 24 L. ed. 84; *Ward* v. *Maryland*, 79 U. S. 12 Wall. 428, 20 L. ed. 452.

Merchandise in mass or bulk, though imported and held intact by the importer, is not necessarily such a technical "original package" as to preclude state action before the sale.

Brown v. *Houston*, 114 U. S. 622, 29 L. ed. 257; *Com.* v. *Zelt*, 138 Pa. 628, 11 L. R. A. 602.

The manufacture and sale of oleaginous substitutes for butter in the United States cannot be said to be sufficiently "national in its nature" to constitute the substituted article a legitimate subject of interstate commerce, at least seven states having by statutes prohibited the manufacture and sale of oleaginous substitutes, in imitation of and intended as a substitute for genuine butter.

State v. *Marshall*, 64 N. H. 549, 1 L. R. A. 51; *State* v. *Addington*, 77 Mo. 110, 12 Mo. App. 214; *Butler* v. *Chambers*, 36 Minn. 69; *Plumley's Case*, 156 Mass. 236, 15 L. R. A. 639; *Plumley* v. *Massachusetts*, 155 U. S. 461, 39 L. ed. 223; *People* v. *Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483; *State* v. *Newton*, 50 N. J. L. 534, 2 Inters. Com. Rep. 63; *Powell* v. *Com.* 114 Pa. 265, 60 Am. Rep. 350, 127 U. S. 678, 32 L. ed. 253; *McAllister* v. *State*, 72 Md. 390.

Messrs. **A. B. Roney, Henry R. Edmunds,** and **Richard C. Dale,** for appellee:

The judgment should be affirmed upon the authority of *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, and *Plumley* v. *Massachusetts*, 155 U. S. 461, 39 L. ed. 223.

Leisy v. *Hardin* has been recognized, (1) by Congress in the passage of the act of August 8, 1890, commonly known as the Wilson Bill; (2) by the several United States circuit courts in *Minnesota* v. *Gooch*, 44 Fed. Rep. 276, 10 L. R. A. 830, 3 Inters. Com. Rep. 530; *Re McAllister*, 51 Fed. Rep. 282; *Re Sanders*, 52 Fed. Rep. 802, 18 L. R. A. 549, 4 Inters. Com. Rep. 305; *Re Ware*, 53 Fed. Rep. 783; (3) by this court in *Com.* v. *Zelt*, 138 Pa. 615, 11 L. R. A. 602; *Titusville* v. *Brennan*, 143 Pa. 642, 14 L. R. A. 100, 3 Inters. Com. Rep. 735.

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

It is not necessary to the decision of this case

that we should enter upon the discussion of the existence and extent of the police power residing in the several states of the Union. It is quite unnecessary to argue that the power of Congress to regulate commerce between the citizens of the different states was not intended to abridge the lawful exercise of the police power by any of the state governments. If judicial decisions can be said to settle any question, these questions are clearly and properly settled by the decisions of the highest tribunal known to our laws, and settled in accordance with the rules laid down in this state since its first organization. In *Powell* v. *Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, the right of this state to deal, in the exercise of its police power, with the manufacture and sale of oleomargarine, and the validity of the particular statute under consideration in this case, were distinctly affirmed. During the last year (1894) a Massachusetts statute relating to the same subject came before the Supreme Court of the United States in *Plumley* v. *Massachusetts*, 155 U. S. 461, 39 L. ed. 223, and was sustained as a lawful exercise of the police power. The defendant in that case had, as the defendant in this case has, a license from the internal revenue department of the United States, authorizing him to deal in oleomargarine. It was held, however, that this did not authorize him to engage in the manufacture or sale of oleomargarine in violation of the state laws, lawfully passed, forbidding or regulating such manufacture and sale. The dealer in articles which the state, in the exercise of its police power, places under restrictions, must make his peace with the state in which his business is conducted, as well as with the internal revenue laws of the United States. This proposition the defendant denies. He has made his peace with the tax laws of the United States, but denies the power of the state to regulate or restrict his sales of the commodity in which he deals, and asserts that he is engaged in interstate commerce, within the true intent of the constitutional provision conferring upon Congress the power to regulate commerce between the several states. In determining the question thus raised, it is important to keep in mind the facts found by the special verdict, as follows: (1) The defendant is a resident in and citizen of this state, with a store or place of business at No. 214 Callowhill street, Philadelphia. (2) He is conducting the sale of oleomargarine as the agent for "Chicago Butterine Company," which is a firm or corporation doing business in Illinois, and is the licensed dealer at No. 214 Callowhill street. (3) The oleomargarine was not made from milk or cream. It was designed to be used in place of butter. It was sent from Chicago to Philadelphia to be sold as food, and the tub sold to Crawford, which is complained of in this case, was sold to him for use as an article of food. (4) The tub contained 10 pounds only; was put up, sealed, and stamped at the factory in the state of Illinois; was received in the same form in Philadelphia, and then "placed in defendant's store, and offered for sale as an article of food." (5) This was one of "many transactions of like character made by the defendant during the last two years;" or, in other words, this was the way in which the defendant did business for his nonresident principals, the manufacturers. They put up the article in 10-pound packages, suited for the retail trade; and, because they do not allow their agents to open or divide these, they treat their trade as wholesale, though in fact they supply the actual consumer, and not the retail dealers.

Looking now at these facts in the light of the cases cited, we shall find every question raised by them has been decided against the defendant by the Supreme Court of the United States, except one. The validity of our act of assembly has been distinctly affirmed as a lawful exercise of the police power. Act May 21, 1885. The fact that an internal revenue license affords the defendant no justification for disregarding a lawful exercise of the police power by the state is stated with equal clearness. The proposition that the judiciary of the United States should not strike down the police power of the states, in the exposition of the interstate commerce powers of the general government, was asserted and abundantly vindicated in *Plumley* v. *Massachusetts*, *supra* (decided within the last year). Our statute is directed especially against the sale of oleomargarine as an article of food. The defendant, in wilful and flagrant disregard of the letter as well as the spirit of the statute, keeps these tubs of the commodity manufactured by his principals at the store in Callowhill street, for sale "as an article of food." He offers them for sale for use as an article of food, and he sold to Crawford the 10-pound tub which is the ground of complaint in this case for use as food. Now, it is very clear that this sale was a violation of our statute. The conviction was eminently proper, therefore, and should be sustained, unless the sale can be justified as one made of an "original package," within the proper meaning of that phrase. The nonresidence of the manufacturer does not play any important part in this case, for he comes into this state to establish a "store" for the sale of his goods, pays the license exacted by the revenue laws, and puts his agent in charge of the sale of his goods from his store, not to the trade, but to customers. We have, therefore, a Pennsylvania store selling its stock of goods to its customers, for their consumption, from its own shelves; and, unless these goods are in such original packages as the laws of the United States must protect, the sale is clearly punishable under our statute.

We first encountered this question of what shall constitute an original package, within the meaning of our national interstate commerce legislation, in *Com.* v. *Zelt*, 138 Pa. 615, 11 L. R. A. 602. A nonresident manufacturer of intoxicating drinks put up his whiskey and other liquors in quart and pint bottles, adapted for use in the retail trade to consumers. These he sent to an agent in charge of a store rented for the purpose in Washington, Pa. The bottles were corked, some sealing wax put over the cork, and the brand or initials of the manufacturer impressed thereon. The bottles so secured were then put in pasteboard boxes or covers, and packed in open boxes or barrels, for shipment to the Pennsylvania store. When they were received at the store the bottles were arranged and displayed on the shelves, and offered for sale to the consumer as original packages of whiskey. Neither the distiller who

shipped the whiskey, nor his agent who sold it, had a license to sell intoxicating drinks under the liquor laws of this state, but made sales of whiskey and beer by the pint and quart under the pretense that each bottle was an original package of commerce. The learned judge before whom an indictment against the seller of the bottles of liquor was brought to trial submitted the question to the jury whether this method of putting up the liquors in bottles was not adopted as a device to evade the liquor laws of this state. The jury found the fact to be that it was a mere device, and rendered a verdict of guilty. Upon an appeal to this court the ruling of the court below was affirmed, and, in speaking on the second assignment of error, we said that whether whiskey or beer could be put up in pint bottles, and sold by the single bottle, as an original package, under the protection of the interstate commerce laws, was a question that would be decided when it was squarely raised. The question was next raised in *Com.* v. *Schollenberger*, 156 Pa. 201, 22 L. R. A. 155, 4 Inters. Com. Rep. 488, and its decision became necessary to the disposition of that case. In that case a nonresident manufacturer of oleomargarine had established a store for its sale in Philadelphia, and held a license, under the internal revenue laws, authorizing such sale. His agent sold a tub of "the goods" to a boarding-house keeper, for use, in the place of butter, on his table. The defense was that the tub had not been broken or divided by the seller, and was therefore an original package within the meaning of the interstate commerce cases. We held that the conclusion did not follow from the fact stated, and attempted to define an "original package" as such a package as was used in good faith by producers and shippers for convenience in handling and security in transportation of their wares in the ordinary course of actual commerce. But we also said that where the size of the package was adapted for the retail trade, so that "breaking of bulk" was not necessary to "reduce the goods into the common mass" and fit them for the retail trade, the traffic so conducted was not interstate, but infrastate, commerce; or, in other words, the common every-day retail traffic of the community in which the store was located. Let us look at the consequences of the adoption of the opposite rule. If a pint bottle of whiskey is an original package, under the protection of Congress, and can be sold as such regardless of the police legislation of the state, we cannot punish the sale to a minor, to a person of known intemperate habits, to a lunatic, on election days, or on the Sabbath. All power over the traffic for police purposes is gone. And why? Because the power to regulate interstate commerce intended to guard against stoppage along state lines for examination or the collection of customs duties, has been extended by construction until it is made to reach and protect a retail traffic carried on within any state, if the things sold have come into the retailer's store from a nonresident manufacturer or shipper. If this be a sound construction, then the power of a state to restrict or prohibit an injurious traffic does not depend on the deleterious character of the thing sold, or the manner in which sales are made, or the public or private injury inflicted by the sale, but on the manner in which the thing sold comes into possession of the seller. If he makes the article, or buys it of another citizen of the state, he cannot sell it without punishment. If he buys it of a nonresident who sends it to him across the state line, he may sell it with impunity and the state is powerless to stay his hands or to regulate his sales. A pint of whiskey put up in a flask, if made or bought in this state, cannot be sold without a license granted by the courts after an examination into the character of the applicant and his business. The same flask of whiskey put up across the border may come, as an original package, into any community, and be sold to any person,—whether a minor, a drunkard, or a lunatic,—under the protection of the Constitution of the United States. We cannot adopt a construction that seems to us so unnatural and unreasonable, and that would work such absurd and monstrous results. On the contrary, we hold, as we think is held by the recent case of *Plumley* v. *Massachusetts*, already referred to, that the mere fact that a police law may affect the trade in articles brought from another state does not amount to an attempt to regulate interstate commerce, or to an assumption of power belonging to Congress.

Coming now to the facts of this case, we find the alleged "original package of commerce" to be a small tub of oleomargarine, containing 10 pounds, and in fact sold to a consumer for use, as an article of food, upon his table. It is true that the defendant treats his trade as one carried on at wholesale, but the facts of the special verdict show that this is not because he supplies dealers or sells in large quantities, for shipment, but because he treats the little tubs and packages he sells his customers as "original packages of commerce," and his lawbreaking traffic as "interstate commerce." He does not "break bulk," by taking 1 pound out of a package, and weighing it on his scales, for the supply of a customer, but requires him to take a whole tub,—whether of 10 pounds, or of 2 or 1, is immaterial, but it must be a whole package, as it was put up at the factory. If the pint bottle or the pound package has not been opened and divided before the sale, the contention is that it has not become a part of "the common mass" of property entering into the ordinary business of the citizens of the state, but is an original package, under the protection of Congress, as interstate commerce. The question to which we are thus brought is the same that was encountered in *Com.* v. *Schollenberger*, 156 Pa. 201, 22 L. R. A. 155, 4 Inters. Com. Rep. 488. It is whether a package intended and used for the supply of the retail trade is an "original package," within the protection of the interstate commerce cases. We held in that case that a manufacturer who puts up his products in packages evidently adapted for and intended to meet the requirements of an unlawful retail trade in another state, and sends them to his own agent in that state, for sale to consumers, is not engaged in interstate commerce, but is engaged in an effort to carry on a forbidden business by masquerading in a character to which he has no honest title. We are not dealing with the legislative question. Whether the trade in oleomargarine is injuri-

ous, and should be restricted, is a question that has been decided for us. It has been declared injurious. It has been placed under restrictions. These restrictions have been held to be a valid exercise of the police power both by this court and the Supreme Court of the United States. Our question is whether this valid restriction can be enforced, or whether the transparent trick of putting up oleomargarine in small packages, in another state, so that it can be sold at retail to consumers as an article of food, will clothe an unlawful retail traffic with the coat of mail belonging to honest, legitimate interstate commerce, and set the police laws of the state at defiance. In disposing of this question, we hold as follows: (1) The character of the package, whether original or not, is a question of fact, when there are facts to be passed upon, bearing upon this question, and should go to the jury. (2) It is a question of law when the facts are agreed upon, or presented by a special verdict, as in this case, and should be decided by the court. (3) It is fair to presume that a package was intended by him who devised it, for the purpose for which he uses it in his own business. (4) A package devised by a nonresident manufacturer, or put up by him, adapted for sale at retail to individual consumers,—such, for example, as a flask of whiskey, or a tub or pail or roll of oleomargarine,—and actually sold by him or his agent to the consumer for use as an article of food or drink, in violation of the laws of the state where such sales take place, is not an "original package" within the meaning of the law relating to interstate commerce. (5) The punishment of such sales, under the police power of the state, is not an interference with the powers of Congress, or with the commerce between the states, which is protected by the Constitution of the United States.

The judgment is reversed, and judgment is now entered on the special verdict, in favor of the Commonwealth. The record is remitted that sentence may be imposed according to law.

George LYON, to Use of Gustavus CONKLIN

v.

J. C. CLEVELAND, *Appt.*

(170 Pa. 611.)

1. **The revival of a judgment against the judgment debtor** is effective as against the grantee in a deed made after the judgment but before the revival, of which the judgment creditor had neither actual nor constructive notice prior to the revival.

2. **Proceedings to revive a judgment as against a terre-tenant** after receiving notice that he held a secret deed to the property at the time the judgment was regularly revived against the judgment debtor are erroneous, since he is bound by the proceedings against the debtor.

3. **The revival by amicable scire facias of a judgment is not abandoned** by subsequent erroneous proceedings upon discovering that a transferee claimed an interest in the property covered by the judgment lien, which are instituted for the purpose of making the judgment effective against him.

(October 7, 1895.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Bradford County refusing to strike off a judgment which had been revived against a judgment debtor by an amicable *scire facias* on the ground that the revival had been abandoned by subsequent proceedings. *Affirmed.*

The facts are stated in the opinion.

Mr. **Edward Overton,** for appellant:

There can be but one final judgment in any personal action, whether founded on contract or in tort.

O'Neal v. *O'Neal*, 4 Watts & S. 130; *Walton's Appeal*, 153 Pa. 99.

A recovery in a personal action is a bar to a recovery in proceedings instituted by attachment, whether defendant does or does not file a bond.

Brenner v. *Moyer*, 98 Pa. 274; *Miller* v. *Rohrer*, 127 Pa. 384.

A *scire facias* to revive a judgment and a judgment thereon are a bar to another *scire facias* on the original judgment.

Custer v. *Detterer*, 3 Watts & S. 28; *Furst* v. *Overdeer*, Id. 470; *Little* v. *Smyser*, 10 Pa. 381; *Zerns* v. *Watson*, 11 Pa. 260.

By issuing his *scire facias* the plaintiff affirmed that he had no lien by virtue of his amicably revived judgment on the land he sought to bind by his *scire facias* on the original judgment.

Robinson v. *Atlantic & G. W. R. Co.* 66 Pa. 160.

A plaintiff may, by his acts, abandon a judgment obtained by an amicable revival.

Ramsey v. *Linn*, 2 Rawle, 231; *Eby's Case*, 9 Watts & S. 145; *Man* v. *Drexel*, 2 Pa. 203; *Meason's Estate*, 4 Watts, 344; *Silverthorn* v. *Townsend*, 37 Pa. 267; *Missimer* v. *Ebersole*, 87 Pa. 109; *Middleton* v. *Middleton*, 106 Pa. 259; *Sayer* v. *Schroeder*, 2 Pennyp. 79; *Baum* v. *Custer*, 22 W. N. C. 145.

Each successive writ of *scire facias* to revive a judgment must be founded upon the judgment which immediately preceded it. A recovery upon a writ of *scire facias* is a bar to any subsequent recovery upon the original judgment.

Collingwood v. *Carson*, 2 Watts & S. 220; *Custer* v. *Detterer* and *Furst* v. *Overdeer*, *supra*.

The plaintiff, without notice of the conveyance, can issue his *scire facias* on the new judgment, and then bring him in as a terre-tenant so as to bind the land.

Wetmore v. *Wetmore*, 155 Pa. 507; *Sayer* v. *Schroeder*, *supra*; *Little* v. *Smyser*, 10 Pa. 281.

The issuing of an alias *fi. fa.* and levy upon the same property first levied is an abandonment of the lien of levy by virtue of the *fi. fa.*

Silverthorn v. *Townsend*, *Meason's Estate*, and *Missimer* v. *Ebersole*, *supra*.

NOTE.—In connection with the above case, see *note* to Betz v. Snyder (Ohio) 13 L. R. A. 235, which to some extent touches the effect of failure to record a deed. As to defense against revival of judgment, see also Enewold v. Olsen (Neb.) 22 L. R. A. 573.

The abandonment of a *scire facias* terminates its virtue to prolong a lien.

3 Trickett, Liens, p. 309.

Messrs. **D. A. Overton** and **J. C. Ingham,** for appellee:

Abandonment is absolute relinquishment. It includes both the intention to abandon and the external act by which the intention is carried into effect.

1 Am. & Eng. Enc. Law, p. 1.

If the defendant has aliened the land, his alienee must be served if he can be found, and the defendant may also be served.

2 Fish's Troubat & Haly, Pr. p. 536; *Reynold's Appeal*, 5 W. N. C. 184; *Ramsey* v. *Linn*, 2 Rawle, 229; *Little* v. *Smyser*, 10 Pa. 381; *Furslit* v. *Overdeer*, 3 Watts & S. 470; *Zerns* v. *Watson*, 11 Pa 260.

If the judgment is regularly revived against defendant, and the plaintiff has no knowledge, actual or constructive, of any terre-tenant, then the lien of the original judgment is continued and preserved against the land in the hands of the terre-tenant.

Buck's Appeal, 100 Pa. 109; *Porter* v. *Hitchcock*, 98 Pa. 625; *Meinweiser* v. *Hains*, 110 Pa. 468; *Hughes* v. *Torrence*, 111 Pa. 611; *Wetmore* v. *Wetmore*, 155 Pa. 507.

And while the lien is so preserved a *scire facias* may issue on the original judgment to revive it against the terre-tenant.

Furslit v. *Overdeer*, *Little* v. *Smyser*, *Porter* v. *Hitchcock*, and *Hughes* v. *Torrence*, *supra*.

The only inquiry is whether the judgment has been regularly revived between the original parties, and no distinction is made between a revival by *scire facias* and by the agreement of the parties.

Buck's Appeal, 100 Pa. 113.

The issuing of the writ of *scire facias* may be dispensed with by the agreement of the parties entered amicably in the case.

2 Fish's Troubat & Haly, Pr. p. 540; *Baum* v. *Custer*, 22 W. N. C. 145; *Porter* v. *Hitchcock*, 98 Pa. 626.

It is the original judgment that is to be revived against the terre tenant.

Porter v. *Hitchcock*, 98 Pa. 627; *Furslit* v. *Overdeer*, 3 Watts & S. 470; *Little* v. *Smyser*, 110 Pa. 381.

The judgment on the amicable *scire facias* in this case could not be revived against the terre-tenant, as she was not a party to it.

Zerns v. *Watson*, 11 Pa. 260; *Little* v. *Smyser*, 10 Pa. 383; *Davidson* v. *Thornton*, 7 Pa. 133; *Wetmore* v. *Wetmore*, 155 Pa. 507.

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

This appeal presents an interesting question. It cannot be said to be definitely settled, but its solution will be made comparatively easy by a distinct statement of it, and of the facts on which it arises. The plaintiff is the holder of a judgment against the defendant, which was entered in 1886. It then became a lien upon a valuable farm owned by the defendant, and occupied by himself and his family. In 1891 the defendant and his family were still in possession of the farm, without visible change. The record showed the title remaining in him. There is no allegation of notice, actual or constructive, that the defendant had parted with his title to any one. Upon this state of facts, the plaintiff applied to the defendant to revive and continue the lien of the judgment by an amicable *scire facias*. This was done, and the judgment of revival duly entered on the records by the prothonotary. During the following year, Mrs. Cleveland told the plaintiff that her husband had conveyed the farm to her by a deed executed by him prior to the revival of the judgment by amicable *scire facias* in 1891. This information started in the mind of the plaintiff the question whether the unrecorded conveyance to Mrs. Cleveland would affect in any manner the lien of his judgment as revived by the amicable *scire facias*, signed only by the defendant. He seems to have assumed that this question must have an affirmative answer, and to have turned to consider, in the next place, what it was necessary for him to do in order to preserve the lien of his judgment upon the farm in the hands of Mrs. Cleveland as terre-tenant. The answer to the first of these questions will dispose of this appeal, and of the appeal of Mrs. Cleveland in another case which was heard at the same time with this one. *Lyon* v. *Cleveland*, 170 Pa. 621. We are to inquire, therefore, what effect the secret conveyance by Cleveland to his wife had upon the lien of the plaintiff's judgment upon the farm so conveyed.

It may be well to begin this inquiry by considering just what is meant when we speak of the lien of a judgment upon real estate. At common law, a judgment was not a lien upon either personal or real estate. We have no statute that, in express words, makes a judgment a lien on land. The lien is not an incident of the judgment, therefore, but the result or outgrowth of a succession of statutes subjecting land to seizure and sale upon execution process. Accordingly, it has been uniformly held that a judgment on which a seizure and sale of land is not authorized is not a lien on the real estate of the defendant. *Beam's Appeal*, 19 Pa. 453; *Schaffer* v. *Cadwallader*, 36 Pa. 126. Judgments against the commonwealth, against counties and townships, against municipal corporations, and against canal and railroad companies, belong to this class. Writs of *fi. fa.* for the seizure and sale of the property of the defendant do not ordinarily issue upon such judgments, but other methods of compelling payment are provided by statute. When the right to seize and sell land in satisfaction of a judgment does exist, it must be exercised within such period as the law giving the right may appoint. Formerly, this period was a year and a day; and, if this was allowed to elapse, the plaintiff was required to warn the defendant by a writ of *scire facias post annum et diem* before he could seize the defendant's land in satisfaction of his judgment. While the right of seizure lasted, the judgment was said to be a lien on the defendant's real estate. When the right of seizure was lost by lapse of time, the judgment was said to have lost its lien.

By our act of April 16, 1845, the plaintiff's right to seize land was extended from a year and a day to five years from the date on which the judgment was entered. The judgment is therefore said to be a lien for five years from its date upon all the real estate owned by the

defendant at that time, because the plaintiff may levy upon and sell such real estate for the collection of the sum due him on his judgment at any time within five years. If the five years are allowed to expire, the plaintiff is in the same situation that he would have been in under the old law limiting his right to execution to a year and a day. His right to seize the defendant's land is lost by the lapse of time; or, in other words, the judgment has lost its lien, since it will not support execution process until regularly revived. The revival of a judgment means simply a new award of execution process for its collection. This may be had by means of a writ of *scire facias*, which, after the expiration of five years, is in effect a *scire facias quare executionem non*. If issued before the expiration of five years, it is a *scire facias* to revive and continue the lien of the judgment for another period of five years. Judgment of revival may be had also by the consent of the defendant without a writ. Such a revival is known as an "amicable *scire facias*," and authorizes the prothonotary to enter judgment against the defendant for the amount due on the judgment, and that the lien of the judgment be extended for another period of five years. This judgment may be again revived as often as the lapse of time may require, either amicably or by writ; and the right of the plaintiff to resort to the real estate owned by the defendant when the judgment was entered is thereby preserved. The last judgment of the series is that by which the amount of the plaintiff's demand is ascertained, and his right to execution therefore determined. The several judgments that precede it have served to preserve the plaintiff's right to seize, upon execution process, all the real estate that could have been seized under the original judgment; or, in other words, they have continued the lien of the judgment upon the lands that were originally subject to it. But, being more than five years old, they will not support execution process, and have ceased to have any significance except as supports to the last of the series, and to process issued upon it. When the defendant in the judgment sells land, the purchaser is bound to take notice of the record. The record informs him of the existence and amount of the judgment; and the law, which he is also bound to know, informs him that the land he is buying is subject to seizure and sale for the payment of the judgment at any time within five years. If he takes possession of the land or records his deed, the plaintiff is bound to take notice of his situation as a terre-tenant, and thereafter, upon the revival of the lien of his judgment, to give the terre-tenant notice. *Armington* v. *Rau*, 100 Pa. 165.

If the purchaser does not record his deed or take possession, but leaves the defendant in undisturbed possession of the land so that the plaintiff has no knowledge of the conveyance, actual or constructive, he does not become a terre-tenant of the land, and has no interest therein of which the plaintiff can take notice. As between himself and his vendor, he may have a good title; but as to the lien creditor he has none, because the conveyance to him is and remains a secret one, while the vendor is permitted to remain in possession in the same manner as before the secret conveyance was made. Under such circumstances, the revival of the judgment against the defendant is all that is possible to the creditor, and it will continue the right to seize and sell the real estate which was subject to seizure under the preceding judgment or judgments of the series. It can make no difference whether the judgment of revival is obtained by means of the writ of *scire facias* regularly issued or by an amicable *scire facias*. It is a judgment against the defendant who was the owner of the land when the judgment was entered, and who remains so to all appearances, and as to all means of knowledge open to the creditor. If the creditor or the purchaser must lose, and if both of them may be said to be innocent parties, then the loss must fall on him whose neglect to give notice has occasioned the omission or failure complained of; but if the purchaser records his deed, or enters into the actual possession of the land, he becomes a holder of the land bound by the judgment,—a terre-tenant,—of whose position and interest the judgment creditor is bound to take notice at his peril. If thereafter the plaintiff, in a judgment against the vendor, disregards the position of the terre-tenant, and revives his judgment without legal notice to him, he will lose his lien, as to the lands so acquired by the terre-tenant, at the end of five years from the time when the notice of the terre-tenant's title can be brought home to him.

It remains to apply these principles to the facts of this case. The judgment held by Conklin was entered against Cleveland in 1886. The defendant then owned the farm on which he lived, and the judgment became a lien upon it. In 1891 the state of the record and of the possession remained the same as in 1886. The plaintiff, having, therefore, no notice of any change in the title, revived his judgment by an amicable *scire facias*, signed by the defendant. This judgment of revival continued the right of the plaintiff to execution against all the lands previously bound by the judgment entered in 1886; in other words, it continued the lien of the judgment upon all such lands against the defendant and all persons claiming under him by means of any secret conveyance. Mrs. Cleveland held such a conveyance. She was bound to know of the judgment and its lien upon the farm. She was bound to know that, if she expected to assert the rights of a terre-tenant, it was her duty to make her title public, so that the plaintiff could be fixed with notice of it. She did nothing. The plaintiff did the only thing possible for him,—he revived his judgment against the defendant; and we have no doubt that the revival bound the land, as to any interest acquired by Mrs. Cleveland, just as completely as it would have done if she had joined in the agreement with her husband. This revival continued the lien of the judgment for five years from the date of its entry, and the subsequent recording of a deed, or notice given in any other manner, could have no retroactive operation. This, then, was the situation when, in 1892, Mrs. Cleveland gave the plaintiff notice that she held a deed for the farm, which had been executed before the entry of the judgment upon the amicable *scire facias*. This notice did not affect the lien of the judgment in the slightest

degree. It gave her no rights as a terre-tenant, except such as began at that time. The plaintiff and the lien of his judgment stood after the notice was given just as they stood before. There was no reason for taking any precautionary steps, or making any effort to bring Mrs. Cleveland on the record, until it became necessary to revive the judgment again against the defendant. The plaintiff seems to have reached an opposite conclusion. He at once issued a *scire facias* on the original judgment, which was at the time more than five years old, and named Mrs. Cleveland therein as a terre-tenant. This was not only unnecessary, but it was wholly unauthorized. The defendant took defense on the ground that the judgment had been once regularly revived as against him, and that he was not liable to a second judgment for the same cause of action. Mrs. Cleveland took defense on the ground that the lien of the judgment of 1886 had been lost by lapse of time, and could not be revived against her. The court below overruled the defense set up by the defendant; disposed of Mrs. Cleveland's allegation that as to her the judgment of 1886, having ceased to be a lien, would not support the *scire facias*, by admitting evidence to show the continuance of the lien against the defendant, and then rendered judgment against both. This was an error. The writ should not have been issued. Having been issued, the court should have refused to enter judgment upon it against either of the defendants. The plaintiff needed no help until it should become necessary to revive his judgment again. When that time comes, he will issue his writ of *scire facias*, naming Mrs. Cleveland as terre-tenant; but he will proceed upon the judgment entered upon the amicable *scire facias* in 1891, which, as we have seen, binds the land as well in the hands of Mrs. Cleveland, upon the facts of this case, as in the hands of her husband. But the error into which the plaintiff and the court below fell was not in this case, but, as we have said, in the action brought by *scire facias* against the defendant and his wife, as terre-tenant on the original judgment entered in 1886.

The judgment appearing upon this record is therefore affirmed.

CALIFORNIA SUPREME COURT.

PEOPLE of the State of California, *Respt.*,
v.
Charles HECKER, *Appt.*

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

1. **Evidence of occurrences the same day but some hours before a fatal affray** is admissible in a prosecution for murder, on the question of self-defense, where they were a part of the same occurrences that culminated in the killing, and tend to enlighten the jury as to the mental attitude of the men toward each other at the time of the affray.

2. **The refusal of instructions as to the rights of a finder in respect to the property found** is reversible error in a prosecution against him for murder, in which he pleads self-defense and the evidence shows that the homicide occurred while he was attempting to enforce a right to possession as against the owner, when both men used firearms, since such instructions are necessary to enable the jury to determine which was first in the wrong.

3. **The duty to refrain from killing a mere trespasser** is not limited to cases where the trespass is committed in a peaceable manner.

4. **That an attempt to kill or inflict great bodily harm is made in resisting a forcible trespass** against personal property does not deprive the person assaulted of the right to kill his assailant without retreating and declining, or making known to his adversary his willingness to decline the strife, where the assault is so sudden and perilous as to render retreat and declination impossible; but as he is the first wrongdoer, although his wrong does not justify the attack upon him, he must retreat and decline the combat, if possible, before resorting to the killing of his adversary.

5. **Retreat is not an essential condition of the right of a person feloniously assaulted without adequate provocation** to kill his assailant, if the assault is sudden and the danger great or apparently great; and he may under such circumstances pursue and slay his adversary if apparently necessary for his safety.

6. **A first felonious assailant cannot kill the person assaulted, in defending himself against a deadly return assault** by the latter, until he has in good faith declined the strife and fairly made known to the latter his willingness to do so, and the imminence of his danger does not relieve him of the necessity of so declining before availing himself of the right of self-defense.

7. **A first felonious assailant may justifiably kill his adversary,** if, after in good faith withdrawing from and declining further combat, and fairly making known such purpose to his adversary, the latter forces a new combat upon him.

8. **A requested instruction** in a criminal action, which requires the jury to be convinced to "an absolute moral certainty" before conviction, is properly refused.

9. **The elimination from a requested instruction** of defendant in a criminal trial, of the direction to find the defendant not guilty if the jury find the facts hypothesized in the instruction, is not reversible error, although it is the better practice to add such conclusion to each instruction which warrants it.

(October 9, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Humboldt County convicting him of murder. *Reversed.*

NOTE.—A very important question as to self-defense is decided in the above case. On the general subject, see a brief *note* to Drysdale v. State (Ga.) 6 L. R. A. 424.

The facts are stated in the opinion.

Messrs. **Chamberlin & Wheeler,** for appellant:

Hecker on finding and taking charge of the horses became invested with the rights and obligations of a depositary for hire.

Civil Code, § 1864.

Hecker had a lien on the horses.

Civil Code, § 3051.

This lien could be extinguished only by a voluntary restoration of the horses to their owner.

Civil Code, § 2913; *Palmtag* v. *Doutrick*, 59 Cal. 154, 43 Am. Rep. 245; *Walcott* v. *Keith*, 22 N. H. 196; *Bruley* v. *Rose*, 57 Iowa, 651.

Where one who finds lost property is wrongfully deprived of its possession, he may regain possession of it, and upon so doing his lien revives.

3 Story, Cont. 5th ed. p. 238, notes.

The judge must charge the jury on any points pertinent to the issue, if requested by either party.

Penal Code, § 1093, subsec. 6; Hayne, New Trial & Appeal, § 120; *Stanton* v. *French*, 83 Cal. 194; *Benedict* v. *Hoggin*, 2 Cal. 385; *People* v. *Payne*, 8 Cal. 341; *Jones* v. *State* (Tex.) 26 S. W. Rep. 1082; *Parker* v. *State*, 136 Ind. 284.

The jury were told what were the rights of the parties if the defendant was guilty of committing a trespass in a peaceable manner.

Trespass in its usual legal acceptation is a wrong done with force to the person, property, or rights of another.

Bouvier, Law Dict. 26 Am. & Eng. Enc. Law, p. 570.

Where the trespass is forcible, against personal property, an owner may resist it, but he is not justified in killing the trespasser.

Carroll v. *State*, 23 Ala. 28, 58 Am. Dec. 282; 26 Am. & Eng. Enc. Law, p. 572.

If Hecker in his endeavor to secure the horse committed only a mere trespass, and Riley had shot and killed him, Riley would, most assuredly, have been guilty of murder.

State v. *Donyes*, 14 Mont. 70; *State* v. *Tarter*, 26 Or. 38.

The owner of personal property may resist a trespass thereto, but not to the extent of taking the trespasser's life.

Powers v. *People*, 42 Ill. App. 427; *Bowman* v. *State* (Tex.) 21 S. W. Rep. 48; *Crawford* v. *State*, 90 Ga. 701; *State* v. *Smith*, 12 Mont. 378; *Callicoatte* v. *State* (Tex.) 22 S. W. Rep. 1041; *People* v. *Flanagan*, 60 Cal. 3, 44 Am. Rep. 52; *People* v. *Campbell*, 30 Cal. 312; 9 Am. & Eng. Enc. Law, p. 603; *State* v. *Perigo*, 70 Iowa, 657.

A person in the exercise of the right of self-defense not only has the right to stand his ground and defend himself when attacked but he may pursue his adversary until he has secured himself from danger.

State v. *Thompson*, 45 La. Ann. 969; *Conner* v. *State* (Miss.) 13 So. Rep. 934; 1 East, P. C. 271; *Luby* v. *Com.* 12 Bush, 1; *Holloway* v. *Com.* 11 Bush, 344; *Bohannon* v. *Com.* 8 Bush, 481, 8 Am. Rep. 474; *Carico* v. *Com.* 7 Bush, 124; *Young* v. *Com.* 6 Bush, 312; *Philips* v. *Com.* 2 Duv. 328, 87 Am. Dec. 499; *Pond* v. *People*, 8 Mich. 150; *West* v. *State*, 2 Tex. App. 460; 2 Starkie, Ev. 963; 9 Am. & Eng. Enc. Law, p. 605.

A man may stand his ground and kill one who is attempting to kill or inflict upon him great bodily harm. And this he may do, even though he might more readily have secured his safety by flight.

People v. *Ye Park*, 62 Cal. 209; *People* v. *Robertson*, 67 Cal. 650.

Messrs. **L. M. Burnell,** and **W. F. Fitzgerald,** Attorney General, and **Charles H. Jackson,** Second Deputy Attorney General, for respondent:

Under no circumstances could Hecker commit a felony in the protection of his lien. He could not resort to killing or the commission of a felony for the protection of his lien.

People v. *Dunne*, 80 Cal. 34; Penal Code, § 197, subsec. 2; *People* v. *Flanagan*, 60 Cal. 3, 44 Am. Rep. 52.

Mere words, no matter how outrageous, would not excuse the killing.

People v. *Turley*, 50 Cal. 469; *People* v. *Butler*, 8 Cal. 435; Wharton, Crim. L. 368.

Abstract and irrelevant instructions should not be given.

People v. *Turley, supra; People* v. *McCauley*, 1 Cal. 379; *People* v. *Roberts*, 6 Cal. 214; *People* v. *Honshell*, 10 Cal. 83; *People* v. *Vincente, Sanchez*, 24 Cal. 17; *People* v. *Turcott*, 65 Cal. 126; *People* v. *Gray*, 66 Cal. 271; *Fowler* v. *Smith*, 2 Cal. 39; *Eldridge* v. *Cowell*, 4 Cal. 88; *Hirshberg* v. *Strauss*, 64 Cal. 272.

A judge may suggest the advisability of bringing in a verdict thus and thus, but he may not command or so instruct a jury, and they need not obey his injunction if he does so command them.

People v. *Horn*, 70 Cal. 17; Penal Code, § 1118; *People* v. *Jenness*, 5 Mich. 305; *Hamilton* v. *People*, 29 Mich. 173; *People* v. *Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *People* v. *Schweitzer*, 23 Mich. 301.

Anything so connected with the crime in point of time and character as to explain how and why it was committed is a part of the *res gestæ*.

People v. *Irwin*, 77 Cal. 495; *People* v. *Nelson*, 85 Cal. 421; *People* v. *O'Brien*, 78 Cal. 41.

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

The appellant, Hecker, was tried for the murder of one Patrick Riley, and by the jury found guilty of murder in the second degree. The killing was admitted, but it was claimed to have been done in self-defense.

It appeared by the evidence that Riley peddled wares through the country, using for the purpose a two-horse team and wagon. He had camped near the farm house of one Briceland, and turned his horses into Briceland's inclosure. From this they strayed, and were lost in the hills. They had been gone for several days when Riley, who had been in vain pursuit of them, met Hecker, and offered to give him $10 if he would find and return them. Hecker was an old resident of the vicinity, and owned a sheep range, which was contiguous to the land of Briceland. He searched for the horses that day, and found them, put them in his corral over night, and the next morning proceeded with them to Briceland's. Riley was away at the time of his arrival, and Hecker either made a voluntary surrender of the horses

to Mrs. Riley, who put them in Briceland's barn, as was claimed by the People, or, as was contended by the defense, they were put there by Mrs. Riley for Hecker, who thus still retained constructive possession of and a lien upon them for the promised reward of $10. The point is one in dispute. Hecker rode on to the little town of Briceland, and passed the day in waiting for Riley. He did not see him, and went home. The next day he returned to town, and met Riley about 11 o'clock in the morning. Riley called him to one side, and the finding of the horses was discussed. There having been no one else present at that interview, the only account of it is Hecker's. But it appears from other evidence that Riley suspected that his horses had been taken and secreted in the hills in expectation of a reward, and the promptness with which Hecker found and returned them seems to have confirmed him in his suspicion, and created the conviction that Hecker had purloined them. There was no question but that Riley's suspicions were unfounded and unjust. It was in evidence that Riley said he would kill the man who stole his horses. Hecker testified that Riley accused him of stealing the horses, and refused to pay him any money for their recovery. The men parted. Hecker returned to the store and saloon, and, after thinking and talking the matter over, as he says, concluded he would take the horses from Briceland's barn, and put them elsewhere until he was paid. Hecker was a cripple; Riley, a powerful man. Hecker armed himself, thinking that Riley would be at Briceland's, and knowing that "he would be trying to get a row." Arriving at Briceland's a little after noon, Hecker found but one horse, the other having been ridden off by Sam Pollock, who had gone to find Riley, and tell him the search was at an end. Hecker took possession of the animal, and led it from the stable. Riley saw him, and came forward, calling to him, and forbidding the act. Hecker half drew his pistol from the bosom of his shirt, and, in turn, told Riley to advance no further. Riley answered that he was unarmed, and turned out his pockets in proof; and a second time the two men parted, Hecker leading away the horse. He returned with it to the town, where he spent the afternoon discussing his grievance. As was shown, he used some loose talk and indulged in some threats: He would not let Riley beat him out of his money; he would have the money, or would have Riley's blood,—while, to add to the bitterness of the matter, he was informed that Riley had gone off to procure his arrest for stealing the horses. This information was brought to him by men whom he had sent to see Riley to fix up the matter, telling them that he wanted no fuss, and to take what they could get and settle it for him. So the time passed until about half past 6 of this July afternoon, when Hecker espied Pollock riding by on the other horse. Hecker, who was himself then mounted, hailed him, and demanded the horse, believing, as he testified, that he "had to have both horses in order to make the lien good." Pollock declined to surrender the animal, saying he would put it where he got it; and so Hecker rode on once more to Briceland's, and to the fatal meeting with Riley. As the two men rode up to the stable, Riley came forward to take his horse. Pollock dismounted. Riley started to remove the saddle. Hecker leaned forward to seize the bridle. There was a struggle for possession, and then, by the evidence for the People, Hecker drew his pistol, and with it struck Riley over the head, and, as he staggered back, fired at him. Hecker's account is that he spurred his horse that he might seize the other's bridle; that, as his horse sprang forward, her fore shoulder struck Riley, and staggered him. "When I broke his hold, he ran right back, and had his hand twisted to pull his pistol, and at last he pulled his pistol out, and pointed at me, and I saw him shut his eye to pull the trigger; and, just as he was about to pull the trigger, I threw myself out of the saddle like that [shows] over the side of my horse, and grabbed my pistol at the same time; and, as I raised mine up, he had his pistol up, and we both shot about the same time. If anything, he shot a little before I did." The defendant was riding a nervous two year old colt, using a "hackamore" in lieu of bridle, and at the shooting she either bolted, or, as Hecker says, he started her to go around Briceland's house, and get out of the way. Riley fired again at him as he went. At some beehives, Hecker reined up, and the two men exchanged shots. Hecker then rode on in another direction, to a place in the yard where there were four stumps, having abandoned, as he says, his first intention to pass around Briceland's house, and endeavoring to get away by another route, or, as the People claim, coming back to engage Riley at closer quarters. Riley ran towards a granary, calling upon one of the bystanders, of whom there were several, to lend him his pistol, and to his wife and daughter to go to the wagon and bring him more cartridges. Whether Riley ran to the granary to escape further combat, or whether he designed to use it as a shield that he might fire with more security upon Hecker, is disputed. Near the granary, and, as Riley was about to pass a corner of it, there was shooting, and Riley, struck through the heart, ran a few yards, and fell dead.

Nothing of the foregoing narrative is to be taken as expressing the views of this court upon the weight of the evidence. That consideration is not before us. The account is designed to throw into prominence the claims made by prosecution and defense for the better understanding of the propositions of law which we are called upon to consider.

The first complaint of defendant is that the court erred in admitting testimony as to the occurrences at the meeting between himself and Riley at noon of the day of the affray. But this complaint is not well founded. Hecker's plea was self-defense. Whether Hecker was within or without his legal rights in seeking to gain possession of the horses, whether he or the deceased first committed a felonious assault, were disputed questions for the jury's determination. The attempt to retake the first horse, though separated in time from the taking of the second, was a part of the same occurrence and transaction which led up to and culminated in the fatal affray. The recovery of the first horse, and the manner of it, the conduct of the two men upon that occasion, their

previous difficulty, their threats against each other, whether communicated or not, all tended to enlighten the jury as to the mental attitudes of the men towards each other at the time of the affray, and thus to assist in determining the disputed question as to which in fact first put himself in the wrong, and which first made a felonious assault upon the other; for only by so determining could the jury justly decide upon the defendant's plea. *People* v. *Lyons*, 110 N. Y. 618; *State* v. *Perigo*, 70 Iowa, 657; *Monroe* v. *State*, 5 Ga. 85; *Williams* v. *State*, 3 Heisk. 376; *State* v. *Zellers*, 7 N. J. L. 265; *Keener* v. *State*, 18 Ga. 194, 63 Am. Dec. 269; *State* v. *Tarter*, 26 Or. 38.

But having admitted, and properly admitted, this evidence, the court erred in refusing to give the instructions asked by defendant (defendant's proposed instructions Nos. 7, 8, and 9)* defining the rights of a finder of lost property to compensation for its care and preservation and to any promised reward, the nature of his lien upon it, and how such lien could be lost or extinguished. It is conceded by the prosecution that these instructions correctly embody the law, but it is contended that they were properly refused as irrelevant. This contention cannot be upheld. One of the questions of primary consideration for the jury was, Which of the two men was the aggressor at the time of the fatal affray, which of the two first overstepped the boundaries of the law, which of the two first trespassed upon the legal rights of the other,—in short, which of the two, by his acts and conduct, first put himself in the wrong? For it is obvious that the determination of this must throw a flood of light upon the other question, second in consideration but first in importance, namely, whether, at the time the defendant first fired, he was acting in self-defense.

The opposing claims of counsel upon this evidence have been suggested. Upon the one hand it was argued that defendant, after voluntarily surrendering his possession of the horses, and so extinguishing his lien, came with a lawless hand to retake them from their owner, prepared for this end to do murder if resisted; and that this motive dominated his conduct in the meeting at noon and the fatal later one. Upon the other hand, it was argued that the surrender of possession had been involuntary and that, consequently, defendant's right to possession still existed even against the owner, that his intent was therefore proper, and his purpose lawful. The absence of instructions upon these questions of law left the jury without rudder or compass. The true rule for measuring the acts of the parties not having been given them, each was at liberty to set up his own independent standard, and approve or condemn in accordance with it. The *refusal to give these instructions thus constituted reversible error. People* v. *Taylor*, 36 Cal. 255; *People* v. *Keefer*, 65 Cal. 232; *People* v. *Fice*, 97 Cal. 459.

The court gave an instruction prepared by defendant after modification. That instruction is as follows, the modification complained of being the italicized phrase inclosed in brackets: "I charge you that the law does not permit the taking of human life or the infliction of great bodily harm in the resisting of a mere trespass against personal property. Therefore, in the present case, should you find from the evidence that defendant attempted to regain possession of the horse returned by Pollock [*in a peaceable manner*] for the declared purpose of holding him for a reward, and that the deceased, Riley, resisted such attempt on the part of defendant by resorting to the use of a deadly weapon, or by attempting to kill Hecker or inflict upon him great bodily harm,—and there was imminent danger of his doing so,—then I charge that Riley was acting unlawfully and without right; and if under these circumstances, you find that Hecker, in order to protect himself from death or great bodily harm at the hands of Riley, shot and killed Riley, then I instruct you that he was justified in so doing, and you must acquit him. And, in this connection, I further instruct you that, if you so find, it makes no difference whether Hecker had a right to take the horse or not; Riley had no legal right to attempt to kill Hecker in resisting a mere trespass." The instruction was offered under defendant's claim of self-defense. As given, it was unobjectionable as a statement of the law excepting for the italicized insertion. One is not justified in taking human life to prevent the commission of a mere trespass, though any person in defense of property has the legal right to prevent the commission of a felony attempted by violence or surprise, and in so doing may use all necessary force, even to the

*"(7) I instruct you as law that the finder of a thing lost, upon taking charge of it, stands in the same legal position as though the owner of the lost property had deposited it with him for hire; and, furthermore, that the finder of lost property is entitled to compensation for all expenses necessarily incurred by him in its preservation, and is also entitled to a reasonable reward for keeping it; and the finder of lost property has a lien upon it for the expenses incurred in its preservation, and for the reasonable reward to which he is entitled; and, in the event of the owner refusing or neglecting upon demand to pay the lawful charges and reward of the finder, the finder may refuse to surrender the property found to the owner, and may retain possession of it until his lien for charges and reward is satisfied.

"(8) If you find from the evidence in the present case that Riley, the deceased, lost his horses, and that Hecker, the defendant, found them and took charge of them, then I instruct you as law that Hecker had a lien on the horses for his compensation for all expenses necessarily incurred by him in their preservation, and for any services necessarily performed by him for the horses, and for a reasonable reward for keeping them; and, until these charges were paid, Hecker had the legal right to retain possession of the horses, and Riley, the deceased, had no right to take the horses away from Hecker, or to in any manner interfere with him, until he first paid or satisfied Hecker's lien.

"(9) I charge you that where a person has a lien on property found for the charges and reward, that such lien depends upon possession. A voluntary surrender by the finder to the owner extinguishes the lien, but an involuntary surrender or loss does not. If, therefore, you find from the evidence in the present case that defendant found the horses of deceased, and brought them to the town of Briceland, and placed them in the barn of one John Briceland, and that, at the time of bringing said horses to Briceland, deceased was absent; and if you further find that defendant did not voluntarily surrender said horses to deceased, but held them for the payment of his charges against them, —then I instruct you that he had not parted with his lien on them, and that if any one took one of said horses from said barn without defendant's consent, that said horse would still be subject to defendant's lien, and he would have the right to take possession of it wherever he might find it."

taking of life. Penal Code, § 197, subd. 2; *People* v. *Payne*, 8 Cal. 341; *People* v. *Flannagan*, 60 Cal. 2, 44 Am. Rep. 52; *People* v. *Dunne*, 80 Cal. 34. The amendment left the instruction confused and erroneous. The defendant was entitled to have the jury instructed that even if he was in the act of committing a forcible trespass in endeavoring to take the horse, if his act amounted to no more than a trespass, Riley was not justified in trying to kill him, if he did try, in attempting to prevent it. And if, under these circumstances, Riley did make the first felonious assault upon defendant, defendant, in turn, would be justified in killing Riley, if the circumstances of Riley's felonious assault were sufficient to excite defendant's fears, as a reasonable man that he was in danger of death or great bodily injury, and he acted under these fears alone, and had in good faith declined further struggle before firing the fatal shot, or was put in such sudden jeopardy by the acts of deceased that he could not withdraw, and if it was thus that Riley met his death. But as given, the court in effect told the jury that the defendant's rights were to be governed by their determination whether or not he was endeavoring to take possession of the horse in a peaceable manner. Even if a peaceable trespass be conceded, the jury was substantially told that Hecker's plea of self-defense under the hypothesis could not be upheld unless his act was a peaceable trespass. But such is not law. "Where the trespass is forcible against personal property, an owner may resist it, but he is not justified in killing the trespasser unless it is necessary to prevent a felonious destruction of the property, or to defend himself against loss of life or great bodily harm." *Carroll* v. *State*, 23 Ala. 28, 58 Am. Dec. 282; 26 Am. & Eng. Enc. Law, p. 572; *State* v. *Tarter*, 26 Or. 38; *State* v. *Perigo*, 70 Iowa, 657.

The acts which a defendant may do and justify under the plea of self-defense depend primarily upon his own conduct, and secondarily upon the conduct of the deceased. There is no fixed rule applicable to every case, though certain general principles, well established, stand forth as guides for the action of men and measures for the jury's determination of their deportment:

First. Self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue, and thus, through his fraud, contrivance, or fault, to create a real or apparent necessity for killing. *People* v. *Robertson*, 67 Cal. 646; *Stewart* v. *State*, 1 Ohio St. 66.

Second. It is not available as a plea to one who, by prearranged duel or by consent, has entered into a deadly mutual combat in which he slays his adversary. In both of these cases the same rule applies. A man may not wickedly or wilfully invite or create the appearances of necessity or the actual necessity which, if present to one without blame, would justify the homicide. *State* v. *Partlow*, 90 Mo. 608, 59 Am. Rep. 31; *State* v. *Underwood*, 37 Mo. 225; *Lambert's Case*, 9 Leigh, 605; 1 Bishop, Crim. L. § 870; *Gilleland* v. *State*, 44 Tex. 356; *Clifford* v. *State*, 58 Wis. 478; *Tate* v. *State*, 46 Ga. 151.

Third. Where one, without fault, is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit a felony or some great bodily injury upon him, and to afford grounds for reasonable belief that there is imminent danger of the accomplishment of this design, he may, acting under these fears alone, slay his assailant, and be justified by the appearances; and as, where the attack is sudden and the danger imminent, he may increase his peril by retreat, so situated he may stand his ground, that becoming his "wall," and slay his aggressor, even if it be proved that he might more easily have gained his safety by flight. *People* v. *Herbert*, 61 Cal. 544; *People* v. *Gonzales*, 71 Cal. 569; *People* v. *Ye Park*, 62 Cal. 204; *People* v. *Robertson*, 67 Cal. 650; *Runyan* v. *State*, 57 Ind. 84, 26 Am. Rep. 52; *Erwin* v. *State*, 29 Ohio St. 186, 23 Am. Rep. 733. So, too, under such circumstances, he may pursue and slay his adversary. But the pursuit must not be in revenge, not after the necessity for defense has ceased, but must be prosecuted in good faith to the sole end of winning his safety and securing his life. *Carroll* v. *State*, 23 Ala. 28, 58 Am. Dec. 282; *Young* v. *Com.* 6 Bush, 312; *State* v. *Collins*, 32 Iowa, 36; Horrigan & T. Cases on Self Defense, p. 230.

Fourth. Where one is making a felonious assault upon another, or has created appearances justifying that other in making a deadly counter attack in self-defense, the original assailant cannot slay his adversary and avail himself of the plea, unless he has first and in good faith declined further combat, and has fairly notified him that he has abandoned the contest. And if the circumstances are such, arising either from the condition of his adversary, caused by the aggressor's acts during the affray, or from the suddenness of the counter attack, that he cannot so notify him, it is the first assailant's fault, and he must take the consequences (*People* v. *Button*, 106 Cal. 628, 28 L. R. A. 591; *State* v. *Smith*, 10 Nev. 106; *Stoffer* v. *State*, 15 Ohio St. 47, 86 Am. Dec. 470); for, as the deceased, acting upon the appearances created by the wrongful acts of the aggressor, would have been justified in killing him, he whose fault created these appearances cannot make the natural and legal acts of the deceased looking to his own defense a justification for the homicide. Before doing so he must have destroyed these appearances, and removed, to the other's knowledge, his necessity, actual or apparent, for self-preservation.

Fifth. Where one is the first wrongdoer, but his unlawful act is not felonious, as a simple assault upon the person of another, or a mere trespass upon his property, even though forcible, and this unlawful act is met by a counter assault of a deadly character, the right of self-defense to the first wrongdoer is not lost; for, as his acts did not justify upon the part of the other the use of deadly means for their prevention, his killing by the other would be criminal, and one may always defend himself against the criminal taking of his life. But in contemplation of the weakness and passions of men, and of the provocation, which, though inadequate, was wrongfully put upon the other, it is the duty of the first wrongdoer, before he can avail himself of the plea, to have retreated

to the wall, to have declined the strife, and withdrawn from the difficulty, and to have killed his adversary, under necessity, actual or apparent, only after so doing. If, however, the counter assault be so sudden and perilous that no opportunity be given to decline or to make known to his adversary his willingness to decline the strife, if he cannot retreat with safety, then, as the greater wrong of the deadly assault is upon his opponent, he would be justified in slaying forthwith in self-defense. *People* v. *Robertson*, 67 Cal. 646; *People* v. *Westlake*, 62 Cal. 303; *State* v. *Perigo*, 70 Iowa, 657. The distinction between this principle and the one preceding it consists in this: In the former case the provocation for making a deadly counter attack in self-defense is adequate, and therefore the first aggressor must remove the necessity for it, and make that fact known before his own right of self-defense can exist; in the latter case the provocation is inadequate, and if the other by his own unlawful act deprives the first wrongdoer of the opportunity to decline a deadly strife, that fault lies, not at the door of the slayer, but of the slain.

So much it has seemed necessary to say in view of the varying theories upon the facts attending this homicide, and in contemplation of a new trial.

If, at the time of the affray, Hecker was a trespasser, and no more, in his endeavor to take the horse, and Riley met his endeavor by a deadly assault upon him with a pistol, it was Hecker's first duty to decline the strife; and, if the suddenness of the assault precluded this, he was justified, so long as the imminence of his danger continued, or apparently continued, in meeting it by a deadly return. If, however, Hecker was not a wrongdoer in seeking to take the horse, and Riley met his attempt by a felonious assault with a pistol, Hecker, if the assault was sudden, and the danger great, or apparently great, would have been justified in standing his ground, or even, as above set forth, in pursuing and slaying his adversary, to win his safety. If, on the other hand, Hecker made the first deadly assault, his right to slay Riley in self-defense did not exist, even though willing thereafter to decline further combat until he had in good faith declined and fairly made known to Riley his willingness to do so. And, if he did not do this, even though he failed because of his own imminent danger, and under these circumstances killed Riley, his act was criminal. And, lastly, if, upon the other hand, he made the first felonious assault, and thereafter, and before firing the fatal shot, did in good faith withdraw and decline further combat, and this was fairly made known to Riley by his conduct, and thereafter Riley pursued him, and forced a new combat upon him, and under these circumstances Riley was killed, the killing was justifiable.

Defendant's proposed instruction No. 13,* as to the right to pursue and slay to secure safety, is, in itself, a correct, if not a full, exposition of the law, and it cannot be said that it does not address itself to a theory permissible under the evidence. It, or an equivalent instruction, should therefore have been given.

It was not error to refuse defendant's proposed instruction 19*. The jury was advised as to the weight of evidence, number and credibility of witnesses. The vice of the rejected instruction was that he declared that the jury must be convinced to an "absolute moral certainty." The refusal to give such an instruction has more than once been upheld. *People* v. *Davis*, 64 Cal. 440; *People* v. *Nelson*, 85 Cal. 403; *People* v. *Ferry*, 84 Cal. 31; *People* v. *Smith*, 105 Cal. 676.

The instruction lettered O† is not erroneous. Standing by itself, it would be of little value to the jury, since it merely declares that the killing after withdrawal from the struggle might be justified. However, it is obviously but a preliminary declaration, as, in the instructions immediately succeeding (P‡ and

*"(13) I further charge you as law that a person in the exercise of self-defense, as I have stated it to you in the foregoing instructions, not only has the right to stand his ground and defend himself when attacked, but he may pursue his adversary until he has secured himself from danger; and if, in so doing, it be necessary, or upon reasonable grounds it appear necessary, to kill his antagonist, the killing is excusable on the ground of self-defense."

*"(19) Gentlemen of the jury, I charge you in this case you are the sole and exclusive judges of the truth of the facts that have been adduced in evidence, and of the credibility of the witnesses who have testified in your hearing; and, in this connection, I further charge you that you are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, as against a less number or against a presumption or other evidence satisfying your minds. In other words, notwithstanding the number of witnesses that may testify, or the amount of evidence that may be introduced upon the part of the prosecution in a criminal case, unless the jury are thereby convinced to an absolute moral certainty of the guilt of the defendant, they must not return a verdict in accordance with such testimony. Upon the other hand, notwithstanding the small number of witnesses that may testify, or the small amount of material evidence that may be introduced on the part of the defense, if the jury are thereby led to believe the defendant is innocent of the crime charged, it is their solemn duty so to find, and their verdict must be, not guilty."

†"O. A homicide is justifiable when committed in the lawful defense of such person, but such person, if he was the assailant, must really and in good faith have endeavored to decline any further struggle before the homicide was committed. If the defendant himself brought on the fight, and went into it armed, and assaulted Riley in the first instance with a deadly weapon, he cannot justify killing him, unless he had really and in good faith endeavored to decline any further struggle before the killing occurred. If, however, the defendant was the assailant, if he had really and in good faith endeavored to decline any further struggle, and thereafter Riley assaulted him with a deadly weapon, the killing then might be justified by the defendant in self-defense.

‡"P. In other words, gentlemen of the jury, if you believe from the evidence that the defendant was the aggressor, and made an assault upon Riley with a deadly weapon, he cannot justify killing him, unless he had really and in good faith sought to avoid further conflict before the fatal shot was fired. In case, however, that the defendant was the assailant, if he had really and in good faith endeavored to decline any further struggle before the mortal wound was given, and thereafter Riley renewed the conflict and made an unlawful assault upon Hecker, then Hecker could justify the killing if it was done in necessary defense of his own life, or to prevent his receiving great bodily injury. In order to determine whether there was any such attempted withdrawal, and whether the defendant really and in good faith endeavored to decline any further struggle, the jury are to take into consideration all the surrounding circumstances, the situation and conduct and relation of the parties at the time of the shooting, and all the other evidence in the case.

Q*), there are set forth in detail the circumstances under the assumed state of facts which would and would not justify. These instructions will be construed together. *People* v. *Turcott*, 65 Cal. 126.

The court gave an instruction substantially as asked by defendant, but struck therefrom the closing sentence, as follows: "And if, under these circumstances, he killed deceased, you must find, as your verdict, not guilty." The complaint is founded upon this excision. It is the natural tendency of advocates to bear with emphasis upon the favorable points both in argument and in instructions, and all the cases are replete, as is this case, with instructions asked by attorneys for the prosecution and defense, and closing with this or an equivalent formula. It cannot be said that to eliminate it from one instruction is error. Yet the practice is not wise. If the instruction offered is not the law, the court may reject it; if it be law, it is better to give it as presented, for not only has either party the right to emphasize by instructions a true principle, but the danger of modifying an instruction which is correct in itself is that it may occasion some just ground for complaint that the modification devitalizes and emasculates the proposition of law whose exposition was sought. We are far from implying that such was the effect in this case, still further from implying that such was the intent, but it certainly is not amiss to suggest the wiser and better practice.

Instruction E†, which is complained of, has often been given and as often approved by this court. The cases in which it is discussed, are reviewed in *People* v. *Bruggy*, 93 Cal. 476. As was said by this court in *People* v. *Herbert*, 61 Cal. 544: "To justify a homicide, there must be a necessity, actual or apparent; and this we understand to be true under our statute as well as at common law." Those cases where the assailed is not required to look to escape as an avenue of safety, arise, as has been before discussed, where the peril is swift and imminent, and the necessity of action immediate. Therein the law does not weigh in too nice scales the conduct of the assailant, and say he shall not be justified because he might have resorted to other means to secure his safety. The suddenness of the attack puts him to the wall. Upon the duty of retreat there was a contrariety of opinion by the writers of common law, and this difference has found its way into the decisions of our states,—some, as Alabama and Iowa, holding to the rule that retreat is necessary; others, as Indiana, Michigan, and our own state, declaring for the contrary doctrine. But it is not stating it too strongly to say that the trend of later judicial decisions is in favor of the latter rule. So that while the killing must still be under an absolute necessity, actual or apparent, as a matter of law, that absolute necessity is deemed to exist when an innocent person is placed in such sudden jeopardy. The right to stand one's ground should form an element of the instructions upon the necessity of killing and the law of self-defense.

For the foregoing reasons, *the judgment and order are reversed*, and the cause remanded.

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

S. M. BUCK, *Respt.*,
v.
City of EUREKA, *Appt.*

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

1. **One who has accepted the appointment to an office having at least a potential existence**, and has received the emoluments of it, is estopped from endeavoring to show to his own advantage that the office had never been lawfully created because it was not done in the proper mode, as by ordinance.
2. **The duty of a city attorney** to attend to "all suits, matters, and things" in which the city may be legally interested, under Pol. Code, § 4291, is not limited to suits in any particular courts.
3. **A contract to pay a city attorney** any compensation other than his salary for conducting litigation on behalf of the city, which is within the scope of his official duties, is void by public policy as well as by the provisions of Const. art. 11, § 9.
4. **For services rendered after the expiration of his term of office** under a void contract to pay an officer extra compensation, he cannot have any recovery under the contract, though he may be entitled to some compensation upon an implied contract.

(October 10, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Humboldt County

NOTE.—For contract with an officer to pay him extra compensation, see also Tippecanoe County Comrs. v. Mitchell (Ind.) 15 L. R. A. 520, and *note*; Adams County v. Hunter (Iowa) 6 L. R. A. 615; Lancaster County v. Fulton (Pa.) 5 L. R. A. 436.

*"Q. If you believe from the evidence beyond a reasonable doubt that the defendant was the assailant, and fired the first shot that was fired, and did not thereafter really and in good faith endeavor to decline any further struggle, and that the shots fired by Riley were shot by him in necessary self-defense, as I have defined it to you, and that thereafter Riley ceased to fire, and then ran away to avoid the defendant; and if you further believe from the evidence that the defendant, Charles Hecker, with intent to wilfully and deliberately kill and murder the deceased, pursued the deceased towards the granary, with his pistol in his hand, for the purpose of overtaking the deceased and killing him; and you further believe from the evidence that the defendant, Charles Hecker, did pursue and overtake the deceased while he was thus fleeing and showing no disposition to kill and murder the defendant, Hecker, and that the defendant then and there, without believing himself to be in danger of losing his own life or receiving great bodily injury at the hands of the deceased or having reasonable ground to believe himself in such danger, fired the fatal shot and killed deceased,—then I instruct you that in such case the defendant would not be justified under the law of self-defense."

†"E. The law of self-defense is founded upon necessity, and, in order to justify the taking of life upon this ground, it must not only appear that the defendant had reason to believe, and did believe, that he was in danger of his life or of receiving great bodily harm, but it must also appear to the defendant's comprehension as a reasonable man that, to avoid such danger, it was absolutely necessary for him to take the life of the deceased."

in favor of plaintiff in an action brought to recover the value of professional services which plaintiff had rendered for defendant. *Reversed.*

The facts are stated in the opinion.

Messrs. **J. N. Gillett** and **E. W. Wilson,** for appellant:

The services for which the contract of employment undertakes to provide, and which were covered by the first and second counts of the complaint, were within the sphere of the plaintiff's duties as city attorney, and such contract was therefore *ultra vires* and void.

Mechem. Pub. Off. § 374; 1 Dill. Mun. Corp. § 233; *Decatur* v. *Vermillion*, 77 Ill. 315; *Ryce* v. *Osage*, 88 Iowa, 558; *Lancaster County* v. *Fulton*, 128 Pa. 48, 5 L. R. A. 436; *Detroit* v. *Whittemore*, 27 Mich. 281; *Chester County* v. *Barber*, 97 Pa. 455.

The contract, being void, creates no obligation between the parties, and cannot form the basis of judicial proceedings.

Santa Clara Valley Mill & L. Co. v. *Hayes*, 76 Cal. 387.

The court erred in refusing to permit the defendant to show that the plaintiff after his nomination, confirmation, and qualification acted in the capacity of city attorney of the defendant corporation, and was so acting during the time the contract in controversy was made.

1 Greenl. Ev. §§ 83, 92, 195; *Delphi School Dist.* v. *Murray*, 53 Cal. 29; *People* v. *Otto*, 77 Cal. 45; *McCoy* v. *Curtice*, 9 Wend. 17, 24 Am. Dec. 113; *Colton* v. *Beardsley*, 38 Barb. 29; *People* v. *Clingan*, 5 Cal. 389; 19 Am. & Eng. Enc. Law, p. 51.

The language of the ordinances must be held to create the office of city attorney.

People v. *Addison*, 10 Cal. 1; *People* v. *Bedell*, 2 Hill, 196; *North* v. *People*, 139 Ill. 81.

Plaintiff is estopped from denying that he was city attorney.

1 Greenl. Ev. §§ 195, 207.

Messrs. **S. M. Buck** and **F. A. Cutler,** for respondent:

There was no office of city attorney of the city of Eureka.

In order that there may be a *de facto* officer there must be a *de jure* office; and the notion that there can be a *de facto* office has been characterized as a political solecism, without foundation in reason and without support in law.

1 Dill. Mun. Corp. § 276; *People* v. *Toal*, 85 Cal. 335; *Decorah* v. *Bullis*, 25 Iowa, 18; *Hildreth* v. *McIntire*, 1 J. J. Marsh. 206, 19 Am. Dec. 62; *Re Hinkle*, 31 Kan. 712.

Merely appointing an attorney is an executive and not a legislative act.

Ashley's Case, 4 Abb. Pr. 37.

The mayor and common council might appoint an attorney to give advice, and draw ordinances and do such legal business as they desire done in the city, and agree by ordinance to give him a specified monthly allowance.

Such act, however, would not create the office of city attorney; it would be simply an employment from month to month to act as attorney for the city.

People v. *Toal*, 85 Cal. 333.

Plaintiff is not estopped to deny that he acted in the official capacity of city attorney.

A fair construction of the language of Pol. Code, § 4391, limits the duties of a city attorney to all such matters as arise within the city.

Herrington v. *Santa Clara County*, 44 Cal. 506; *Jones* v. *Morgan*, 67 Cal. 311; *Huffman* v. *Greenwood County Comrs.* 23 Kan. 281.

Nor is the contract of employment of plaintiff void as against public policy.

Jones v. *Morgan*, *supra;* 1 Dill. Mun. Corp. § 479; *Memphis* v. *Adams*, 9 Heisk. 518, 24 Am. Rep. 335.

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

Appeals from the judgment entered upon verdict of jury, and from the order denying a new trial. Plaintiff sued the city of Eureka, and charged in his complaint upon three counts. In the first, he pleaded that one Wing Hing, upon January 21, 1886, brought action against the defendant, city of Eureka, in the circuit court of the ninth judicial circuit, to recover damages in the sum of $432,800. The city of Eureka, on the 8th day of February, 1886, employed and retained plaintiff to act for it as its attorney in the matter of said action, and agreed to pay him a reasonable compensation for his services, under resolution ordering: "That S. M. Buck, Esq., be, and he is hereby retained, and authorized to act for the city of Eureka as its attorney in defense of said action; and he is also authorized to retain and associate with himself in the defense of said action some able attorney and counselor residing in San Francisco, California, if in his judgment it becomes necessary. And said S. M. Buck, Esq., is instructed to conduct said defense as economically as it can be done consistent with a vigorous and successful defense thereof." Plaintiff performed all duties imposed upon him by his contract. The case in the circuit court was finally dismissed for lack of prosecution. The value of plaintiff's services is alleged to be $13,000, of which the city paid $1,000, and refused to pay more. The second count charges in like manner and for like services as the first, asking compensation, however, for so much of the services as was rendered after August 1, 1886. The value of this is alleged to be $10,000. The second count is apparently framed in anticipation of the defense presented by the city: namely, that at the time of the making of the contract plaintiff was, and continued to be until August 1, 1886, the city attorney of the city of Eureka. The third count charges for services in a different employment, and does not call for consideration or review. Judgment was asked for $7,000, with interest. A verdict in the sum of $4,250, with interest, was rendered; and this verdict, so far as the value of the services is concerned, is supported by the evidence. In defense of the action, the city of Eureka pleaded and sought to prove that, at the time of his employment, plaintiff was its city attorney, and that the contract was therefore void, as increasing his compensation during his term of office. Const. art. 11, § 9. By respondent it is contended (1) that the office of city attorney of the city of Eureka was never created; (2) that he was never the incumbent of such office; and (3) that if the office existed, and he was its incumbent, still

he is entitled to compensation under the contract, since it was no part of his duty as such officer to defend the suit in question.

Certain provisions of part 4, title 3, of the Political Code were and are a part of the charter of the city of Eureka (Stat. 1873–74, p. 91). Those pertinent to this consideration are as follows:

"Sec. 4408. The common council has power: (1) To create the office of city clerk, city attorney, assessor, tax collector and such other offices as may be necessary, and prescribe their duties and fix their compensation. . . ."

"Sec. 4369. The common council must during the first year by ordinance fix the term of office of all elective officers and the time when they must be elected, and provide for the appointment of other necessary officers, including city clerk and treasurer, and fix their terms and amount of their bonds."

"Sec. 4386. The mayor has power: (1) To nominate and with the consent of the common council to appoint all nonelective officers of the city provided for by the common council, including city attorney, secretary of the council, and city treasurer. . . ."

"Sec. 4374. All city officers, before entering upon their duties, must take the oath of office. The marshal, attorney, clerk, assessor, collector, and treasurer must also give a bond with sureties to be approved by the mayor payable to the corporation by its corporate name in such penalty as may be prescribed by ordinance conditioned for the faithful performance of the duties of their office, and a like bond may be required of any officer whose office is created by an ordinance."

"Sec. 4391. The city attorney must attend to all suits, matters, and things in which the city may be legally interested; to give his advice or opinion in writing whenever required by the mayor or common council, and do and perform all such things touching his office as by the common council may be required of him."

The defendant produced its records for the purpose of showing that plaintiff was nominated and confirmed as city attorney for the term of two years from July 12, 1884, to July 12, 1886, and that after such nomination he qualified and acted as such city attorney. The court refused to admit the proofs, and defendant then offered in evidence its records to show the existence of the office of the city attorney of the city of Eureka, and the plaintiff's incumbency therein during the time mentioned, which record evidence was stricken out upon motion of plaintiff. The evidence so offered and rejected consisted of various ordinances "fixing official fees and salaries in the city of Eureka," and dating from the year 1876. In each of these the council fixed the salary of the "city attorney." Finally, in 1882, by ordinance, the council declared that the city attorney shall receive a "salary of $25 a month." This ordinance was in force during all the time in question. In 1877 the council passed its ordinance "fixing the bonds of city officers," which provided that "the city officers hereinafter named, before entering upon the duties of their respective offices, shall give a bond," etc. "The penalty of such bonds shall be as follows: . . . The city attorney's bond, $1,000." This ordinance remained in full force and effect. The minutes of the meeting of the common council for July, 1884, show: "The mayor placed before the council the name of S. M. Buck for the position of city attorney for the ensuing term; whereupon, on motion, the nomination was confirmed." The bonds of the city officers for the terms commencing in 1884 could not be found, but the minutes of the council for August of that year show that "the mayor verbally announced to the council his approval of the bonds of . . . S. M. Buck as city attorney." There was likewise offered in evidence a document from the mayor's office, under the seal of the city, reciting the especial confidence reposed in the integrity and qualifications of S. M. Buck for the office of city attorney, and appointing him with consent of the council as city attorney for the term as established by law, etc., to which was appended the oath of S. M. Buck to support the Constitution of the United States and of this state, and faithfully discharge "the duties of the office of city attorney of the city of Eureka." It was likewise shown that plaintiff drew and received from the city the "salary" fixed by ordinance, of $25 per month during all of this time, up to July 12, 1886.

There can be no question upon this evidence, assuming for the moment the existence of the office, but that plaintiff was not only *de facto* city attorney, but that he was the regularly appointed, qualified, and acting city attorney,—a *de jure* officer,—charged with all the duties and entitled to all the emoluments of the office. There can be no better proof of the acceptance and holding of an office than the qualification of the officer, and his drawing of the salary. Here, the plaintiff was appointed as city attorney, filed his bond as city attorney, took the oath of office as city attorney, and drew the fixed salary of city attorney, all duly and regularly, as required by law and the ordinance of the city.

Nor can plaintiff be heard to say (still assuming the existence of the office) that his contract with the city, or his understanding with the council, imposed upon him other or different or lesser duties than those which by law he was obliged to perform. He cannot, for example, be heard to say, as here he undertakes to do, in the face of the ordinance fixing his compensation, that his understanding with the council was that they were to give him $25 a month as a "retainer,"—a "stipend,"—and were to pay him "extra for all important duties, particularly business in the superior court, or business in the higher courts." It was not within the power of the plaintiff or of the council to modify, by convention, the duties which by law were made to pertain to the office of city attorney. Pol. Code, § 4391. And the plaintiff, after having qualified, filed his bond, and taken his oath to perform the duties of the office, and drawn the salary pertaining thereto, will not be permitted to assert that the duties he swore to perform were not those the performance of which the law made obligatory upon him.

The contention that he was not city attorney cannot, then, be based upon any defect in the machinery of appointment, nor upon plaintiff's refusal, with proper formalities, to accept the

appointment. It is claimed to rest upon the fact that the council, notwithstanding its repeated recognition of the existence of the office, never in fact created it, and that, therefore, it never existed. And the argument is that the council had power to create the office (Pol Code, § 4408); that they were required, if they created it, to do so by ordinance (Id. § 4369); that the mode is the measure of their power; and that no ordinance was produced wherein and whereby the common council of the city Eureka did ordain that the office of city attorney of the city of Eureka is hereby created.

It is a general rule, founded upon the dictates of public policy, that the acts of a *de facto* officer are valid, and that those who deal with such an officer are protected. The public is not required to know the terms and tenure upon which one openly holding and claiming the right to hold a public office maintains his position; nor is any person who has dealt with such an officer to suffer loss if the tenure should prove illegal. So, likewise, it is the general rule, upon grounds of plain justice and public policy, that a *de facto* officer is forever estopped in civil or criminal actions from denying that he holds the office, and from escaping any of the responsibilities which attach to his incumbency. But the further rule is that the law as to *de facto* officers applies only where there is a *de jure* office, the idea of a *de facto* officer being necessarily founded upon the conception of a *de jure* office. A *de jure* office is one having a legal existence, or, rather, one having an existence recognized by law. We are not here further concerned with the law concerning *de facto* offices, since, as has been said, this office, if it existed, was filled by a *de jure* incumbent. While it is certainly impossible to conceive of an officer either *de facto* or *de jure* filling or attempting to fill a nonexisting office, there is a marked and well-recognized distinction between such nonexisting offices and those which, while having an irregular or merely potential, or in some instances even an illegal, existence, yet do exist, and are recognized by the law. Of offices having an illegal existence which are, nevertheless, recognized, the government of a state in rebellion and of a municipality acting as such without legal authority are conspicuous examples. The government of a state in rebellion and all officers thereunder are absolutely illegal; yet, upon strong and plain grounds of public policy, the government and officers are recognized by law, and the incumbents are treated as *de facto* officers. "In such a case the acts of a *de facto* executive, a *de facto* judiciary, and of a *de facto* legislature, must be recognized as valid. But this is required by political necessity." *Hildreth* v. *McIntire*, 1 J. J. Marsh. 207, 19 Am. Dec. 61. So a municipal corporation acting under color of the law may have no legal existence, and consequently no legal municipal offices; yet such a corporation has still an existence recognized by law, and, upon plain grounds of public policy, the question of its legal existence should be raised only by the state itself upon quo warranto. Cooley, Const. Lim. 254; *Geneva* v. *Cole*, 61 Ill. 397; *St. Louis Comrs.* v. *Shields*, 62 Mo. 247; *State* v. *Carr*, 5 N. H. 367.

In some states, indeed, it is the established rule that officers filling offices created by unconstitutional laws are, nevertheless, *de facto* officers, until, under direct proceedings, the act has been declared unconstitutional. Thus, in *Burt* v. *Winona & St. P. R. Co.* 31 Minn. 472, it was held that the municipal court of Mankato was a *de facto* court, and that there can be a *de facto* office under an unconstitutional act creating it until the act is declared void. In the case of *Trumbo* v. *People*, 75 Ill. 561, a school district had been illegally established. The supreme court of Illinois, reviewing the case in a later opinion (*Leach* v. *People*, 123 Ill. 420), says: "So far as that alleged district was concerned, there was no such legal district, and there was no *de jure* office of school director of that alleged district." Yet, upon a proceeding to collect a tax, the tax was sustained, it being held that the school directors were officers *de facto*, and that in collateral proceedings the legality of the formation of the district could not be inquired into. And in *Com.* v. *McCombs*, 56 Pa. 436, it is said: "An act of the assembly even if it be unconstitutional, is sufficient to give color of authority to the person acting under it." These decisions are in obvious conflict with the authority of the great leading cases of *State* v. *Carroll*, 38 Conn. 449, 9 Am. Rep. 409, and *Norton* v. *Shelby County*, 118 U. S. 425, 30 L. ed. 178; in the latter of which Field, J., explains that, while there are many cases deciding that a person holding an office under an unconstitutional law is a *de facto* officer, in every one it will be found that there was a legal office, and that the unconstitutional law went only to the mode or manner of filling it. And they are likewise in conflict with the rule in this state, declared in *People* v. *Toal*, 85 Cal. 333. They are not here cited in commendation or approval, but as instructive examples of the lengths to which those courts have felt compelled to go in carrying out what they conceived to be the plain mandate of public policy. When, however, we come to consider the doctrine as applied to offices having an irregular or potential existence (as distinguished from a nonexisting office, or one void in its creation), the cases are numerous and uniform in treating the incumbents of such offices as *de facto* officers.

In *Gibb* v. *Washington*, McAll. 439, Fed. Cas. No. 5,380, dealing with the question of the creation of the office of appraiser, the court says: "If such an office has been even colorably created, then any irregularity which does not render the creation of the office void cannot be availed of." In *Re Ah Lee*, 6 Sawy. 410, 5 Fed. Rep. 899, the Constitution of Oregon provided that, when the population of the state reached 200,000, the legislature should district the state into designated circuits, and provided for the election of judges to the circuit courts therein. The legislature passed the act before the state attained the requisite population, and before election, the governor, without authority, appointed the judge whose act was under review. The court held that, admitting the act to be unconstitutional and the appointment of the governor to be invalid, still the judge was a judge *de facto*, since the office in effect was created by the Constitution. In *Carleton* v. *People*, 10 Mich. 250, the county officers were elected before the law creating the offices went into effect. They were held to be

de facto officers. Though there were no legal offices in existence at the time, still the offices were created and had a potential existence. And the court, in distinguishing between such offices and nonexistent offices, aptly says: "Where the law negatives the idea that there can be a legal incumbent, any one assuming to act assumes what any one is bound to know is not a legal office." In *Yorty* v. *Paine*, 62 Wis. 154, the legislative act creating the town of Pine River provided that the electors should meet upon the first Tuesday of the following April (April 4), and elect town officers, but the act itself did not become a law until four days afterwards,—April 8. The potential existence of the town was recognized as sufficient for holding the election, and the officers were declared to be *de facto*, though elected without authority of law to offices then having no more than a potential existence. In *Fowler* v. *Beebe*, 9 Mass. 231, 6 Am. Dec. 62, the legislature had created a new county and the offices thereof. The governor appointed officers before the law went into effect. It was held that their acts were binding as *de facto* officers, though the appointments themselves were afterwards declared void by the same court when the question was presented upon direct attack. *Com.* v. *Fowler*, 10 Mass. 291. Here, too, therefore, the potential existence of the office was recognized. In *Leach* v. *People*, 122 Ill. 420, an unconstitutional law regulating township organizations provided for the number of members, mode of election, etc., of the board of supervisors, and under this law a board was selected whose acts were under consideration. It was held that, notwithstanding the invalidity of the law, there was still "such a legal official body known to the law as the 'Board of Supervisors of Wayne County;'" and the acting board, though in number and in mode of selection illegal, was upheld as a *de facto* body. The case of *Smith* v. *Lynch*, 29 Ohio St. 261, is nearly a parallel case with the one at bar. The legislature of Ohio authorized villages and towns to establish boards of health and appoint members. The village of West Cleveland, by a void ordinance, attempted to do this. The members appointed qualified and entered upon the discharge of their duties, and were accepted and regarded by the public as such members. The opinion of the court, delivered by Welch, Ch. J., is as follows: "The questions argued by counsel are: (1) Had the superior court jurisdiction? (2) Are the requirements of the statute as to the manner of passing the ordinance mandatory, or are they merely directory? (3) If these requirements are mandatory, are the persons so acting to be regarded as a board of health *de facto*? We are satisfied that the last named of these questions must be answered in the affirmative. It is unnecessary, therefore, to consider the first and second questions. In other words, we think that, under the circumstances, the board is to be regarded as a board *de facto*. Whether it was a board *de jure*, and whether the superior court had jurisdiction of the case, became, therefore, immaterial questions. It is claimed by council for the plaintiff that this is not a case where an office has been filled, and its duties performed, by parties not legally appointed or qualified, but a case where there was no office to be filled. We do not so understand the law. The statute (66 Ohio Laws, p. 200) creates the office. It authorizes the council to 'establish' the board, and to fill it by appointment. True, until the council act in the premises, it is a mere potentiality in their hands; yet it is none the less an office, known to the law. Where the council assumes to establish the board under the law, and to appoint its members, there is no good reason why an irregularity or illegality in the act of establishing the office, any more than the irregularity or illegality in the appointment of the officers, should be held as rendering the acts of the officers void, and themselves mere trespassers. The reasons—the considerations of public policy—which exist in one case exist equally in the other. It is enough that the office is one provided for by law, and that the parties have the color of appointment, assume to be and act as such officers, and that they are accepted and acknowledged by the public as such, to the exclusion of all others. Such was the case here. There was both the color and the fact of office."

The office under consideration was given a potential existence by the acts of the legislature in the sections of the Code above quoted. The plaintiff, having accepted the appointment to it, and received the emoluments of it, is estopped from endeavoring to show to his own advantage that the council did not follow a prescribed mode in perfecting that potential existence. It was therefore error for the trial court to strike out the admitted evidence. It does not seem to be disputed that, if plaintiff's services in the case of *Wing Hing* v. *Eureka* were such as under his office he was in duty bound to perform, his contract with the council would be void as an attempt to increase his compensation; and, indeed, no question can arise upon this point. It is definitely settled by the language of the Constitution, in the first place (Const. art. 11, § 9); and in the second place, even in the absence of such a provision, such a contract would be declared void upon grounds of public policy. "It is a well-settled rule that a person accepting a public office, with a fixed salary, is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary be a very inadequate remuneration for the services. . . . Whenever he considers the compensation inadequate, he is at liberty to resign. The rule is of importance to the public. To allow changes and additions in the duties properly belonging or which may properly be attached to an office to lay the foundation for extra compensation, would introduce intolerable mischief. The rule, too, should be rigidly enforced." Dill. Mun. Corp. 4th ed. § 233; Mechem, Pub. Off. §§ 324–376.

The contention here is, however, that these services were not among those whose performance is enjoined on the city attorney, and herein plaintiff relies upon the case of *Herrington* v. *Santa Clara County*, 44 Cal. 496. As the law then stood, the district attorney was entitled to receive as compensation 10 per cent of all money recovered by him, for the county in any action. The county supervisors, ignoring the district attorney, authorized other attorneys to bring suit without the county for

the recovery of a large sum of money. Recovery was had in the action, and the district attorney sued to recover his percentage. The law made it the duty of the district attorney to prosecute all actions for the recovery of debts, etc., and to defend all suits brought against his county. Pol. Code, § 4256. The district attorney was not denying that it was his duty to prosecute this suit, but, to the contrary insisted that it was his duty. The defendant county never claimed that it was not the district attorney's duty to prosecute the suit, but insisted that the duty was not exclusively imposed upon and the right not exclusively vested in him, but that the supervisors could, if they saw fit, engage other counsel to perform the service, as in many cases special counsel are employed. The language of the court in its opinion, therefore, while not *obiter*, was not addressed to any contention raised by the parties. The decision of the court was by a bare majority; Chief Justice Wallace being disqualified, and Justice Rhodes expressing no opinion. It was based upon two grounds; the second, which is argued at length, holding that, as the district attorney had not collected the money, he was not entitled to his commission; and the first, which is not argued, being a declaration to the effect that it was "not a duty enjoined upon the district attorney by law to prosecute or defend civil actions in which the county is interested which are pending in any other county than his own." This declaration is, however, supported by no reasoning, by no analysis of the statute, and by no citation of authority; and it would be difficult so to support it. Says Dillon: "The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may and what may not be considered strictly official; and if these distinctions are much favored by courts of justice, it may lead to great abuse." 1 Dill. Mun. Corp. 4th ed. § 233.

When the law of the state says that the district attorney shall prosecute and defend all suits, and the city attorney shall attend to "all suits, matters, and things in which the city may be legally interested," it is a most forced and unwarranted construction to hold that in the one case it means only such suits as are commenced and finally determined in the county courts, and in the other only such as are in like manner commenced and determined in the municipal courts. If the legislature meant that, it could and would have said so. But when it says "all suits, matters, and things," the language will bear no other construction than that which is patent on its face. No rules of interpretation are necessary to be considered, for no need or room for interpretation exists. Thus the court, in *Ryce* v. *Osage*, 88 Iowa, 558, said the law made it the duty of the city attorney "to act as attorney for the city in any suit or action brought by or against the city, and generally to attend to the interests of the city as its attorney." There, as here, plaintiff claimed extra compensation for services rendered under contract with the counsel for defending an action against the city in the district and supreme court, and there, as here, urged that it was no part of his official duty to defend the suit. Says the court: "It seems to us that a mere reading of that section of the ordinance which prescribes the duties of the city attorney is sufficient to show that under it he was required to act for the city, as its attorney, in any case brought by or against it. . . . That the services rendered by the plaintiff, and for which he now seeks to recover, were included within his duties as city attorney, is too plain to admit of argument." In *Lancaster County* v. *Fulton*, 128 Pa. 48, 5 L. R. A. 436, construing a similar statute, says the court: "The services for which the contract in question undertakes to provide, are clearly within the sphere of the duties of the solicitor of Lancaster county." *Russell* v. *Hallett*, 23 Kan. 276, is not in conflict with the authorities upon this question. In that case the county attorney sued his county for compensation for services demanded of him without the duties of his office, as the court decided. He had been compelled to assist in a trial in a county other than his own. The law expressly limited his duty to attend before magistrates and judges in his county. Kan. Gen. Stat. 1868, p. 284, § 137.

But it is unnecessary to multiply quotations upon this plain proposition. We think it must be apparent that the construction given to the statute in *Herrington* v. *Santa Clara County*, *supra*, cannot be supported, and should no longer be maintained; and we believe that the evil results to the public service which must arise under that construction justfy and demand a declaration from this court that it be no longer considered as authority. It is of the last importance that any and every public officer entering upon the discharge of his duties should know once and for all that, be the duties onerous or be they easy, the compensation for them must be that fixed by law, and that only. If they become too burdensome, the law does not forbid the officer's resignation; but it does emphatically say that he shall not under any circumstances, by use of the power of his office, by contract, express or implied, fair or unfair, or by aid even of legislative enactment, obtain increased compensation for their performance. "The successful effort to obtain office is not unfrequently speedily followed by efforts to increase its emoluments; while the incessant changes which the progressive spirit of the times is introducing effects, almost every year, changes in the character, and additions to the amount, of duty in almost every official station; and to allow these changes and additions to lay the foundation of claims for extra services would soon introduce intolerable mischief." *Evans* v. *Trenton*, 24 N. J. L. 764.

The services here performed by the plaintiff being such as it was his duty to perform as the city attorney of the city of Eureka, the contract was an attempt to increase his compensation, and is in violation of the Constitution, against public policy, and therefore void. "A promise to pay them [officers] extra compensation, is absolutely void, under the statute of Ohio. Such promise could not be enforced at common law, being against sound policy, and quasi extortion. English judges have declared that such claims by them are novel in courts of justice, and that actions founded on

such promises are scandalous and shameful (2 Burr. 934); and in the court of errors of New York they meet with no more favor. *Hatch* v. *Mann*, 15 Wend. 46." *Gillmore* v. *Lewis*, 12 Ohio, 281; *Vandercook* v. *Williams*, 106 Ind. 345; *Decatur* v. *Vermillion*, 77 Ill. 315; *Hunter* v. *Nolf*, 71 Pa. 282.

Nor can plaintiff recover under the contract, as by his second count he seeks to do, for such part of the services as was rendered after his term of office had expired. This is not the case of a city attorney carrying on litigation, after his term of office had expired, with the knowledge and consent of the authorities, in which case an implied contract and promise to pay might arise after his tenure had terminated. Here plaintiff declares on and seeks to recover under a contract against public policy and wholly void. Such a contract will not support any action for recovery. As is said by the court in *Lancaster County* v. *Fulton*, *supra*: "There is no pretense that any new agreement was entered into or the terms of the original in any manner changed after the expiration of his term of office. Neither the subject of a new contract nor the modification of the original ever appears to have been considered by the parties. The services of plaintiff below were no doubt efficient and valuable; but, so far as they were rendered during his term of office, his salary is all the compensation he can claim. As to services rendered after the expiration of his term of office, under and in pursuance of the original illegal and void contract, he cannot, under the pleadings and evidence in this case, recover." A void contract cannot form the basis of a judicial proceeding. *Santa Clara Valley Mill & L. Co.* v. *Hayes*, 76 Cal. 387.

There are considerations in plaintiff's case which appeal with force to a court. In the first place, the services rendered, as found by judge and jury, were of great value to defendant. In the second place, they were rendered under an early interpretation given to the statute, which justified plaintiff in suing upon his contract. In now declaring what we believe to be the only tenable construction of the law relative to the duties of the office, it has followed as a necessary consequence that the contract, void as against public policy, will not support a cause of action. Plaintiff, however, if the facts will warrant it, should recover, not upon the original or void contract, but upon an implied one for services rendered after the expiration of his term of office.

The judgment and order are reversed, with directions to the trial court to permit plaintiff, if he shall be so advised, to amend his complaint, or file an amended complaint, seeking compensation upon *quantum meruit* for services rendered after the expiration of his term of office.

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

MONTANA SUPREME COURT.

STATE of Montana, *ex rel.* Sam TOI, *Respt.*,
v.
E. S. FRENCH, *Appt.*

(.....Mont.....)

1. Imposing on laundrymen the payment of a license fee of $15 for a steam laundry, $10 for every male person in the business other than that of a steam laundry, and $25 for a male laundryman employing one or more other persons, does not grant a monopoly or have a prohibitory effect.

2. The uniformity clause of Const. art. 12, § 1, relating to taxation, does not apply to licenses imposed on occupations.

NOTE.—*Limit of amount of license fees.*

I. *Power to fix license fees generally.*
II. *Constitutional restrictions as to amount.*
  a. *Provisions against discrimination.*
  b. *Provisions against violation of contract obligations.*
  c. *Provisions requiring equality and uniformity.*
  d. *Direct restrictions as to amount of levy.*
  e. *Miscellaneous provisions.*
III. *Graduation of license fees.*
IV. *Limitations peculiar to municipal corporations.*
  a. *Statutory and charter restrictions.*
  b. *Must not be discriminating.*
  c. *Under a general power to regulate.*
    1. *What may be included in the fee.*
    2. *Must not be for revenue.*
    3. *Distinction between measures for revenue and for regulation.*
    4. *Must not be unreasonable or in restraint of trade.*
    5. *Reasonableness, by whom determined.*
    6. *Presumption of reasonableness.*
    7. *What impositions are reasonable.*
  d. *Under a power to restrain or prohibit.*
  e. *Under a power to tax or license.*
  f. *When discretion is expressly conferred.*

I. *Power to fix license fees generally.*

The power of a sovereign state to fix license fees at such figures as it may see fit would appear to be unlimited, except in cases in which its exercise would conflict with some constitutional provision.

Thus, the legislature of a state may impose such license taxes upon privileges as it may choose. Columbia v. Beasly, 1 Humph. 232, 34 Am. Dec. 646 (1839).

And it may, in regulating any matter which is a proper subject for the police power, impose such sums for licenses as will operate as a partial restraint on the business or on the keeping of a particular kind of property. Tenney v. Lenz, 16 Wis. 566 (1863).

And in the exercise of the police power it might prohibit altogether the sale of liquors, and consequently may attach such conditions to the allowance of their sale as it sees fit to prescribe. Timm v. Harrison, 109 Ill. 593 (1884) (*dictum*).

And it may prohibit or permit the doing business in the state by foreign insurance companies, as it sees fit, and if it is permitted it may impose such conditions and restrictions, and require such payment, for the privilege as it may choose. Milwaukee Fire Department v. Helfenstein, 16 Wis. 137 (1862); Leavenworth v. Booth, 15 Kan. 627 (1875) (*dictum*).

30 L. R. A.

See also 31 L. R. A. 55, 522; 32 L. R. A. 527; 33 L. R. A. 839; 34 L. R. A. 100; 40 L. R. A. 611; 47 L. R. A. 205.

3. The fact that Chinamen are engaged in the hand-laundry business does not make invalid a statute imposing a license fee of $25 on a male laundryman employing one or more other persons in such business, while the fee for a steam laundry is $15, where the law in its terms applies to all male laundrymen of every condition and nationality.

(October 14, 1895.)

APPEAL by defendant from a judgment of the District Court for Lewis and Clarke County in favor of relator in a mandamus proceeding to compel defendant to issue a license to relator to conduct a laundry. *Reversed.*

Statement by **De Witt, J.**:

This is an appeal from the judgment of the district court upon an application for a writ of mandate requiring the appellant to accept $10 as a license fee from the respondent, and to issue to respondent a license to conduct a laundry. Sections 4079 and 4080 of the Political Code are as follows:

"Sec. 4079. Every male person engaged in the laundry business, other than the steam laundry business, must pay a license of $10 per quarter; provided, that where more than one person is engaged or employed or kept at work, such male person or persons shall pay a license of $25 per quarter, which shall be the license for one place of business only.

"Sec. 4080. Every person who carries on a steam laundry must pay a license of $15 per quarter."

So, it may properly delegate the power to license and to fix the fees to be paid for the license, to municipal subdivisions and bodies. See *infra*, IV. e, f.

And where by the charter of a city a power to license a particular occupation is given, such power involves the necessity of determining both the extent and duration of the license and the sum to be paid therefor. Darling v. St. Paul, 19 Minn. 389 (1872) (*dictum*).

A city council having power to license and regulate may require a reasonable sum by way of an excise for granting such license. Cincinnati v. Bryson, 15 Ohio, 625, 45 Am. Dec. 593 (1846).

Where a municipal corporation is authorized to regulate a given subject and require those who do any act or carry on any business to obtain a license, a reasonable fee for the license and the labor or expense attending its issue may be properly charged, although the power to do so is not expressly given. St. Paul v. Dow, 37 Minn. 20 (1887); Jacksonville v. Ledwith, 26 Fla. 163, 9 L. R. A. 69 (1890).

See, as to the requirement of reasonableness, which appears to be applicable to municipal corporations only, *infra*, IV. c, 4–7.

II. Constitutional restrictions as to amount.

Various constitutional provisions have been frequently interposed, sometimes successfully, as furnishing a limitation either directly or relatively, upon the discretion of legislative and municipal bodies in fixing the amount of license fees: such provisions applying of course, when deemed applicable, alike to state and to municipal licenses.

a. Provisions against discrimination.

Provisions against discrimination sometimes act as a limitation, preventing the imposition of a license fee upon one class of subjects relatively larger than that imposed upon another class.

Thus, a license tax of $300 per annum, imposed upon persons not permanent residents in the state upon the sale of any goods other than agricultural products and articles manufactured in the state, conflicts with the provision of the Federal Constitution that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, where the tax imposed upon resident traders ranges from $12 to $150 per annum. Ward v. Maryland, 79 U. S. 12 Wall. 418, 20 L. ed. 449 (1871).

And a license tax imposed by statute upon vendors of patent rights or territory for the sale of patent rights or patented articles, of double the amount of that imposed upon other peddlers, is invalid as discriminating against peddlers of patent rights, as well as being a tax upon a patent right. *Re* Sheffield, 64 Fed. Rep. 883 (1894).

So, an ordinance imposing a license fee of $25 upon nonresident hawkers and peddlers, and only $10 upon those residing in the city, is illegal in so far as it imposes a larger tax on nonresidents. State v. Orange, 50 N. J. L. 389 (1888).

And a license fee of $100 imposed upon keepers of meat shops in one part of a city, and of $25 in other parts, is a tax for revenue purposes, and unconstitutional as such for discrimination between different portions of the city. St. Louis v. Spiegel, 75 Mo. 145 (1881).

So, an ordinance imposing a license fee upon transient merchants doing business in the town, designed to discriminate in favor of resident merchants and against all others, conflicts with the provision of the Federal Constitution giving power to Congress to regulate commerce between the states, and with that of the state of Iowa, that laws of a general nature shall have a uniform operation. Pacific Junction v. Dyer, 64 Iowa, 38 (1884).

But a license tax imposed by a city, of $2 per year upon hand carts, of $3 for buggies, and so on for vehicles of a different character, and finally of $30 per year for a six-horse omnibus, is not unconstitutional because of discrimination or as being in violation of natural rights. St. Louis v. Green, 7 Mo. App. 468 (1879).

And a license tax of $85, imposed by statute on persons dealing in distilled liquors or retailing spirituous liquors on land, is not unconstitutional for unjust discrimination because a tax of only $50 is levied on persons following a like occupation on steamboats, though such steamboats ply between places in a single parish only. Kaliski v. Grady, 25 La. Ann. 578 (1873).

And Ga. act Feb. 16, 1876, requiring persons employed in hiring laborers in the state for employment outside its limits to procure a license and pay $100 therefor for revenue purposes, is not unconstitutional as discriminating between residents and nonresidents. Shepperd v. Sumpter County Comrs. 59 Ga. 532, 27 Am. Rep. 394 (1877).

See also, as to fixing different rates for different classes of callings, *infra*, II. c, and III. And see generally, as to discrimination in fixing municipal license fees, *infra*, IV. b.

And see, in connection with this subdivision, the principal case, STATE, TOI, v. FRENCH.

Discrimination against nonresidents by imposing license taxes is not considered here further than it depends upon the amount of the charge. Many other cases decide that such burdens which are placed only upon nonresidents are unconstitutional.

As to discrimination against foreign corporations, see *note* to Cone Export & C. Co. v. Poole (S. C.) 24 L. R. A. 239 (1894).

b. Provisions against violation of contract obligations.

Licenses are not contracts which cannot be changed within the constitutional prohibition against violation of contract obligations, and when required for regulation they do not violate a

The respondent here, Sam Toi, appeared in the district court, and filed a petition praying for a writ of mandamus, in which petition he set forth as follows: That appellant is the treasurer of Lewis and Clarke county, and that it was his duty to issue licenses when tendered the fees therefor; that respondent is a male person, a resident of the county, and engaged in the laundry business, other than a steam laundry, and that he is employing male persons other than himself in such business; that he tendered to the said treasurer the sum of $10, and demanded that the treasurer issue to him a license for the conduct of the laundry business; that the treasurer refused to issue said license unless the respondent paid him the fee of $25, as required by section 4079, Pol. Code. The county attorney filed a demurrer to this petition, upon the ground that it did not set up facts sufficient to warrant the issuing of the writ of mandamus. The demurrer was overruled, and the writ was issued, commanding the treasurer to receive from the respondent the sum of $10, and issue to him a license for the conduct of said laundry business. From this judgment the respondent below appeals. There are some other matters set up in the petition for the writ, which will be noticed as the subject is treated in the opinion below.

Mr. **H. J. Haskell,** for appellant:

The license is uniform on all persons engaged in carrying on the same class of laundries.

---

contract not to tax, but the rule is different where they are exacted for the purpose of revenue.

Thus, a license to sell liquor is a mere permit to engage in that business, and not a contract guaranteeing that the state will not increase the amount required to be paid therefor. Hadtner v. Williamsport, 15 W. N. C. 138 (1883).

And the same was held in Moore v. Indianapolis, 120 Ind. 483 (1889), with reference to the power of a municipality to raise the price of a license for the unexpired period before its expiration.

So, a franchise conferred by the legislature on private persons to construct a railroad track through the streets of a city and run cars thereon, prescribing certain conditions to be performed by the grantees, is not a contract which will exempt the occupation of operating the road from a tax imposed by the city under a power to license and regulate occupations. San José v. San José & S. C. R. Co. 53 Cal. 475 (1879).

And a provision in the charter of a city railroad company that the company shall pay such license for each car run as is paid by other passenger railroad companies in a city, which is $30, is not a contract that the license fee should never exceed such sum. Union Pass. R. Co. v. Philadelphia, 101 U. S. 528, 25 L. ed. 912 (1879).

Nor do a license fee of $5 on each car of a railroad company, imposed by a city, and a subsequent bond required by ordinance for faithful compliance with regulations, etc., given by the railroad company as a condition for the consent to its occupancy of its streets, constitute a contract with the city that such license fee shall not be varied or increased. Johnson v. Philadelphia, 60 Pa. 445 (1869).

And the right of a municipality to require payment of a license fee of $50 per year for each boat used, under a charter authorizing it to license, tax, and regulate ferries, is not affected by a provision in the charter of the ferry company that it should be subject to the same taxes as should be imposed on other ferries and under the same regulations and forfeitures, where other ferries are required by general law to pay to the county not less than $5 nor more than $300, such charge being a license fee and not a tax. Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560 (1882).

In Howland v. Chicago, 108 Ill. 500 (1884), it was said that it was decided in Wiggins Ferry Co. v. East St. Louis, *supra*, that a license fee exacted for the mere purpose of revenue, for a license to do that which the exactor had no power to forbid, is not a tax in the sense of the Constitution.

An imposition by a municipal council of a license tax upon the cars of a railroad company within its limits for the purpose of raising revenue, however, would be an invasion of the chartered rights of a company and void where its charter subjected it to certain regulations of the municipality with relation to paving, grading, etc., and exempted it from other municipal control. Johnson v. Philadelphia, *supra*.

And a municipal requirement of an annual license fee of $50 for large cars and $25 for small cars, imposed upon a street-railroad company, which regulated nothing except to prohibit the running of the cars without such payment, is not a measure of regulation, but the imposition of a tax upon the company in derogation of its rights to property acquired under a precedent contract for the use and occupation of the streets. New York v. Second Ave. R. Co. 32 N. Y. 261, 34 Barb. 43 (1865).

Nor can a municipal corporation exact an additional license fee from a telephone company for the purpose of revenue only, where such companies are required to pay to the state annually a license fee for carrying on other business, which is declared to be in lieu of all taxes for any purposes authorized by the laws of the state. Wisconsin Teleph. Co. v. Oshkosh, 62 Wis. 32 (1884.)

c. *Provisions requiring equality and uniformity.*

The provision found in the Constitutions of most of the states, requiring taxation to be equal and uniform, is the one which has been most frequently interposed with a view to limiting the license fees imposed upon one class or locality so as to be uniform with those imposed upon others; but while there is some conflict of authority, the great majority of the decisions have declined to give that effect to the provision, though they have placed such refusal upon different grounds.

Thus, it has been held that a license fee is not a tax within constitutional restrictions upon the power to tax.

This is the rule of the principal case, STATE, TOI, v. FRENCH.

And this was decided in Chilvers v. People, 11 Mich. 43 (1863), with reference to a fee for the privilege of running a ferry.

And in Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560 (1882), with reference to a license fee of $50 annually for each boat, required of a ferry.

And in People v. Thurber, 13 Ill. 554 (1852), with reference to a license fee of 3 per cent on the amount of premiums charged by persons acting as agents for foreign insurance companies.

And in Braun v. Chicago, 110 Ill. 186 (1884), with reference to an ordinance requiring a license fee of $100 of bankers and of $25 of commission merchants, brokers, and money changers.

So, in Charity Hospital v. Stickney, 2 La. Ann. 550 (1847), a charge of $520 annually, imposed on theaters for the benefit of a charity hospital, was attacked as unconstitutional, but upheld on the ground that the exaction was the price of a license, and not a tax.

And a license tax imposed upon liquor dealers is

The legislature is authorized to divide a business into classes for the purpose of imposing a license tax.

People v. *Henderson*, 12 Colo. 369.

If it operates on all alike who fall into the same class, the constitutional requirement that "taxes shall be uniform upon the same class of subjects" is satisfied.

Timm v. *Harrison*, 109 Ill. 593; Cooley, Taxn. 169; *Howland* v. *Chicago*, 108 Ill. 496; *Bozeman* v. *Cadwell*, 14 Mont. 480.

Even within the class taxed, however, there may be rules of distinction, and these are perfectly admissible, provided they are general rules and are observed.

Cooley, Taxn. 170; *State* v. *Stevenson*, 109 N. C. 730; *Singer Mfg. Co.* v. *Wright*, 33 Fed. Rep. 121.

The power to classify and arrange into classes of subjects is not limited or restricted.

Weaver v. *State*, 89 Ga. 639; *People* v. *Henderson*, *supra*; Black, Const. Law, p. 408; *Howland* v. *Chicago*, *supra*; *Home Ins. Co.* v. *Swigert*, 104 Ill. 653; *Germania L. Ins. Co.* v. *Com.* 85 Pa. 513; *Ex parte Mirande*, 73 Cal. 365; *Timm* v. *Harrison*, *supra*; *Ex parte Thornton*, 12 Fed. Rep. 538; *Gatlin* v. *Tarboro*, 78 N. C. 119.

There is no discrimination between persons engaged in carrying on the same class of laundries. The law operates alike upon all persons under like circumstances and conditions,

---

not a state tax and is not therefore unjust or unequal because levied on all dealers alike without regard to the amount of business done by each. Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654 (1875).

Nor is Idaho act 1891, § 1, providing for the payment of $500 per year, or a proportionate amount for each fraction of a year, for a license to sell intoxicating liquor in towns in which a designated vote was cast for governor at the last general election, and $300 in all other cities and towns, and $100 for licenses for hotels outside of cities, towns, villages, and hamlets, within Idaho Const. art. 7, §§ 2, 5, requiring equality and uniformity of taxation upon the same classes of subjects. State v. Doherty, 2 Idaho 1105 (1892).

And a statute requiring a license fee of $10 of all liquor dealers in addition to all other licenses required by law, and providing that the moneys received therefrom shall constitute a fund for the foundation and maintenance of an asylum for inebriates, is within the police powers of the legislature and not in violation of the constitutional provisions against unequal taxation. State v. Cassidy, 22 Minn. 312, 21 Am. Rep. 765 (1875).

And Ala. act Jan. 16, 1854, authorizing and requiring the probate judge of the county to collect a tax of $50 on licenses for the retailing of spirituous liquors in the city of Mobile, for the use of the Mobile school commissioners, is a police regulation which may be graduated by the populousness of the community in which the privilege is to be exercised, and by the profitableness of the employment, and not subject to the objection that it is not levied equally throughout the taxable district. *Ex parte* Marshall, 64 Ala. 268 (1879), Stone, J., dissenting.

So, a municipal requirement of a building license and that a fee of 50 cents shall be paid for a license to erect, enlarge, or add to any building under a power to make by-laws regulating the erection of buildings, is not a tax for revenue purposes, and is not therefore subject to the objection that it is unequal in its operation and operates as a restraint of trade. Welch v. Hotchkiss, 39 Conn. 140, 12 Am. Rep. 383 (1872).

And a license fee imposed upon merchants or dealers in wines and liquors, estimated upon the amount of their gross annual sales, is a tax upon the thing and not upon the persons, and is not subject to objection for want of uniformity. Williamsport v. Stearns, 2 Pa. Dist. R. 351, 12 Pa. Co. Ct. 625 (1892); Allentown v. Gross, 132 Pa. 319 (1890).

But such a fee imposed upon merchants, created by adopting the classification made by the appraiser of mercantile taxes, is void for want of uniformity where the classification adopted exempts persons whose annual sales do not reach a certain amount. Williamsport v. Stearns, *supra*.

And a requirement of a license fee from peddlers, classifying them as foot peddlers, peddlers with one-horse cart or wagon, and peddlers with two-horse cart or wagon, charging a different rate for each, is a police requirement and a valid exercise of a power to regulate, and not in conflict with a constitutional requirement of uniformity of taxation upon all of a class. Kneeland v. Pittsburgh (Pa.) 10 Cent. Rep. 421 (1887).

So, many of the cases have laid down the rule, without either denying or affirming the application of the constitutional provision, that license fees are equal and uniform so long as the tax imposed is the same upon all the members of a particular class.

Thus, the constitutional requirement as to uniformity of taxation does not prevent a municipality from discriminating in fixing rates for licenses for the transaction of different classes of business, and imposing a higher rate upon one class than upon another. *Ex parte* Hurl, 49 Cal. 557 (1875).

A license tax upon different industries, varying in amount upon each, but being the same upon the subjects of the same class, is not unconstitutional for want of uniformity. Hadtner v. Williamsport, 15 W. N. C. 138 (1883).

And an ordinance imposing a license tax of a fixed sum upon each of various occupations named does not violate the constitutional rules requiring uniformity because it does not graduate the amount required to be paid by persons pursuing the vocation according to the amount of business done. Templeton v. Tekamah, 32 Neb. 542 (1891).

So, the rule of uniformity prescribed by Ill. Const. art. 9, authorizing the general assembly to tax liquor dealers, etc., by general law, uniform as to the class upon which it operates, permits it to classify the different kinds of liquor dealers included in the general description, and impose differential taxes upon such classes so long as the tax imposed is the same upon all the members of the particular class. Timm v. Harrison, 109 Ill. 593 (1884).

And Ill. act July 1, 1883, prohibiting cities, towns, and villages from granting licenses for keeping dram shops except upon payment of a sum not less than $500 per annum, or not less than $150 per annum, when the license is for the sale of malt liquors only, does not conflict with the principle of uniformity prescribed by the Illinois Constitution, the fee being the same for all members of the particular class. Timm v. Harrison, 109 Ill. 593 (1884).

Nor is a law fixing the fee for a license of a liquor dealer at $50 per quarter, and for one who sells at a way-side inn or station at $10 per quarter, and exempting physicians and apothecaries, unconstitutional and void for want of uniformity, as there is uniformity as to each class. Territory v. Connell (Ariz.) 16 Pac. Rep. 209 (1888).

So, a license tax imposed upon express companies, of various amounts in different cities in proportion to the number of inhabitants in each, is not unconstitutional as not of uniform operation

and therefore does not deprive any person of his property without due process of law, or deny to any person the equal protection of the law in violation to the 14th amendment of the Constitution of the United States.

Home Ins. Co. v. *New York*, 134 U. S. 594, 33 L. ed. 1025; *Giozza* v. *Tiernan*, 148 U. S. 657, 37 L. ed. 599; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923; *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 133 Ind. 513, 18 L. R. A. 739; *Singer Mfg. Co.* v. *Wright*, 33 Fed. Rep. 121; *State* v. *Hathaway*, 115 Mo. 36; *Craig* v. *Board of Medical Examiners*, 12 Mont. 203.

The classification made of laundries other than steam laundries is valid.

Cooley, Taxn. 171, 582; *Gatlin* v. *Tarboro*, 78 N. C. 119.

The action of the legislature in the classifying of laundries for the purpose of imposing a license tax, as steam laundries and laundries other than steam laundries, is justified, if justification were needed, by their different nature, character, means, and methods of doing business.

Pacific Exp. Co. v. *Seibert*, 142 U. S. 339–353, 35 L. ed. 1035–1039, 3 Inters. Com. Rep. 810; *Standard Underground Cable Co.* v. *Attorney General*, 46 N. J. Eq. 270; *Warren* v. *Geer*, 117 Pa. 207; Cooley, Taxn. p. 222.

Those affected by the proviso are not necessarily Chinese; it applies to all alike who carry on the class of laundries mentioned therein.

Ex parte Thornton, 12 Fed. Rep. 538; *Soon Hing* v. *Crowley*, 113 U. S. 703, 28 L. ed. 1145.

---

throughout the state, as it operates uniformly as to all persons standing in the situation which is held to be the test of such taxation. Osborne v. State, 33 Fla. 162, 25 L. R. A. 120, 4 Inters. Com. Rep. 731 (1894).

And La. act 1886, No. 101, providing for a license fee of $600 to be paid to both the city and the state by all banks the capital of which is less than $800,000, is not unconstitutional for want of equality and uniformity, as the fee required is equal and uniform as to all banks constituting that class. State v. Traders' Bank, 41 La. Ann. 329 (1889).

Nor is a license tax imposed by a municipality upon merchants, the amount of which is graduated according to the amount of their monthly sales, unequal and therefore unconstitutional, as it applies uniformly to all persons in the same category. Sacramento City & County v. Crocker, 16 Cal. 119 (1860).

And an ordinance charging a license fee upon vehicles graded in amount from $3 to $25, with reference to the character of the particular vehicle and the use to which it is put and the number of horses used therewith, enacted under a power to license vehicles and charge not more than $30 nor less than $2, is not void for want of uniformity, as it acts uniformly on all the subjects of a particular class. Smith v. Louisville (Ky.) 6 S. W. Rep. 911 (1888).

So, the same result has been reached in other cases by a general holding that the rule of equality and uniformity was not violated without stating the grounds.

This was done with reference to a law requiring a license fee of $85 from proprietors of bar-rooms, etc., on land, and of only $50 from proprietors of bars kept on steamboats, in State v. Rolle, 30 La. Ann. 991, 31 Am. Rep. 234 (1878).

And with reference to a license tax of $250 for pursuing the occupation of junk dealers, when the license tax imposed upon ordinary dealers was only $100, in New Orleans v. Kaufman, 29 La. Ann. 283, 29 Am. Rep. 328 (1877).

And with reference to an occupation tax of $250 upon persons dealing in stocks and bills of exchange in towns or cities exceeding 5,000 inhabitants and of $50 in towns and cities of less population, in Texas Bkg. & Ins. Co. v. State, 42 Tex. 636 (1875).

And with reference to a license tax imposed upon keepers of private markets when no such tax was imposed upon persons selling meats, etc., in the public markets, in New Orleans v. Dubarry, 33 La. Ann. 481, 30 Am. Rep. 273 (1881).

And the same rule has been applied when the exaction was designed for the purpose of revenue as well as for regulation.

Thus, in Wiley v. Owens, 39 Ind. 429 (1872), it was held that a fee charged by a city for a license designed for the purpose of revenue as well as regulation is not invalid within the constitutional requirement of uniformity and equality of taxation, because it is larger than the fee charged for a similar license in other cities.

And in Hadtner v. Williamsport, 15 W. N. C. 138 (1883), it was held that a license tax which is greater upon some employments than upon others, imposed under a power to tax as well as to regulate, cannot be judicially declared invalid because of inequality.

In Denver City R. Co. v. Denver, 2 Colo. App. 34 (1892), however, it was held that a license tax of an amount greater than the amount necessary to defray the expense of police supervision imposed by a city without valuation upon property subjected to general taxation and used in the business licensed, under a statute authorizing it to license, regulate, and tax any lawful occupation, violates Colo. Const. art. 10, § 3, requiring taxes to be uniform and to be levied and collected under general law prescribing a just valuation.

And an insurance company required to pay a license tax of $1,000 upon an agency maintained in New Orleans cannot be required to pay a second tax because it has established a second office therein auxiliary to the first, for the accommodation of persons residing at a distance from the main office, without contravening the constitutional requirement of uniformity of taxation. Merchants' Mut. Ins. Co. v. Blandin, 24 La. Ann. 112 (1872).

And a city ordinance, fixing the amount of a license tax upon insurance companies upon the basis of the amount of premiums received by them, contravenes the requirement of La. Const. art. 118, of uniform taxation, and cannot be enforced. New Orleans v. Home Mut. Ins. Co. 23 La. Ann. 449 (1871).

And a city having power to exact a license fee from tugs and barges, which makes a reduction of 40 per cent on vessels owned by residents thereof, must, under Mo. Const. art. 10, § 3, requiring that the tax shall be uniform upon the same class of subjects, make a similar reduction as to all boats taxed. St. Louis v. Consolidated Coal Co. 113 Mo. 83 (1892).

The contrary rule, that the constitutional provision is applicable, however, was adopted by the earlier Louisiana cases.

Thus, license taxes imposed by municipalities on persons pursuing the same calling or profession must be equal under the constitutional provision requiring uniformity of taxation. New Orleans v. Home Mut. Ins. Co. *supra*.

And a license imposed by a parish upon retail liquor dealers, the amount of which is regulated by the amount of business done, one sum being charged when the business is more than a specified amount and another when it is less, conflicts with that provision. East Feliciana v. Gurth, 26 La. Ann. 140 (1874).

So, a statutory provision authorizing the levying

To be obnoxious to the objection that it is class legislation there must be a discrimination between persons of the same class.

State v. *Hathaway*, and *Pacific Exp. Co.* v. *Seibert*, *supra*; Cooley, Const. Lim. 935; *Doyle* v. *Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; Black. Const. Law, p. 60; *Angle* v. *Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55.

Messrs. **Alex C. Botkin** and **J. M. McDonald**, for respondent:

The court may declare a portion of an act or a proviso in a section of an act of the legislature to be in violation of the Constitution.

Cooley, Const. Lim. pp. 9, 214; *State* v. *Sinks*, 42 Ohio St. 345; *Warren* v. *Charlestown*, 2 Gray, 84.

Courts look to the effect of a law, as well as to its ingenious wording, in the effort to have it appear constitutional.

District Court Cases, 34 Ohio St. 440; *State* v. *Hipp*, 38 Ohio St. 19.

The Constitution and laws of a state, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void.

Cohens v. *Virginia*, 19 U. S. 6 Wheat. 264, 5 L. ed. 257; *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 210, 6 L. ed. 73; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Ex parte Turner*, Chase Dec. 157.

In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.

Henderson v. *Wickham*, 92 U. S. 268, 23 L. ed.

---

and collecting of a specific tax on drays, wagons, carriages, etc., in proportion to the number of animals used in drawing any particular vehicle, is unconstitutional for want of uniformity, whether the imposition is regarded as a tax or a license, as licenses are required to be uniform upon the same professions or callings. State v. Endom, 23 La. Ann. 663 (1871).

And a license tax varying in amount according to the number and character of vehicles and the number of horses used to draw them, and not upon the business or vocation or upon the value of the property, if it be intended as a property tax, conflicts with the constitutional provision. Cullinan v. New Orleans, 28 La. Ann. 102 (1876).

In State v. Liverpool, L. & G. Ins. Co. 40 La. Ann. 463 (1888), however, it was held that La. Const. 1879, art. 206, requiring license taxes to be graduated, exempts them from the constitutional requirement of equality and uniformity.

As to the Louisiana rule subsequent to the taking effect of the Constitution of 1879, see later Louisiana cases *supra*, this section, and *infra*, III.

d. *Direct restrictions as to amount of levy.*

Direct restrictions as to the amount of taxes which can be levied do not apply to licenses unless they are imposed for the purpose of revenue, but a constitutional restriction as to the amount of the license fee is of course imperative.

Thus, a license tax is not a property tax, and is not therefore unconstitutional, when it, together with the ad valorem tax permitted by the Constitution, exceeds the constitutional limitation on the amount of tax that can be levied. Morehouse v. Brigham, 41 La. Ann. 665 (1889).

But a municipal ordinance exacting fees for keeping a butcher's stand or selling articles within the corporate limits but without the market place, imposes a tax for revenue, and is not a contribution legally authorized in the exercise of the police power, under La. Const. art. 243, with reference to the regulation of the slaughtering of cattle and other livestock, and is therefore invalid if in excess of the limitation. Mestayer v. Corrige, 38 La. Ann. 707 (1886).

And a municipal corporation cannot exceed the limit prescribed by La. Const. art. 206, and impose a license fee for the sale of alcoholic and spirituous liquors greater than that required by the general assembly on the ground that it is a police regulation, within La. Const. art. 170, authorizing the general assembly to regulate their sale and use. State v. Chase, 33 La. Ann. 287 (1881).

So, the requirement by a municipality of a license fee of $25 per month for a traveling agent is unauthorized and invalid, under La. Const. art. 206, prohibiting any political corporation from imposing a greater license tax than is imposed by the general assembly for state purposes, when no license is imposed upon that calling by the legislature. New Orleans v. Graves, 34 La. Ann. 840 (1882).

But a license tax levied by a city, which does not exceed that levied upon the same occupations in the city by the state in accordance with the provision of the Louisiana Constitution, is not rendered invalid by the fact that the state has invalidated her license tax by illegal discrimination between persons pursuing the same business in different subdivisions of the state. New Orleans v. Ponchartrain R. Co. 41 La. Ann. 519 (1889).

And police juries are not restricted in their action, under a statute giving them exclusive power to make such laws and regulations for the sale or prohibiting the sale of intoxicating liquors as they may deem advisable, and requiring them to adopt such regulations as may be necessary to carry out the purposes of the law in regard to licenses exacted by them for that purpose, to the amount exacted by the state for the same. Jones v. Grady, 25 La. Ann. 586 (1873).

So, a license fee imposed upon owners of hacks, of $8 annually for each hack, and of different sums ranging from $2.50 to $12 upon owners of other vehicles, which is intended as a license tax under the police power, and the leading and primary purpose of which is for regulation, is not invalid as being in excess of the Texas constitutional limitation of one half the occupation tax imposed by the state upon the same class of subjects, though as a secondary purpose it provides a fund for improving the streets. *Ex parte* Gregory, 20 Tex. App. 210, 54 Am. Rep. 516 (1886).

But a municipal exaction of $20 for the privilege of running a hack, and of $5 for running a buggy within the city for hire, cannot be regarded as a license proper to meet the necessary expense of numbering, registering, and otherwise providing for their government, but is an occupation tax and invalid as such under the provision of the Texas Constitution, where such amount is in excess of half the rate levied by the state. *Ex parte* Gregory, 1 Tex. App. 753 (1877).

And an annual license tax of $25 on every vehicle used for transporting passengers or baggage, drawn by two animals, is invalid under that provision, where the general law levies $1 annually for each stall and $1 for each hack or other vehicle in every livery or feed stable, but imposes no specific tax on public vehicles other than those in livery and feed stables. *Ex parte* Slaren, 3 Tex. App. 662 (1878), following *Ex parte* Gregory, *supra*.

e. *Miscellaneous provisions.*

An annual license tax imposed upon artists, photographers, etc., of $35 in cities of over 3,000 inhabitants and $20 in cities of between 500 and 3,000 inhabitants, and $5 in towns of less than 500

547; *Chy Lung* v. *Freeman*, 92 U. S. 275, 23 L. ed. 550.

Where a state law is attacked, the question is whether, if followed, it would avoid the protection guaranteed by the Constitution, laws, and treaties of the United States.

Kennard v. *Louisiana*, 92 U. S. 480, 23 L. ed. 478; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220.

Courts will take judicial notice of whatever is generally known within the limits of their jurisdiction.

Brown v. *Piper*, 91 U. S. 37, 23 L. ed. 200; *Ah Kow* v. *Nunan*, 5 Sawy. 552; *Sparrow* v. *Strong*, 70 U. S. 3 Wall. 97, 18 L. ed. 49.

A statute that in operation and effect imposes upon subjects of the emperor of China lawfully residing in the United States burdens or exactions not common to all persons in the same calling and condition is in violation of the Constitution, laws, and treaties of the United States, and void.

Yick Wo v. *Hopkins*, *supra*; *Wo Lee* v. *Hopkins*, 26 Fed. Rep. 471; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923; Chinese Treaty, art. 4, March 17, 1894.

The proviso is in violation of § 27, art. 3, of the Constitution of Montana in that it deprives the persons affected of their property without due process of law.

Yick Wo v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220; *Re Lowrie*, 8 Colo. 516, 54 Am. Rep. 558.

---

inhabitants, does not conflict with a constitutional prohibition against class legislation. State v. Schlier, 3 Heisk. 281, 8 Heisk. 455 (1871).

And a license tax of $2.50 per day, required by a municipality of hawkers and peddlers of merchandise kept by merchants or manufacturers in the city, is not subject to objection as class legislation. Cherokee v. Fox, 34 Kan. 16 (1885).

And the ordinance of Mobile passed March 2, 1866, requiring every express company doing business in that city and whose business extends beyond the limits of the state to pay an annual license of $500, if within the limits of the state $100, and if within the limits of the city $50, is a tax for the license to do business, and does not impose an import or export duty, and is not a regulation of commerce, foreign or interstate, and is not in conflict with either the Federal or state Constitution. Osborne v. Mobile, 44 Ala. 493 (1870); Southern Exp. Co. v. Mobile, 49 Ala. 404 (1873).

So, a municipal requirement of a license fee of not more than $300 from any person selling spirituous liquors by retail within 1 mile of the town is a police regulation, and not unconstitutional as taking private property for public use, though it would be so if it were regarded as a tax for municipal purposes upon property outside of the municipal limits. Falmouth v. Watson, 5 Bush, 660 (1869).

But Ala. act Jan. 22, 1879, as amended December 8, 1880, providing that no person shall employ or contract with or in any other way induce laborers to leave designated counties without first paying such counties a license tax of $250, is prohibitory and unconstitutional as impairing the laborers' right of free emigration. Joseph v. Randolph, 71 Ala. 499, 46 Am. Rep. 347 (1882).

And a license tax levied upon goods brought from another state cannot be upheld as an imposition for inspection where the amount is more than is required for inspection and the proceeds are applied to other uses. American Fertilizing Co. v. North Carolina Board of Agriculture, 43 Fed. Rep. 609, 11 L. R. A. 179, 3 Inters. Com. Rep. 532 (1890).

III. *Graduation of license fees.*

La. Const. art. 217, provides that the general assembly shall graduate the amount of license taxes.

This provision, not indicating any standard of graduation, leaves it to the legislature to determine the method to be adopted in effecting it. State v. Traders' Bank, 41 La. Ann. 329 (1889); New Orleans v. Ponchartrain R. Co. Id. 519 (1889); State v. Liverpool, L. & G. Ins. Co. 40 La. Ann. 463 (1888).

And the judiciary has no authority to interfere in the absence of any rule to guide its investigation and scrutiny. State v. Traders' Bank, and New Orleans v. Ponchartrain R. Co. *supra*.

Thus, the division by the general assembly of companies and persons pursuing the business of insurance into different classes according to the amount of premiums collected, and the levying upon each class a different license tax, greater upon those receiving a larger amount than upon those receiving a less, are a sufficient graduation. State v. Liverpool, L. & G. Ins. Co. *supra*.

And that a license law requires smaller insurance companies to pay a larger tax in proportion to their premiums than larger companies does not render it unconstitutional under that provision, there being no requirement that the tax shall be in proportion to the business done, though it may impugn its justice. *Ibid.*

So, a license tax of $1,000 imposed upon places for concert, dancing, and variety performances, in cities having a population of more than 25,000, and of $500 in cities and towns having less than that number, is properly graduated and equal and uniform as to each class, within the requirement of the Louisiana Constitution. State v. Schoonhausen, 37 La. Ann. 42 (1885); State v. O'Hara, 36 La. Ann. 94 (1884).

And a license tax of a specified sum on peddlers of a particular kind of goods is not subject to the objection that it is not sufficiently graduated. McClellan v. Pettigrew, 44 La. Ann. 358 (1892).

Nor is a license tax upon a business as a whole, which is duly graduated, rendered unconstitutional for want of graduation by a requirement of a license fee of not less than $50 for an additional business, as the addition of the $50 when the additional business is done does not destroy the original graduation. New Orleans v. Clark, 42 La. Ann. 9 (1890).

But the constitutional provision with reference to graduation does not require license taxes to be equal and uniform as to all corporations transacting the same kind of business, and does not prevent the imposition of a different tax upon domestic corporations from that imposed on foreign ones. New Orleans v. Ponchartrain R. Co. 41 La. Ann. 519 (1889).

The power to graduate license fees, however, is not dependent upon constitutional authority, but has been upheld universally within proper limits in other states in the absence of any constitutional requirement or authority.

Thus, a municipal council has the right to grade and class and fix the rate of licenses granted by it, but in doing so it must keep within the limits fixed by charter or other statutory provisions. Kniper v. Louisville, 7 Bush, 599 (1870).

And a city authorized to license insurance companies may properly vary the amount charged therefor to correspond with the incomes of the different companies licensed. Burlington v. Putnam Ins. Co. 31 Iowa, 102 (1870).

Nor can a citizen doing a general business at the place of his domicil escape payment of a license tax imposed upon merchants by the municipal

De Witt, J., delivered the opinion of the court:

It appears that the legislative assembly divided laundry licenses into three classes, as follows: Steam laundry, $15; one male laundryman, $10; male laundryman employing one or more other persons, $25. The respondent contended in the lower court—a contention which prevailed—that this legislation is unequal and not uniform, and therefore void, under the Constitution. The legislature is not required to tax all property and occupations equally or uniformly, unless so commanded by the Constitution. Cooley, Taxn. p. 570. chap. 6, quoting *Butler's Appeal*, 73 Pa. 448; *Rome* v. *McWilliams*, 52 Ga. 251; *Decker* v. *McGowan*, 59 Ga. 805. See also *Singer Mfg. Co.* v. *Wright*, 33 Fed. Rep. 121. Constitutions of a state are distinguished from the Constitution of the United States, in this: "The government of the United States is one of enumerated powers; the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess. In this respect it differs from the Constitutions of the several states, which are not grants of powers to the states, but which apportion and impose restrictions upon the powers which the states inherently possess." Cooley, Const. Lim. p. 10. Therefore a state legislature is not acting under enumerated or granted powers, but rather under inherent powers, restricted only by the pro-

---

government because the amount of his tax is arrived at by reference to his profits. Ficklen v. Shelby County Tax. Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79 (1892).

And a charter provision authorizing the city council to license, tax, and regulate all such business and employments as the public good may require, authorizes the enactment of an ordinance requiring a license for carrying on the business of selling goods, wares, and merchandise at a fixed place, graduating the amount or the fee according to the amount of sales or business done. *Ex parte* Mount, 66 Cal. 448 (1885).

And a percentage on the gross receipts of a foreign insurance company doing business in a municipality may be properly taken as an equitable mode of ascertaining the amount of a license fee charged for the privilege of carrying on such business. Walker v. Springfield, 94 Ill. 364 (1880).

So, the classification of townships and cities by population for the purpose of fixing a minimum license fee for the sale of intoxicating liquors therein is valid. State v. Gloucester County Circuit Ct. Judge, 50 N. J. L. 585, 1 L. R. A. 86 (1888).

And a police regulation providing for a license may graduate the amount thereof by the number of votes cast for the governor at the last general election next preceding the date of the application therefor. State v. Doherty, 2 Idaho, 1105 (1892).

And a tax of $50 on licenses for retailing spirituous liquors for the use of the school commissioners is a police regulation, which may be graduated by the populousness of the community in which the privilege is to be exercised and by the profitableness of the employment. *Ex parte* Marshall, 64 Ala. 266 (1879).

But the question of population, for the purpose of ascertaining the amount to be paid for a license to sell liquors, can only be determined from the last preceding census by the state or general government, under Wis. Laws 1885, chap. 296, § 1, providing therefor. State v. Keaough, 68 Wis. 135 (1887).

So, a license tax upon merchants is not a property tax, and therefore unconstitutional, because the amount thereof is graduated by the average amount of their stock. Newton v. Atchison, 31 Kan. 151, 47 Am. Rep. 486 (1883).

And the city council may provide that the license to be paid by laundrymen shall be in proportion to the number of persons employed by them under the charter of the city of Oakland, providing that licenses shall be discriminating and proportionate to the amount of the business done. *Ex parte* Sisto Li Protti, 68 Cal. 636 (1886).

And a municipal requirement under a power to establish and regulate market houses and to license and regulate fresh-meat stores, establishing market houses and requiring persons selling therein to pay rent but no license, and that persons keeping meat stores shall pay a license of $100, and forbidding them to sell game, fish, vegetables, and other articles of merchandise, and requiring a license of $50 from keepers of game or fish shops, is a mere classification of dealers with a license differing in amount, and properly graduated. Vosse v. Memphis, 9 Lea, 294 (1884).

So, a municipality has full power, under a charter authorizing it to license keepers of livery stables, to prescribe a rule that such license should be paid in proportion to the number of carriages kept for hire. Howland v. Chicago, 108 Ill. 500 (1884).

And Ky. act May 8, 1886, providing for a license tax in the city of Louisville for each vehicle running therein, of not more than $30 nor less than $2, authorizes the city council to fix the amount of the fee by ordinance within the specified limits at different amounts with reference to, and graded upon the character of, the particular vehicle, and the use to which it is put, and the number of horses used therewith. Smith v. Louisville (Ky.) 6 S. W. Rep. 911 (1888).

So, the amount of a fee charged by a municipal corporation for a building permit, may be graduated according to the estimated cost of the building, as the examination of the plans and specifications necessary to its issuance would require more labor and expense in the case of a large building than of a smaller one. St. Paul v. Dow, 37 Minn. 20 (1887).

And a license tax imposed upon hotels is not unreasonable or oppressive because the amount paid is graduated by the number of rooms which may be devoted to the accommodation of the public. St. Louis v. Bircher, 7 Mo. App. 169 (1879).

So, a license tax on vehicles, graduated at $5 on those drawn by one horse, and $8 on those drawn by two horses, and $12 on those drawn by three or more, is reasonable and valid. Gibson v. Coraopolis, 22 Pittsb. L. J. N. S. 64, 8 Lanc. L. Rev. 359 (1891).

And an annual license tax imposed upon artists, photographers, etc., of $35 in cities of over 3,000 inhabitants, and $20 in cities of between 500 and 3,000 inhabitants, is not unconstitutional as class legislation. State v. Schlier, 3 Heisk. 281, 3 Heisk. 455 (1871).

The right of a municipality, however, to require an annual license fee of more than $50 from the larger manufacturers depends under a charter provision authorizing the requirement of a license of not less than $50 nor more than $500 and the grading and fixing of rates within the designated limits, upon the existence of the fact that all smaller ones within the city are charged at least $50; and an ordinance requiring brewers to pay 1-10th of 1 per cent on the amount of liquor manufactured, for a license, providing that each shall be required to pay at least $15 per annum, is unauthorized and invalid. Kniper v. Louisville, 7 Bush, 599 (1870).

See also *supra*, II. c., *Provisions requiring*

visions of their sovereign Constitution. We therefore inquire whether our Constitution restrains the legislature from enacting such a law as §§ 4079, 4080, Pol. Code.

The respondent contends that the restraint is found in the following provisions of the Constitution:

"Sec. 1. The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in this state." Art. 12.

"Sec. 11. Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." Art. 12.

The respondent argues that under these provisions the imposition of a license fee of $25 upon him, as a laundryman with a helper, while the laundryman without a helper and the steam laundryman pay a less license, is unconstitutional, in that it is not uniform and equal. We shall not decide whether this law is or is not a classification of the laundry business for license purposes, which the legislature may

---

equality and uniformity, a large number of the decisions in which uphold provisions for a graduated fee.

IV. *Limitations peculiar to municipal corporations.*

Power to license, conferred upon cities, is not an unlimited or arbitrary power, but one to be exercised in conformity with the general law. Louisville v. Kean, 18 B. Mon. 9 (1856).

But it confers authority to impose an additional tax for the grant of a privilege besides that which is required to be paid to the state. *Ibid.*

And the municipality is not limited with reference to the amount which it may require to be paid therefor to that levied by the state on citizens generally. Perdue v. Ellis, 18 Ga. 586 (1855); *Ex parte* Burnett, 30 Ala. 461 (1857); Deitz v. Central, 1 Colo. 323 (1871).

The limit is to be found in statutory and charter provisions, and in the general principle requiring municipal ordinances to be reasonable and in the nature and purposes of the power conferred.

a. *Statutory and charter restrictions.*

Statutory and charter restrictions upon the amount of license fees are, of course, applicable to municipal licenses only, and the question of their existence is usually one of statutory construction.

Thus, a municipal charter conferring power upon city authorities to levy taxes upon all subjects within its jurisdiction upon which a tax may be levied by the state, providing that the tax shall be apportioned in the same manner as the state tax, requires the city to follow the apportionment of occupation taxes assessed by the state in levying a license tax on such occupation. Marshall v. Snediker, 25 Tex. 460, 78 Am. Dec. 534 (1860).

And the Illinois insurance law, § 30 (Rev. Stat. 1874, chap. 73), providing for taxation of foreign insurance companies, which shall be received in lieu of all town and municipal licenses, except that a license fee not exceeding 2 per cent on the gross receipts of the agents may be imposed in towns having an organized fire department, operates as a limitation upon the power of a city to impose more than 2 per cent on such receipts. Walker v. Springfield, 94 Ill. 364 (1880).

And the proviso of that act, permitting cities having an organized fire department to levy a license fee not exceeding 2 per cent of the gross receipts of foreign insurance agents, requires affirmative action by the city in fixing the rate, which may be less but not more than 2 per cent, and must be computed upon the gross, and not the net, receipts. Chicago v. James, 114 Ill. 479 (1885).

But an ordinance requiring all foreign fire and life insurance companies engaged in effecting insurance in the city to pay to the city treasurer the sum of $2 upon the hundred upon the amount of all premiums received during the half year, to be set apart for the maintenance of the fire department, and requiring agents of such companies to render an account of the premiums received under penalty of $200, is justified under a charter authorizing the city to license and regulate agents of such insurance companies, and is not rendered invalid by that act. *Ibid.*

So, Kan. act 1871, creating the insurance department, does not repeal or modify the act of 1870 authorizing cities of the first class to levy and collect a license tax on fire and life insurance companies or agencies, so as to exempt a foreign insurance corporation doing business in such a city, which pays to the superintendent of insurance under the provision of that law an amount greater than that paid by other insurance companies, from a license fee of $50 upon fire companies and $100 upon life companies, imposed by a municipal ordinance therein. Leavenworth v. Booth, 15 Kan. 627 (1875).

And La. act 1879, No. 27, providing that no parish or municipal corporation shall assess any license tax of over $500 upon any insurance company transacting business therein, and containing the usual repealing clause, is not retroactive, and does not repeal an ordinance of a municipality previously enacted under due authority, which had gone into effect, imposing a license tax of $1,000 on certain designated classes of companies. New Orleans v. Rhenish Westphalian Lloyds, 31 La. Ann. 781 (1879).

So, an ordinance enacted a few days after the enactment of Ill. act June 15, 1883, fixing the minimum license fee for keeping a dram shop at $500, but before it took effect, fixing fees for licenses issued thereunder previous to the taking effect of that law at $103, and providing that unless otherwise revoked they should extend to a time about nine months after such law took effect, is not a fraud upon the statute or invasion thereof, and licenses issued thereunder at a fee of $103 are valid. Swarth v. People, 109 Ill. 621 (1884).

And a liquor dealer in a city containing between 23,000 and 24,000 inhabitants is subject to a license fee of $500, under a statute fixing that rate for cities of the first, second, and third classes, and $300 for all other cities, where such city was one of the third class under an act dividing cities into three classes only, though by a subsequent act, subsequently held to be unconstitutional, cities were divided into seven classes, and those containing less than 75,000 inhabitants were put into the fourth, fifth, sixth, and seventh classes. Com. v. Smoulter, 128 Pa. 137 (1889).

But a brewer is a manufacturer of beer and subject to the license tax of $10 imposed upon manufacturers by La. act 4, Extra Sess. 1881, § 3, when his receipts are between $30,000 and $40,000, and not to that of $75 imposed upon persons engaged in distilling and rectifying alcoholic or malt liquors, imposed by § 9 thereof. State v. Weckerling, 38 La. Ann. 36 (1886).

make, even if it were held that the uniformity clause in the Constitution applied to such a license. Many cases might be cited upon this question. We shall decide this appeal without reaching a consideration of that point. A license fee is a tax sometimes, and for some purposes. Sometimes, and for some purposes, it is not a tax. Cooley, Taxn. pp. 572, 573, 592, 596, 600, 601; *People* v. *Martin*, 60 Cal. 153; *Santa Barbara* v. *Stearns*, 51 Cal. 499; Cooley, Const. Lim. p. 245; Desty, Taxn. p. 305. The particular distinctions as to when a license fee is a tax and when it is not, we shall not discuss, further than to give the reasons for our opinion that this license fee under consideration is not a tax, as falling within the equality and uniformity provisions of the Constitution. The Constitution provides that the legislature shall levy a uniform rate of assessment and taxation, and secure a just valuation for taxation of all property (art. 12, § 1), and that taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax (Id.). In a separate sentence in said section 1 it is provided that the legislative assembly may also impose a license tax both upon persons and upon corporations doing business in the state. But neither in this sentence of section 1, nor elsewhere, is it stated that licenses shall be uniform. If the Constitution does not require that licenses shall be uniform, they need not be. Judge Cooley says, in his work on Taxation: "It has been seen that the sovereignty may, in the discretion

---

And a retail dealer upon whom a license fee of $5 was imposed under the provisions of the state license law of 1881, § 6, but who combines with his business the sale of liquors in less quantities than one pint, can only be required to pay a total license fee of $50 under the proviso thereof that no license shall issue to sell liquors in such quantities at a fee less than $50, as that proviso excepts him from the general rule prescribed by that act in such case requiring payment of four times the ordinary rate, that being less than $50. Jefferson Police Jury v. Marrero, 38 La. Ann. 896 (1886).

And a retail grocer who sells liquor in quantities less than five gallons in addition to his other business is subject to a license fee of not less than $50 under the proviso of the license act that the license for such additional business shall be as thereinafter provided for in § 11, providing that no license shall issue for making such sales for less than $50, and the license will not be regulated by the provision of § 11 thereof for licensing hotels, bar rooms, and persons engaged in the sale of soda water, etc., such provision not being applicable to the business of a retail grocer. New Orleans v. Clark, 42 La. Ann. 9 (1890).

But statutory and charter restrictions upon the power to tax, like constitutional ones, do not apply to license fees required for the purpose of regulation.

Thus, the right to pass an ordinance fixing the price of a license to retail liquor at $500 per year is not limited, when otherwise duly authorized, by a charter provision allowing the city authorities to levy a tax not exceeding 50 per cent of the state tax, the license not being a tax. Perdue v. Ellis, 18 Ga. 586 (1855).

And U. S. Rev. Stat. §§ 130, 131, and the act of Congress of 1878, § 3, limiting the rate of taxation in the District of Columbia to $1.50 per hundred, expressly confines the limitation to taxes upon real and personal property, and does not apply to taxes upon employments or occupations to be raised by licenses which may be exacted under police powers confided to municipalities. Cooper v. District of Columbia, 4 McArth. 250 (1880).

So, a penalty of 2 per cent per month, imposed by city authorities for delinquency in the payment of license fees, is not prohibited by La. act 48 of 1871, § 9, amending the city charter of 1870, limiting penalties on delinquent taxes to 10 per cent per annum, as that provision applies to taxes only and not to licenses. New Orleans v. Ponchartrain R. Co. 41 La. Ann. 519 (1889).

But an ordinance requiring agents of foreign insurance companies to pay to the city 2 per cent of the premiums received, not granting permission to do business, but assuming that the authority already exists, does not provide for a license within the meaning of a charter provision limiting the amount of license fees. Hartford F. Ins. Co. v. Peoria, 156 Ill. 420 (1895).

In Hartford F. Ins. Co. v. Peoria, *supra*, the court distinguished Walker v. Springfield, 94 Ill. 364 (1880), in which a sum charged an insurance company was said not to be a tax but a fee paid for a license, saying that there is not authority in that case or any other to which its attention had been called for holding that such a requirement is a license.

Such restrictions with reference to licenses, however, are imperative, and must be strictly complied with.

Thus, a municipal council must, in the exercise of a power to grade, fix, and class licenses, keep within the limits fixed by charter or other statutory provisions. Kniper v. Louisville, 7 Bush, 599 (1870).

And a city having authority by its charter to demand license fees from certain classes of business not to exceed $500 per annum cannot require the payment of a percentage on all business done which might amount to more than $500, and no recovery can be had under such an ordinance even for a less sum than such limit. Hartford F. Ins. Co. v. Peoria, 156 Ill. 420 (1895).

And an ordinance requiring a license fee of $5 for every three days for selling goods by sample, enacted under a charter provision authorizing a license fee of not less than $5 or more than $500, is invalid as the licensee might sell for so long a period for the license as to make the amount greater than the maximum amount fixed by the charter. Darling v. St. Paul, 19 Minn. 389 (1872).

So, the Arkansas revenue act of March 13, 1883, §§ 4, 6 directing an annual county tax of $400 upon liquor dealers supersedes the former provisions fixing the price of licenses and investing the county court with a discretion as to the amount, and an excess exacted by it may be recovered from the county. Drew County v. Bennett, 43 Ark. 364 (1884).

And a power conferred upon a municipality to increase the price of licenses does not authorize the increase of a penalty imposed for violation of the requirement of a license, where the amount of the penalty is fixed by statute. Schroder v. Charleston, 2 Treadway Const. 725 (1815).

And a municipal ordinance of a township in Canada, imposing a duty of £25 upon a tavern, is invalid when not referred to the electors at the meeting duly convened, as required by 16 Vict. chap. 184, § 4, whenever the fee imposed exceeds £10. *Re* Barclay, 12 U. C. Q. B. 86 (1855).

And a municipal ordinance requiring a license fee of $50 for every passenger railroad car and $25 for small one-horse cars bases the fee on the size of the cars and not upon the manner in which they are propelled, and a change by a railroad company of the motive power of smaller cars from one horse

of its legislature, levy a tax on every species of property within its jurisdiction, or, on the other hand, that it may select any particular species of property, and tax that only, if in the opinion of the legislature that course will be wiser. And what is true of property is true of privileges and occupations also; the state may tax all, or it may select for taxation certain classes and leave the others untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by Constitution. In another chapter it has been shown that constitutional provisions requiring the taxation of property by value have no application to the taxation of other subjects, and do not, therefore, by implication, forbid the taxation now under consideration." Page 570. These remarks of Judge Cooley are taken from the opening sentence of his chapter entitled "Taxation of Business and Privileges." See also chapter 6 of the same work, as to a general discussion of the impossibility of absolute uniformity.

In the case of *People* v. *Coleman*, 4 Cal. we find, on page 54, 60 Am. Dec. 581, that the counsel arguing in favor of the uniformity and equality of license fees makes the following remarks: " 'How this is to be done,' says the learned counsel, 'is no part of our province to decide; nor are we to say whether it is possible to devise an occupation tax which would be equal and uniform, unless it be a tax levied equally and for the same amount upon all oc-

---

to two does not make it liable for more than the $25 tax on such cars. New York v. Twenty-Third Street R. Co. 62 Hun, 545 (1891).

But a charter provision requiring rates of license for the transaction of business to be proportionate to the amount of business done, and that the license shall be discriminating, only requires that after the selection of a business as a subject for license, the sum exacted from each person following that business shall be fixed by the amount of business done by each. *Ex parte* Hurl, 49 Cal. 557 (1875).

And an ordinance requiring the payment of $5 per day for a license for auction houses is not rendered invalid by a statute providing that license taxes shall be at such rate per year as shall be just and reasonable. Fretwell v. Troy, 18 Kan. 271 (1877).

So, one who refuses to apply for or take out a license to sell intoxicating liquors, and continues to sell in violation of the law requiring it, cannot complain while thus continuing to sell that a fee of $1 for the clerk in addition to the license fee is in excess of the amount allowed by statute. Moore v. Indianapolis, 120 Ind. 483 (1889).

And interest at the rate of 2 per cent per month may be added by a city to an unpaid license tax imposed by it under La. act 20 of 1882, § 63, providing that the city council may impose an annual license tax on trades, professions, and callings, and act 119 of 1882, authorizing them to enforce the collection of taxes due them. New Orleans v. Ponchartrain R. Co. 41 La. Ann. 519 (1889); New Orleans v. Firemen's Ins. Co. Id. 1142 (1889).

So, in State v. Schonhausen, 37 La. Ann. 42 (1885), in which an appeal was taken from a judgment for a license tax of $1,000 for keeping a place for a concert, dancing, and variety performance, manifestly for delay, 10 per cent on the amount of the license was adjudged as damages for a frivolous appeal.

So, an application for a license is a proceeding within the purview of an ordinance providing that no action or proceeding pending at the time any ordinance shall be repealed shall be affected in any way by such repeal, so that the city authorities cannot hold an application in abeyance for the purpose of repealing the ordinance under which it was made and enacting another, thus exacting another higher license fee. State v. Baker, 32 Mo. App. 98 (1888).

b. *Must not be discriminating.*

The effect of constitutional provisions upon discriminating license fees, which is applicable alike to state and municipal licenses, is treated *supra*, II. a, *Provisions against discrimination*. But the principle of municipal law requiring municipal ordinances to be reasonable, operates to prevent improper discriminations in fixing the rates for municipal licenses.

Thus, authority conferred upon municipal authorities to levy license taxes upon privileges, does not authorize them to create a privilege for the purpose of taxing it or to discriminate between persons exercising the same privilege by taxing one at a higher rate or in a different mode from another. Nashville v. Althrope, 5 Coldw. 554 (1868).

And a municipal ordinance passed under a general power exacting a license for selling goods, fixing a much larger rate of license for selling such as are not in the city or *in transitu* to it, than for such as are within it or *in transitu* to it, is unjust, unequal, partial, oppressive, and in restraint of trade, and therefore invalid. *Ex parte* Frank, 2 Cal. 606, 28 Am. Rep. 642 (1878).

So, an agent of a mercantile firm from another state taking orders by sample within a city is liable to taxation therein, if at all, as a merchant only, and a municipal requirement of a license fee of $300 per annum for the privilege of selling goods by sample in a city declaring it a separate avocation is invalid as discriminating against merchants selling by sample. Nashville v. Althrop, *supra*.

And a municipal ordinance providing that any person who shall sell or contract to sell in a designated city or county, or cause to be sold, or solicit the sale or purchase of, any goods, wares, or merchandise, or other property with designated exceptions which is still in original packages, without at the time having the goods at or in the said city or county, or a bill of lading or receipt of a common carrier showing that the goods therein named had been shipped and were *in transitu* to such city or county, shall pay a license in proportion to the amount of business done, is obnoxious to the objection that it is unjust and oppressive in that it discriminates between merchants of the same place against one who deals in goods outside the corporate limits and not actually *in transitu*, and obstructs commercial intercourse between the seaports and interior, and is in restraint of trade, exacting a heavy tribute from the owner of goods outside the corporate limits and not *in transitu* as a condition on which he will be allowed to offer them for sale therein. *Ex parte* Frank, *supra*.

And an ordinance impoeing a prohibitive license fee on hawkers and peddlers, which practically exempts residents, is invalid for discrimination between residents and nonresidents. Brooks v. Mangan, 86 Mich. 576 (1891).

So, in Columbia v. Beasly, 1 Humph. 232, 34 Am. Dec. 648 (1839), it was said that municipal corporations may tax privileges in such proportion as they choose, but the inequality must not be such as to make the tax oppressive on a particular class.

And in McGrath v. Newton, 29 Kan. 364 (1883) an ordinance levying a license tax on a large number of different kinds of business at different rates, in some instances charging transients more than persons permanently located, was attacked upon the ground that it was in restraint of trade and dis-

cupations. All that we maintain is that an occupation tax which is not equal and uniform violates the Constitution,'"—in reply to which the court remarks: "Is, then, the clause under consideration so vague as to be wholly unsusceptible of a practical meaning, and the force of the provision to be defeated from a want of some indefinable equality and uniformity existing in the imagination of learned counsel, but so subtle in its character as to defy the ordinary use of language in its description? In construing this section, force and meaning must be given to every part of it. We cannot suppose the convention intended to enact, as a part of the fundamental law of this state, a provision so doubtful and ambiguous, and at the same time so completely calculated to paralyze the energies and prostrate the resources of the state government. . . . The occupation of the humblest artisan, with no capital but his labor, the reward of whose toil secures to him only a scanty subsistence, must be taxed equally with the [occupation of the] richest merchant, banker, or broker, or if not equally, at least the state has no right to release the miserable pittance so cruelly wrung from his hard earnings." In that case it was held that the uniformity clause of the Constitutions did not apply to license fees upon occupations. We do not concur in all that was said in deciding that case. We have omitted a portion of the remarks from our quotation, and added a parenthesis which the language seems to need. The California supreme court

---

criminated against certain kinds of business, and that it was oppressive and unreasonable, but was upheld upon the ground that at least some of the items were legal, and that, owing to a misjoinder of parties having no community of interest, the judgment below would have to be affirmed, though the conclusion was reached that some of the taxes were void.

And a license fee of $50 per day, imposed on transient dealers under a police power, is invalid as discriminating between goods manufactured in the wholesale and manufacturing parts of the city and goods held for sale by dealers in the retail streets. Glaser v. Cincinnati, 31 Ohio L. J. 243 (1893).

But when the discrimination is between different classes, and consists of nothing more than a reasonable graduation of the license, the validity of the imposition is not affected.

Thus, a county ordinance is not invalid because it fixes a less rate of license for the business of selling liquors at a wayside tavern or watering place than for the same business carried on in a village, town, or city. Amador County v. Kennedy, 70 Cal. 458 (1886).

And an ordinance requiring a license for keeping a dram shop is not invalid because the price therefor is differential according to the street upon which the shop is located, all persons being left to apply for a license in whatever locality they choose. East St. Louis v. Wehrung, 46 Ill. 392 (1868).

And a city ordinance levying an annual license tax of $80 payable quarterly, upon druggists having permits from the probate court to sell intoxicating liquors, and an annual license tax of $5 upon druggists not having such permits, under statutes authorizing the levy of license taxes upon various kinds of business and occupations, is not illegal and void so far as it levies a greater tax upon druggists having such permit than upon those not having it. Tulloss v. Sedan, 31 Kan. 165 (1883).

Nor is a municipal ordinance requiring a license tax of $2,500 and a hospital tax of $50 of keepers of bar rooms or coffee houses who conduct concert saloons where theatrical plays are performed in the same room or building, unconstitutional and void as discriminating against their business by charging largely in excess of other business of the same character, because coffee houses are only required to pay $75 and theatrical plays $250. Goldsmith v. New Orleans, 31 La. Ann. 646 (1879).

And an ordinance requiring a license for exhibitions is not invalid because it requires the payment of a smaller fee for a license for a month than would be required for three weeks by the week. Webber v. Chicago, 50 Ill. App. 110 (1892), affirmed in 148 Ill. 313 (1894).

So, a license fee of $2.50 per day required by a municipality of professional hawkers and peddlers for selling merchandise similar to that kept by merchants or manufacturers in the city, is not objectionable as being partial and discriminating. Cherokee v. Fox, 34 Kan. 16 (1883).

And an ordinance imposing a license fee upon transient merchants is not to be regarded as discriminating against nonresident merchants merely because there may be no resident merchants who are compelled to pay the fee. Ottumwa v. Zekind (Iowa) 29 L. R. A. 734 (1895).

But ordinances fixing license fees with a view to protect the home merchants against a transient one cannot be passed under a power to license and regulate. Ottumwa v. Zekind, *supra (dictum)*.

And a license tax imposed upon persons engaged in raising, grazing, herding, or pasturing sheep, of $50 for every 1,000 sheep, required by a county ordinance, is not invalid as discriminating, special, unequal, or partial. *Ex parte* Mirande, 73 Cal. 365 (1887).

So, in Los Angeles v. Southern P. R. Co. 61 Cal. 59 (1882), a license tax of $429, charged against a steam railroad company having a depot in the city, was upheld under attack upon the ground that its business extended beyond the city limits.

See also *supra*, III., *Graduation of license fees.*

c. *Under a general power to regulate.*

I. *What may be included in the fee.*

A few of the cases have adopted and acted upon the theory that the fee for a license, required for the purpose of regulation only, should be limited to a sum sufficient to meet the necessary expenses incident to its issue.

Thus, in State v. Long Branch Comrs. 42 N. J. L. 364, 36 Am. Rep. 518 (1880), it was said that a fee for a license may be exacted under a grant of power for regulation only, but it should not exceed the necessary or proper expense of issuing the license.

And in Mobile v. Yuille, 3 Ala. 137 (1841), the court doubted the validity of a provision for the forfeiture of bread of less weight than the ordinance required, and exacting from the baker as a price for his license a sum beyond what was necessary to compensate for issuing and registering it; but the case was decided on other grounds.

And in State v. Herod, 29 Iowa, 123 (1870), it was held that a charge of a license fee of $5 for every vehicle used for the purpose of carrying passengers, upon persons engaged in such business, is not unreasonable when it is scarcely, if any, more than is necessary to pay the clerk's fine connected with the registry of the vehicles.

But the general rule is that a license tax imposed for regulation is intended as a means of carrying the regulation into effect. Vansant v. Harlem Stage Co. 59 Md. 330 (1882) *(dictum)*.

And that a power to license as a means of regulation implies the power to charge a fee therefor, sufficient to defray the expense of issuing the license and to compensate the city for any expense

has not followed that case, in whole. *People* v. *McCreery*, 34 Cal. 433. But the principle that the uniformity clause does not apply to license fees has been maintained in California. *Ex parte Hurl*, 49 Cal. 557. It was again said in *Santa Barbara* v. *Stearns*, 51 Cal. 499: "A license charge or fee for the transaction of business is, in our opinion, a tax, within the meaning of the term 'tax,' as employed in those sections [referring to sections other than the uniformity clause]. It is not a tax within the meaning of section 13 of article 11 of the Constitution [which is the uniformity section of the California Constitution]. . . . *People* v. *Coleman*, 4 Cal. 46, 60 Am. Dec. 581; *People* v. *Raymond*, 34 Cal. 492; *Sacramento City and County* v. *Crocker*, 16 Cal. 119; *Taylor* v. *Palmer*, 31 Cal. 240; *Emery* v. *San Francisco Gas Co.* 28 Cal. 345; *Emery* v. *Bradford*, 29 Cal. 75; *Ex parte Hurl*, 49 Cal. 557; Cooley, Const. Lim. 201." See also *San José* v. *San José & S. C. R. Co.* 53 Cal. 475; *Ex parte Mirande*, 73 Cal. 375; *Ex parte Sisto Li Protti*, 68 Cal. 635; *People* v. *Thurber*, 13 Ill. 554; *East St. Louis* v. *Wehrung*, 46 Ill. 392; *Slaughter* v. *Com.* 13 Gratt. 767; *Baker* v. *Cincinnati*, 11 Ohio St. 534; *Kleizer* v. *State*, 15 Ind. 449.

The alleged inequality or nonuniformity of this classified laundry license does not seem to be such as to grant a monopoly, or such as to be prohibitory of a legitimate trade or occupation. We are of opinion that the first sentence of section 1, article 12, and the whole of sec-

---

incurred in maintaining such regulation. *Re* Wan Yin, 10 Sawy. 532 (1885); Jacksonville v. Ledwith, 26 Fla. 163, 9 L. R. A. 69 (1890); Vansant v. Harlem Stage Co. *supra* (*dictum*); Mankato v. Fowler, 32 Minn. 364 (1884) (*dictum*).

And the power to regulate and inspect justifies the imposition of such fees and charges as will cover the expense of inspection as well as the police supervision necessary to prevent the business to be regulated from becoming harmful to the public. Jacksonville v. Ledwith, 26 Fla. 163, 9 L. R. A. 69 (1890).

Thus, shows and performances require inquiry as to the character of those who propose to exhibit, and as to the nature of the thing to be exhibited, and the exhibition may require additional attention from those entrusted with the public peace to prevent disorder and disturbances, the burden thus devolved on the public officials requiring perhaps an increase in their number or compensation for the benefit of exhibitors, and so may justly be charged a license fee of an amount greater than the expense of filling up a blank. Baker v. Cincinnati, 11 Ohio St. 534 (1860).

And a grant of municipal authority to regulate the vending and inspection of meats, etc., justifies the imposition of such fees as will cover the expenses of the inspection of the articles offered for sale as well as of the police supervision of the business necessary to prevent its becoming harmful to the public. Jacksonville v. Ledwith, *supra*.

And the power to regulate the soliciting from travelers of patronage for hotels, conferred upon municipal corporations by Mansf. (Ark.) Dig. § 751, gives them the right to charge a license fee sufficient in amount to cover the expense of the license and of the enforcement of such police superintendence as may be lawfully exercised over the business. Fayetteville v. Carter, 52 Ark. 301, 6 L. R. A. 509 (1890).

So, in Van Hook v. Selma, 70 Ala. 361, 45 Am. Rep. 85 (1881), the rule was laid down that the amount exacted for a license, when designed for regulation and not for revenue, is not to be confined to the expense of issuing it, but that a reasonable compensation may be charged for the additional expense of municipal supervision over the particular business or vocation at the place where it is licensed.

And the expense of issuing and of regulation have been said to constitute the extreme limit.

Thus, in Jacksonville v. Ledwith, 26 Fla. 163, 9 L. R. A. 69 (1890), it was said that no more can be charged for a license than the necessary expense of issuing it and of the labor of officers and other expenses caused to the public by the business licensed.

And in St. Louis v. Boatmen's Ins. & T. Co. 47 Mo. 150 (1870), and St. Louis v. Marine Ins. Co. Id. 163 (1870), it was held that a power to license insurance companies limits the right to charge a fee therefor to such an amount as will cover the necessary expenses of issuing it and the additional labor of officers and the expense thereby incurred.

And in Burlington v. Putnam Ins. Co. 31 Iowa, 102 (1870), it was said the license should be charged for as such, and only to such extent as may reasonably compensate the city for issuing and enforcing the license and for the care exercised by it under its police authority over the particular person licensed.

And in Moore v. Minneapolis, 43 Minn. 418 (1890), it was said that a charge of $1 for the clerical work of issuing a license, in addition to the fee prescribed by the ordinance providing for it, is unauthorized; but the recovery for the sum thus paid was refused because the complaint did not properly allege a cause of action therefor.

But the power to impose licenses for municipal purposes carries with it power to consider and determine the nature of the occupations, trades, and business to be licensed, and to discriminate between the business which may be useful and beneficial to the community and that which may be immoral or disorderly in its nature and tendency, and fix the fees therefor at such sums as shall be equitable and just. *Re* Guerrero, 69 Cal. 88 (1886).

And the license charged should not ordinarily be as great in case of occupations, trades, and professions which are beneficial to the community as in case of those not useful or beneficial, especially when immoral in their nature and tendency. Van Hook v. Selma, 70 Ala. 361, 45 Am. Rep. 85 (1881) (*dictum*).

In granting licenses the items which may be taken into consideration as elements in fixing the cost are the value and material in merely allowing and issuing the license, the value of the benefit of the license to the person obtaining the same, the value of the inconvenience and cost to the public in protecting such business and in permitting it to be carried on in the community and in some cases an additional amount imposed as a restraint upon the number of persons who might otherwise engage in the business. Leavenworth v. Booth, 15 Kan. 627 (1875) (*dictum*).

Thus, where the occupation, like peddling, is liable to degenerate into a public nuisance if not restrained, it is a legitimate exercise of the police power to impose a license fee large enough to act as a restraint upon the number of persons who might otherwise engage in it, though the sum exacted is greater than the expense of issuing a license and of police supervision over the business. Duluth v. Krupp, 46 Minn. 435 (1891).

And a municipal requirement of a license to peddle or deliver milk and of a fee of not less than $500 or more than $10 for every vehicle used for that purpose, under a power to license such persons as shall be best calculated to secure a supply of

tion 11, article 12, are upon the same subject, and must be read together, and that they refer to taxation, and the equality and uniformity thereof, and that the last sentence of section 1, article 12, upon licenses, does not fall within the uniformity provision.

The laundry license fee is not obnoxious to the provisions of section 1 of the 14th amendment to the Constitution of the United States. *Home Ins. Co.* v. *New York*, 134 U. S. 594, 33 L. ed. 1025; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810.

It is also set up in the petition for the writ of mandamus, and, of course, admitted by the demurrer, that the relator below, and respondent here, is a subject of the emperor of China, and that the provision of the law requiring a fee of $25 from a male laundryman with one assistant was meant and intended to affect only Chinamen; that Chinamen are engaged in the class of laundry business falling within the $25 fee; that steam laundries employ a large number of persons, and make greater profits than the petitioner or his countrymen; and that he will not be able to conduct his business in competition with the steam laundry, if he is required to pay the license fixed by the laws cited. The fact that Chinamen are engaged in the hand laundry business is purely fortuitous. *Singer Mfg. Co.* v. *Wright*, 33 Fed. Rep. 121. The law, in its terms, applies to all male laundrymen, of every condition and nationality. If the equality and uniform-

---

pure and wholesome milk, is a means of regulation and control and a proper restraint upon persons by whom milk is offered, and within the scope of the power granted. People v. Mulholland, 82 N. Y. 324, 37 Am. Rep. 568 (1880).

So, a license fee charged for the keeping of dogs is not invalid because more than the sum required for the expense of issuing it, as dogs are liable by running mad and destroying sheep to do great mischief, and the license fee may be fixed therefor with a view to restraint as well as regulation. Tenney v. Lenz, 16 Wis. 566 (1863).

And in Cole v. Hall, 103 Ill. 30 (1882), a license fee imposed by a municipality, of $1 for each dog, upon the owner thereof for the purpose of indemnifying the owners of sheep in case of damage committed by dogs, was upheld on that ground.

And a license fee required for keeping a saloon may be fixed at such an amount as will produce a considerable revenue in excess of the amount required for regulation, where the object is to restrain the number of places and keep the business within control. Kitson v. Ann Arbor, 26 Mich. 325 (1873).

So, a sufficient sum may be charged for a license to wholesale liquor dealers to restrict the persons selling as well as to compensate the municipality for additional police expenses that may directly or indirectly result from the traffic, as a license to wholesale dealers for police supervision, as well as in case of licenses authorizing sales in smaller quantities. Dennehy v. Chicago, 120 Ill. 627 (1887).

Thus, a municipal ordinance fixing the price of a retail license for the sale of spirituous liquors for one year at $125 is not designed to raise revenue, and is in no proper sense a tax, but a part of the police regulations, the fee being intended to prevent the indiscriminate opening of establishments for the sale of liquor thought to be dangerous to the public peace and morals. Burch v. Savannah, 42 Ga. 506 (1871) (*dictum*).

And a municipal requirement of a license of $50 per quarter or $200 per year for the sale of spirituous liquors will not be declared illegal when it does not appear but what that amount is necessary to properly regulate the business by confining it to fewer and more responsible persons, or in some other way tending to the preservation and enforcement of good order and the general welfare of the city. *Ex parte* McNally, 73 Cal. 632 (1887).

So, in Dennehy v. Chicago, *supra*, a license of $500 per annum charged to wholesale liquor dealers, was upheld.

The only license fee that can be required for ordinary legitimate kinds of business, like that of butcher, baker, auctioneer, or the like, which are not liable to become public nuisances, however, should be a sufficient sum to pay the cost of issuing the license and defray the expense of necessary police supervision, and it should not be competent to attempt to restrain the number of persons engaging in them by the imposition of a large fee. Duluth v. Krupp, 46 Minn. 435 (1891) (*dictum*).

Thus, a license tax of $500 imposed upon railroad ticket brokers or scalpers under a power to license, tax, and regulate is excessive, exorbitant, and illegal, where it would have the effect of prohibiting the business, as it is not *per se* injurious to the public. Hirshfield v. Dallas, 29 Tex. App. 242 (1890).

Nor is an annual license fee of $25 for selling vegetables in the streets of a city authorized under a power to regulate, where that sum is much in excess of what is necessary to cover the expense of its issue, as the business is not pernicious but beneficial, and there is little occasion for police supervision. St. Paul v. Traeger, 25 Minn. 248, 33 Am. Rep. 462 (1878).

And the occupation of an emigrant agent does not belong to that class which is so inherently harmful or dangerous to the public that it may be restricted or prohibited by the requirement of a prohibitive license fee or otherwise, where the occupation consists merely in hiring laborers in the city to be employed beyond its limits. State v. Moore, 113 N. C. 697, 22 L. R. A. 472 (1893).

So, in Marmet v. State, 45 Ohio St. 77 (1887), the general rule was laid down that power to regulate by license and to compel the payment of a reasonable fee may be maintained where a special benefit is conferred at the expense of the general public, or the business imposes a special burden on the public, or where the business is injurious to or involves danger to the public.

And in Perdue v. Ellis, 18 Ga. 586 (1855), in which an ordinance fixing the price of a retail liquor license at $500 was attacked on the ground that it was in restraint of trade, the court intimated its opinion that the price of a license ought to vary according to the profits of the business and other circumstances, but the ordinance was upheld on the ground that it was duly authorized by charter provision and therefore valid.

So, a license tax upon the business of running drays, imposed under a power to license and regulate, will not be held void as in restraint of trade and the levy of a tax, where the employment gives the draymen or hackmen special privileges which they enjoy to the prejudice of the city in the injury necessarily done to her streets and pavements of an amount far greater than the price of a license. Cincinnati v. Bryson, 15 Ohio, 625, 45 Am. Dec. 593 (1846).

And it is competent for a city council in fixing the sum required for a license to look at the probability that the city might be put to an expense in litigation and to other expenses arising out of the business licensed, as well as at the expediency of fixing such prices as to prevent persons from embarking in the business who could not furnish such evidence of their responsibility as that required by

ity provisions of the Constitution do not apply to the license fee under consideration, the subjects of the emperor of China are certainly in no different or better condition to make complaint than the subjects of any other foreign power who may be residing within the state, or even the citizens of the United States themselves.

We are of opinion that the district court erred in issuing the writ of mandate. The questions which we have determined in this opinion are the only ones presented upon the appeal, and upon them is rested the decision. *It is ordered that the judgment be reversed,* and the case be remanded, with directions to dismiss the writ.

Pemberton, Ch. J., and Hunt, J., concur.

IOWA SUPREME COURT.

STATE of Iowa
v.
V. A. WHEELOCK, *Appt.*

(.....Iowa.....)

1. A reasonable license fee charged upon itinerant vendors of drugs or articles intended for the treatment of diseases, who publicly profess to cure or treat diseases, is not an unconstitutional interference with interstate commerce, although the medicines sold are in original packages brought from another state.

2. A license fee of $100 per annum, charged upon an itinerant vendor of drugs professing to cure or treat all diseases, is not unreasonable.

---

the payment of the fee. St. Paul v. Colter, 12 Minn. 41, 90 Am. Dec. 278 (1866).

And that a license tax imposed upon a telegraph company is wholly disproportioned to the usual, ordinary, or necessary expenses of municipal officers of issuing licenses and other expenses thereby imposed by the municipality, is not sufficient as a defense against the payment thereof where the liability imposed upon the city by the erection of telegraph poles is not considered. Chester City v. Western U. Teleg. Co. 154 Pa. 464 (1893).

But a license fee of an amount much greater than the cost of controlling and supervising the licensee cannot be sustained on the ground that demands might be made against the municipality imposing it on account of the licensee. Philadelphia v. Western U. Teleg. Co. 40 Fed. Rep. 615, 2 Inters. Com. Rep. 728 (1889).

See also, as to a larger license fee than is necessary to meet expenses of regulation, *supra*, IV. c, 3, *Distinction between measures for revenue and for regulation;* IV. c, 7, *What impositions are reasonable.*

And see *infra*, 2, 3, of this section, as to the effect of fixing a license fee at a figure which will produce revenue.

2. *Must not be for revenue.*

A power to license and regulate does not confer authority to tax for revenue purposes. Vansant v. Harlem Stage Co. 59 Md. 350 (1882); Van Hook v. Selma, 70 Ala. 361, 45 Am. Rep. 85 (1881); Jacksonville v. Ledwith, 26 Fla. 163, 9 L. R. A. 69 (1890); Burlington v. Putnam Ins. Co. 31 Iowa, 102 (1870); Littlefield v. State, 42 Neb. 223, 28 L. R. A. 588 (1894); State v. Long Branch Comrs. 42 N. J. L. 364, 36 Am. Rep. 518 (1880); State v. New Brunswick, 43 N. J. L. 175 (1881); State v. Hoboken, 41 N. J. L. 71 (1879) (*dictum*).

And a license tax imposed by a city under its police power is invalid where the fees required are not for the purpose of paying the costs of labor and material in issuing the license and it is clearly intended as a means of revenue. Jackson v. Newman, 59 Miss. 365, 42 Am. Rep. 367 (1882); Van Hook v. Selma (*dictum*); State v. New Brunswick, and State v. Hoboken, *supra.*

And a power to grant licenses for the privilege of carrying on trades and regulating the price therefor is a police power which does not give the right to use a license as a mode of taxation for revenue, and the fee must be reasonable for the purpose of regulation. State v. Bean, 91 N. C. 554 (1884).

And a charter provision, giving the city court exclusive jurisdiction to license innkeepers within the city limits, does not authorize the imposition of a tax on innkeepers for the license issued. Essex County Freeholders v. Barber, 7 N. J. L. 78 (1823).

Thus, in Jackson v. Newman, *supra*, a fee of $40 per year exacted by a city for a license for hack driving under its police power was held to be invalid as clearly intended as a means for raising revenue.

And a power to license insurance companies does not confer a right to charge a license fee therefor with a view to revenue, unless that seems to be its manifest purpose, but is limited to such a charge for the license as will cover the necessary expenses of issuing it and the additional labor of officers and the expense thereby incurred. St. Louis v. Boatmen's Ins. & T. Co. 47 Mo. 150 (1870); St. Louis v. Marine Ins. Co. 1d. 163 (1870).

And a power to grant or refuse licenses to insurance companies does not justify a municipal requirement of the payment by insurance companies of 1 per cent of the premiums into the city treasury in addition to the sums required for licenses, such an exaction being a tax. Burlington v. Putnam Ins. Co. 31 Iowa, 102 (1870).

And a municipality authorized by charter provision to appoint measurers of coal, wood, etc., brought in for market and sold therein, and to make them a reasonable allowance and make such regulations as may be necessary and proper for carrying the same into effect, and inflict penalties for breach of such regulations, does not authorize the levy of a tax on coal, etc., for revenue purposes. It has power to tax thereunder only so far as is necessary to defray charges of inspection and measurement when required. Collins v. Louisville, 2 B. Mon. 134 (1841).

So, a grant of authority to regulate the vending of meats, etc., does not give power to tax the occupation of vending any of the named articles. Jacksonville v. Ledwith, 26 Fla. 163, 9 L. R. A. 69 (1890).

And a charter provision authorizing a municipality to license and regulate hawkers, peddlers, and others confers police power for the purpose of regulation only, and ordinances passed thereunder requiring a larger amount are in effect revenue measures and illegal. State v. New Brunswick, 43 N. J. L. 175 (1881).

A market, being a franchise or technical privilege, is not taxable except for regulation, under a charter provision authorizing taxes for the purpose

See also 41 L. R. A. 501; 47 L. R. A. 583; 48 L. R. A. 417.

(October 10, 1895.)

APPEAL by defendant from a judgment of the District Court for Shelby County convicting him of being an itinerant vendor of drugs and nostrums without a license, contrary to the provisions of the statute. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Pfau & Young** and **Whitney Brothers**, for appellant:

The powers vested in Congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes is a power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution.

Leisy v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823.

While, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet a subject-matter which has been confined by the Constitution exclusively to Congress is not within the

---

of revenue upon all property and privileges taxable by the state for state purposes, and licensing, taxing, and regulating auctioneers and certain other designated employments and all other privileges taxable by the state, the term "all other privileges" meaning others of the same kind as those designated. Jacksonville v. Ledwith, *supra*.

And a license tax of 25 cents per day for keeping a private butcher's stand within the corporate limits of a town cannot be imposed under police powers to regulate private markets or the selling of meats, etc., at private stands. Delcambre v. Clere, 34 La. Ann. 1050 (1882).

These cases and those in the following subdivision are to be distinguished from those under statutes or charter provisions conferring the power to tax as well as to regulate. Cases of the latter character are collected, *infra*, IV. e, *Under a power to tax or license.*

There is some apparent conflict between the cases in the above subdivision and some of those in the following one by which the rule is laid down that the mere fact that a measure for regulation incidentally produces revenue will not invalidate it when its primary purpose is regulation or restraint, but in view of the latter class of cases, and of the absolute impossibility of fixing a rate which will just suffice to regulate without the slightest variation, it is thought that the above cases must be taken as going no farther than to prohibit the use of a power to regulate either for the sole purpose of revenue or with revenue as one of its direct purposes.

3. Distinction between measures for revenue and for regulation.

A reasonable fee for a license issued under a power to regulate is not a tax but simply a sum collected of the party interested for the purpose of defraying necessary expenses attending its issuance. St. Paul v. Dow, 37 Minn. 20 (1887).

And a measure adopted by a city in the exercise of a power to regulate will be upheld by the courts when plainly intended as a police regulation and the revenue derived therefrom is not disproportionate to the cost of issuing the license and regulation of the business licensed. Littlefield v. State, 42 Neb. 223, 28 L. R. A. 588 (1894).

And a license fee charged by a city for keeping a stall for the sale of fresh meats outside of the public market is not a tax, but compensation demanded from those who will not sell in the public market, for the additional expense thereby caused. Ash v. People, 11 Mich. 347, 83 Am. Dec. 740 (1863).

Thus an ordinance requiring each owner of a dog to procure a collar and pay a tax of $2 for each dog owned by him is not a revenue measure though called a tax, but is a valid exercise of the power to regulate. Com. v. Markham, 7 Bush, 486 (1870).

And a charge of 25 cents imposed by a municipality upon persons keeping stands in the market is not a tax, though so called in the ordinance providing therefor, but a price demanded for accommodations provided, which is justified under ordinary municipal powers. Cincinnati v. Buckingham, 10 Ohio, 257 (1846).

And a charge of $25 on each day's exhibition of a circus, imposed by statute, is a charge for a license to exhibit, and not a tax to which a percentage fixed by the board of police can be added for county taxes, under the Mississippi statute. Orton v. Brown, 35 Miss. 426 (1858).

And a license required for building, and a fee of 50 cents for each license to erect, enlarge, or add to any building, under a power to regulate the erection of buildings, is not a tax for revenue purposes. Welch v. Hotchkiss, 39 Conn. 140, 12 Am. Rep. 383 (1872).

If the fee required for a license is intended for revenue, however, its exaction is an exercise of the power of taxation. Home Ins. Co. v. Augusta, 50 Ga. 530 (1874) (*dictum*).

And the sum demanded for a license to pursue an employment when used as a means of supplying the public treasury is a tax on such employment which is unauthorized in the absence of the power to tax. Mays v. Cincinnati, 1 Ohio St. 268 (1853).

In Mays v. Cincinnati, *supra*, Cincinnati v. Buckingham, 10 Ohio, 257 (1846), was distinguished upon the ground that in that case the sum exacted was not a tax but rather a price demanded for the accommodations provided for the frequenters of the market by the city authorities.

So, the amount of a license fee or charge is to be considered in determining whether or not the exaction is really one for revenue or prohibition, instead of one for regulation under the police power. Atkins v. Phillips, 26 Fla. 281, 10 L. R. A. 158 (1890) (*dictum*).

And an exaction of a sum for a license in excess of what is necessary to cover public expenses, and graduated by the amount of business done, is a tax upon the business upon its face. State v. Long Branch Comrs. 42 N. J. L. 364, 36 Am. Rep. 518 (1880); *Re* Wan Yin, 10 Sawy. 552 (1885).

Thus, a license fee required of draymen, which is so large as not to be necessary to secure the objects of the grant of power and as to have been principally for revenue, is in effect a tax, and not within a charter power to regulate drays, etc. Fort Smith v. Ayers, 43 Ark. 82 (1884).

And an ordinance imposing a license fee of 25 cents per wagon on wagons run for hire, and an additional license tax of $2 for each six months for the privilege of exercising the vocation, is as a matter of law one for revenue purposes, and invalid when enacted under police power. Knox City v. Thompson, 19 Mo. App. 523 (1885).

So, a fee of $75 for an original license, imposed by a municipality upon owners of passenger omni-

jurisdiction of the police power of the state, unless placed there by congressional action.

Henderson v. *Wickham*, 92 U. S. 259, 23 L. ed. 543; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527; *Walling* v. *Michigan*, 116 U. S. 446, 29 L. ed. 691; *Robbins* v. *Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694; *Leisy* v. *Hardin*, *supra*.

Whenever a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the states may be exerted as if a specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that the power should not be affirmatively exercised.

Mobile County v. *Kimball*, 102 U. S. 691, 26 L. ed. 238; *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 30 L. ed. 244; *Robbins* v. *Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36.

The license is in effect a tax upon the goods shipped and sold by the licensee, upon the property of a nonresident while in the hands of the owner, and, before the same has become a part of the mass of the property of the state

---

buses upon each omnibus used within the corporate limits, and $50 for the annual renewal thereof, is unreasonable and excessive, and invalid as an attempted exercise of the power of taxation not granted by the statute. Vansant v. Harlem Stage Co. 59 Md. 330 (1882).

And a license fee exacted from gardners, of 25 cents for every load of vegetables sold in a public market, will be regarded as a measure for creating revenue and cannot be justified under the police power, where the presence of the gardners and their wagons does not cause additional expense to the city but tends to increase her revenue. State v. Blaser, 36 La. Ann. 363 (1884).

So, an ordinance requiring an annual license fee of $100 for the privilege of engaging in the fish and crab business at a designated market, enacted under a power to regulate markets and sell, lease, or dispose of the stalls and stands therein, is invalid as an effort to raise revenue under guise of the police power, where it is far in excess of the expense of issuing the license and regulation of the calling. State v. Rowe, 72 Md. 548 (1890).

And a license fee of $3 per month exacted for the privilege of selling butcher's meat was held to be a tax for revenue purposes, and not an exercise of police power conferred upon the corporation, and therefore illegal, in State v. Bean, 91 N. C. 554 (1884).

And a license fee of $25 for a saloon and $50 annually for peddling with a wagon, required of liquor dealers in addition to other licenses, is a revenue measure, and invalid as against one having a general license to sell beer in the county. Du Boistown v. Rochester Brewing Co. 9 Pa. Co. Ct. 442.

So, a license fee charged for the privilege of building vaults in the streets in front of the licensee's dwelling, which is graduated by the capacity of the vault, is a tax or assessment and not a regulation, within a charter provision authorizing the regulation of the building of vaults. State v. Hoboken, 33 N. J. L. 260 (1869).

So, a license fee of $250 per month or $25 per day for shorter periods, exacted from transient merchants by ordinance, is excessive and invalid as an attempted exercise of the taxing power, the fee not being required for regulation, and the business not being injurious or liable to become a nuisance. Ottumwa v. Zekind (Iowa) 29 L. R. A. 734 (1895).

Ottumwa v. Zekind, *supra*, distinguishes Decorah v. Dunstan Bros. *infra*, IV. c, 7, upon the ground that in that case the license tax was imposed upon auctioneers and not on transient merchants, and that auctioneers require more supervision.

And a license tax cannot be upheld as a provision for inspection with respect to goods brought from another state, when the amount of the tax is in excess of what is required for the purpose of inspection and the proceeds are applied to other uses. American Fertilizing Co. v. North Carolina Board of Agriculture, 43 Fed. Rep. 609, 11 L. R. A. 179 (1890).

The fact that a city derives a revenue incidentally from a reasonable exercise of its police power in licensing, regulating, and controlling a business, however, is no serious objection to such control. Mankato v. Fowler, 32 Minn. 364 (1884) (*dictum*); State v. Hoboken, 41 N. J. L. 71 (1879) (*dictum*).

And a reasonable license fee imposed under a power to regulate is not necessarily invalid because it incidentally produces revenue. St. Paul v. Colter, 12 Minn. 41, 90 Am. Dec. 278 (1866).

And a license fee will not be regarded as a revenue measure because fixed at a rate designed to prevent the indiscriminate engagement in the business licensed, where it is one which is dangerous to the public peace and morals. Burch v. Savannah, 42 Ga. 596 (1871) (*dictum*).

Thus, a reasonable charge for a license imposed by a municipality upon a railroad within its limits as a police regulation is valid and reasonable though it incidentally augments the receipts of the treasury. Johnson v. Philadelphia, 60 Pa. 445 (1869).

So, in Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419 (1882), it was said that the power to license is a police power though it may be used for the purpose of raising revenue.

But it must appear that the means adopted are such as are reasonably necessary to accomplish the purpose of regulation. State v. Hoboken, *supra* (*dictum*).

And a requirement of a license fee of $50 for large cars and $25 for small ones, of a street-railroad company, which regulates nothing but to prohibit the running of the cars until the fee is paid, is not a measure of regulation but the imposition of a tax. New York v. Second Ave. R. Co. 32 N. Y. 261, 34 Barb. 43 (1865).

So, a license fee for keeping a butcher's stand or selling articles within the corporate limits and without the market place is a tax for revenue, and not a contribution legally authorized in the exercise of the police power. Mestayer v. Corrigé, 33 La. Ann. 707.

Where the leading and primary purpose is regulation, it is a license and not a tax, though, as a secondary purpose, it is designed to produce revenue. *Ex parte* Gregory, 20 Tex. App. 210, 54 Am. Rep. 516 (1886).

Numerous cases illustrating as to what is reasonable for the purpose of regulation and what will be deemed an attempted exercise of the taxing power, will be found *infra*, IV. c, 7, *What impositions are reasonble*.

4. Must not be unreasonable or in restraint of trade.

The amount of a license fee exacted by a municipality for the transaction of a business in it, under a general power conferred by its charter, must be reasonable and not oppressive, partial or in restraint of trade. *Ex parte* Frank, 52 Cal. 606, 28 Am. Rep. 642 (1878); Bloomington v. Wahl, 46 Ill. 489 (1868).

seeking to tax it, is a measure regulating interstate commerce, and therefore void.

Brown v. *Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134; *Robbins* v. *Shelby County Tax. Dist.* and *Wabash, St. L. & P. R. Co.* v. *Illinois, supra; Cook* v. *Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *State Freight Tax Case*, 82 U. S. 15 Wall. 232, 21 L. ed. 146; *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158; *Wabash, St. L. & P. R. Co.* v. *Illinois, supra; Ratterman* v. *Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59.

The smallness of the license or tax does not eliminate its regulative character.

Brown v. *Maryland*, 25 U. S. 12 Wheat. 439, 6 L. ed. 685; *State Freight Tax Case*, 82 U. S. 232, 21 L. ed. 146.

The purpose for which the license for selling proprietary medicine in the state of Iowa is exacted does not render the statute constitutional if in effect it lays a burden upon interstate commerce.

State Freight Tax Case, supra.

Because the statute in question is indiscriminative it is not for that reason constitutional, in so far as it applies to the facts in the case at bar.

Bowman v. *Chicago & N. W. R. Co.* 125 U.

And it must not create oppressive monopolies but must be calculated to advance the general welfare of the inhabitants of the municipality. Bloomington v. Wahl, *supra.*

The amount of a license fee adopted under a power to grant licenses for the privileges of carrying on trades and regulating the price therefor, must be reasonable for the purpose of regulation. State v. Bean, 91 N. C. 554 (1884).

And an ordinance purporting on its face to be for the levying and collection of a license tax, but which is a clear and palpable attempt to destroy and prohibit a legitimate and commendable business, is invalid and cannot be enforced. Lyons v. Cooper, 39 Kan. 324 (1888).

And the invalidity of an ordinance fixing the price for a license to retail liquors at a prohibitory figure is not affected by the fact that a dealer who had submitted to its terms had done a prosperous business. *Ex parte* Burnett, 30 Ala. 461 (1857).

5. *Reasonableness, by whom determined.*

What is a reasonable license fee must depend largely upon the sound discretion of the city council with reference to all the circumstances of the case. *Re* White, 43 Minn. 250 (1890) (*dictum*); Mankato v. Fowler, 32 Minn. 364 (1884).

And the courts will not interpose and declare a license tax to be unjust and unreasonable unless a flagrant case of excessive and oppressive abuse of power by the city authorities in levying the tax is established. Lyons v. Cooper, *supra.*

So, in Osborne v. State, 33 Fla. 162, 25 L. R. A. 120, 4 Inters. Com. Rep. 731 (1894), a doubt was expressed as to whether judicial action could be based even upon a showing that the imposition was prohibitive or destructive to the business on which it was imposed.

But the courts have power to inquire into the reasonableness of a fee exacted in the exercise by a municipality of a power to regulate, though considerable latitude will be allowed for the exercise of legislative discretion. Littlefield v. State, 42 Neb. 223, 28 L. R. A. 588 (1894).

The city authorities are primarily at least the judges of what is a reasonable fee for a license, and it is not within the legitimate province of a court to fix the precise amount to be charged, but it is the right and duty of the courts to decide whether the amount so fixed is unreasonable or excessive. Vansant v. Harlem Stage Co. 59 Md. 330 (1882) (*dictum*).

And it belongs to the court to determine what are reasonable regulations made by a municipality within the power granted by charter. State v. Orange, 50 N. J. L. 389 (1888); Kip v. Paterson, 26 N. J. L. 298 (1857) (*dictum*); Glaser v. Cincinnati, 31 Ohio L. J. 243 (1893).

And whether the circumstances incident to the inspection or regulation of occupations justify the imposition of a rate prescribed by ordinance for a legitimate purpose, is a proper subject of testimony where the validity of the ordinance is in question. State v. New Brunswick, 43 N. J. L. 175 (1871) (*dictum*).

But evidence of the population of the city and county and of the annual sales of liquor and the profits therefrom is inadmissible on a jury trial in an action for violation of an ordinance imposing a license tax on liquor dealers claimed to be unreasonable and prohibitive in amount, the question of the reasonableness of the ordinance being one for the court. Elk Point v. Vaughn, 1 Dak. 113 (1875).

6. *Presumption of reasonableness.*

The amount required to be paid for a license demanded under a power to regulate, however, will be presumed to be reasonable unless the contrary appears. Fayetteville v. Carter, 52 Ark. 301, 6 L. R. A. 509 (1890); Van Hook v. Selma, 70 Ala. 361, 45 Am. Rep. 85 (1881); Littlefield v. State, 42 Neb. 223, 28 L. R. A. 588 (1894).

The judiciary will not declare such a requirement void unless from its inherent character or from previous proofs adduced it is shown to be unreasonable. Littlefield v. State, and Van Hook v. Selma, *supra.*

Every fair intendment should be made in favor of its reasonableness. Vansant v. Harlem Stage Co. 59 Md. 330 (1882) (*dictum*).

Whether it was intended as a regulation or a tax, see State v. Long Branch Comrs. 42 N. J. L. 364, 36 Am. Rep. 518 (1880) (*dictum*).

And where a municipal government imposes a license charge in the exercise of its police power on a business which, for the protection of the health of the community, requires daily inspection and supervision, the amount of the charge will be presumed to be reasonable and not a tax for revenue, unless the contrary appears on the face of the ordinance or is established by proper evidence. Atkins v. Phillips, 26 Fla. 281, 10 L. R. A. 158 (1890).

Thus, a municipal requirement of a license fee of $500 for the privilege of selling intoxicating liquor cannot be held as a matter of law to be so large as to render it void as unreasonable and prohibitory. Wiley v. Owens, 39 Ind. 429 (1872).

And it cannot be judicially assumed that a city ordinance requiring the payment of $50 every ninety days for the privilege of retailing spirituous liquors in quantities less than one quart in the city of Oakland is a virtual prohibition of the sale of such liquors. *Ex parte* Hurl, 49 Cal. 557 (1875).

And an ordinance exacting a license fee of $10 from all persons engaged in selling merchandise, enacted under a power to license for the purpose of regulation, will be held to be valid in the absence of anything to show that the amount exacted was unreasonable or in excess of the amount necessary for that purpose. Van Hood v. Selma, 70 Ala. 361, 45 Am. Rep. 85 (1881).

Neither will the court say as a matter of law that

S. 507, 31 L. ed. 714, 1 Inters. Com. Rep. 825; *Robbins* v. *Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694; *State Freight Tax Case, supra.*

The right to tax applies equally as well to the principal as to the agent.

Robbins v. *Shelby County Tax. Dist. supra.*

Interstate commerce cannot be interdicted or regulated under cover of police power.

Leisy v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Cooley* v. *Port Wardens*, 53 U. S. 12 How. 299, 13 L. ed. 996; *Robbins* v. *Shelby County Tax. Dist.* and *Bowman* v. *Chicago & N. W. R. Co. supra.*

Messrs. **Milton Remley**, Attorney General, and **Thomas A. Cheshire**, for appellee:

The state has power to levy a tax upon occupations.

State v. *Blair* (Iowa) 60 N. W. Rep. 486; *Howe Mach. Co.* v. *Gage*, 100 U. S. 676, 25 L. ed. 754; *Hinson* v. *Lott*, 75 U. S. 8 Wall. 148, 19 L. ed. 387; *Woodruff* v. *Parham*, 75 U. S. 8 Wall. 123, 19 L. ed. 382; *Nathan* v. *Louisiana*, 49 U. S. 8 How. 73, 12 L. ed. 992; *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Ward* v. *Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Kirtland* v. *Hotchkiss*, 100 U. S. 499, 25 L. ed. 562; *Wiggins Ferry Co.* v. *East St. Louis*, 102 Ill. 574; *Corson* v. *State*, 57 Md. 266; *Marshalltown* v. *Blum*, 58 Iowa, 184, 43 Am. Rep. 115; *Pacific Junction* v. *Dyer*, 64 Iowa, 38.

---

a license fee of $100 per boat is not within a power conferred upon a municipality to regulate and license. Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419 (1882).

And a license fee of $5 per annum for each skiff kept for use is not so plainly unreasonable that an ordinance requiring it will be held void, when there is nothing in the record from which it can be seen that such price is not entirely fair and just. Poyer v. Desplaines, 22 Ill. App. 576 (1887).

Nor is a license fee of $12.50, required under a power to regulate the soliciting from travelers of patronage for hotels, conferred upon municipal corporations by Mansf. (Ark.) Dig. § 751, unreasonable. Fayetteville v. Carter, 52 Ark. 301, 6 L. R. A. 509 (1890).

So, a license fee of $50 per annum for each car imposed by ordinance of the city of Chicago on street-car companies occupying its streets under a power to license, is not excessive or unreasonable upon its face. Allerton v. Chicago, 9 Biss. 552 (1880).

Neither is a license fee of $100 for one year, $60 for six months, $5 for one month, and $5 for one day, for peddling within the city of Duluth. Duluth v. Krupp, 46 Minn. 435 (1891).

Nor is a license fee of $10 for conducting an employment agency when the business is limited to the employment of females within designated counties, and of $150 when the business extends to the employment of males or of females elsewhere than in such counties. Moore v. Minneapolis, 43 Minn. 418 (1890).

And a municipal requirement of $10 per year for the privilege of peddling milk, and an additional fee of $2 per year for persons owning only two cows and delivering by hand, is not inherently unreasonable. Littlefield v. State, 42 Neb. 223, 23 L. R. A. 588 (1894).

There are New Jersey decisions, however, to the effect that the burden of proof of reasonableness rests with the municipality making the imposition.

Thus, an ordinance requiring a fee of 5 cents per load of all persons who sell hay or other produce and deliver the same within the city is unreasonable and illegal where it is not shown on the part of the city how the imposition will tend to promote good order. Kip v. Patterson, 26 N. J. L. 298 (1857).

And a license fee of $5 imposed on each hawker or peddler with the privilege of using one peddler wagon or cart under a police power is invalid, unless shown to be within the limit of the necessary or probable expense of issuing the license and inspecting and regulating the business licensed. State v. New Brunswick, 43 N. J. L. 175 (1881). But see State v. Long Branch Comrs. *supra.*

So, in Osborne v. State, 33 Fla. 162, 25 L. R. A. 120, 4 Inters. Com. Rep. 731 (1894), a license for $200 for doing express business in a state of 15,000 inhabitants was held not to be excessive when not shown to be prohibitive or destructive to the business of express companies.

7. What impositions are reasonable.

By unreasonableness the courts do not simply mean that the tax must not be larger than the judges might think wise, though a tax might be held unreasonable because of its oppressiveness, as, for example, when a business of $1,000 a year was taxed $900. Cooper v. District of Columbia, 4 MacArth. 250 (1880).

Reasonableness cannot be determined by any hard and fast rules, but is relative, depending upon the cost of regulation, the character of the business regulated, and the circumstances of each particular case.

Thus, a city cannot in the exercise of its police powers exact an exorbitant tax from a person engaged in the sale of spirituous or fermented liquors at a place remote from the settled portion of the city, where no police supervision is ever made over such place. Salt Lake City v. Wagner, 2 Utah, 400 (1879).

In Falmouth v. Watson, 5 Bush, 660 (1869), however, it was held that municipal authority to exact payment of not more than $300 from any person selling spirituous liquors by retail within 1 mile of the town is a police regulation, and is not unconstitutional as taking private property for public use, though it would be so if it were a mere tax for municipal purposes outside the municipal limits.

But in Salt Lake City v. Wagner, *supra*, Falmouth v. Watson, *supra*, was distinguished on the ground that in the latter case the vending of ardent spirits was in such proximity to the town as to render its exercise liable to affect the good order of the local community.

So ordinarily a large license fee will be held unreasonable when no regulation is attempted or needed.

Thus, an ordinance entitling the city constable to $2 for each night of attendance, to be paid by the owners or exhibitors of every theater, is unreasonable and invalid, when his services are unnecessary, and a city tax of $20 per month was provided for by a previous ordinance under a general charter, the object of which is the preservation of good order within the city. Waters v. Leech, 3 Ark. 110 (1840).

And a municipal by-law requiring a license fee of from $5 to $20 per month, at the discretion of the president, for keeping a huckster's shop, enacted under a power to make prudential by-laws and regulations not contrary to law, is unreasonable and in restraint of trade where it is not shown that any restriction was necessary or that such shops could be an evil if conducted under proper regulations. Dunham v. Rochester, 5 Cow. 462 (1826).

And a license tax of $20 a year, imposed by a municipality upon proprietors of wash houses un-

The statute under which defendant was indicted does not discriminate against nonresidents.

State v. *Gouss*, 85 Iowa, 21; *State* v. *Parsons*, 124 Mo. 436.

The law in question is within the police power of the state as well as the taxing power.

Thorpe v. *Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Com.* v. *Alger*, 7 Cush. 84; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394; *Council Bluffs* v. *Kansas City, St. J. & C. B. R. Co.* 45 Iowa, 342, 24 Am. Rep. 773; Tiedeman, Pol. Powers, § 85; *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23.

After the box, or barrel, or crate in which goods are shipped is opened, the articles contained therein, because done up in small boxes, bottles, or cans, cannot be called and treated as original packages.

Keith v. *State*, 91 Ala. 2, 10 L. R. A. 430; *State* v. *Parsons*, *supra*; *Com.* v. *Schollenberger*, 156 Pa. 201, 22 L. R. A. 155, 4 Inters. Com. Rep. 488; *Re Harmon*, 43 Fed. Rep. 372; *Smith* v. *State*, 54 Ark. 248; *State* v. *Chapman*, 1 S. D. 414, 10 L. R. A. 432.

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

The conviction of the defendant was had under section 10 of chapter 75 of the Acts of the 18th General Assembly, as amended by section 2 of chapter 137 of the Acts of the 19th General Assembly and section 3 of chapter 83 of the Acts of the 21st General Assembly, which

---

der a power to regulate, is an unreasonable and arbitrary exaction for the purpose of revenue, and invalid where there is nothing in the business or proposed regulation from which the city is likely to incur any special expense. *Re* Wan Yin, 10 Sawy. 532 (1885). But see principal case, STATE v. FRENCH, in this connection.

So, a license fee of $1,000 on the occupation of an emigrant agent, unaccompanied by any police regulation whatever, is unreasonable, prohibitive, and illegal. State v. Moore, 113 N. C. 697, 22 L. R. A. 472 (1893).

And an ordinance establishing a license fee of $3 for each vehicle drawn by two horses, and $1 for each vehicle drawn by one horse, enacted under a power to regulate and license vehicles, is invalid, as a revenue measure, where no attempt is made to regulate and all classes of business may be carried on by those who pay the license. Brooklyn v. Nodine, 26 Hun, 512 (1882).

And as a general rule, at least with reference to employments not requiring restraint, a fee which is disproportionate to the cost of regulation will be deemed unreasonable.

Thus, license fees imposed by municipalities upon a corporation occupying its streets, amounting in all to $1,600 per annum, is unreasonable and void in the absence of a power to tax, where the cost of supervising and controlling the corporation for the protection of persons and property had for several years been only $35 per annum. Philadelphia v. Western U. Teleg. Co. 40 Fed. Rep. 615, 2 Inters. Com. Rep. 728 (1889).

And a municipal ordinance imposing a license tax upon a railroad company of $15 for every one-horse car, and $25 for every two-horse car, which would amount annually to about $1,745, under a police power to regulate, is invalid as a revenue measure where there is nothing to show that such sum would be a reasonable compensation for inspecting and regulating the company's business. State v. Hoboken, 41 N. J. L. 71 (1879).

But in New Orleans v. New Orleans City & Lake R. Co. 40 La. Ann. 587 (1888), a license fee of $25 per year for carrying on and operating a horse and steam railway for the transportation of passengers was upheld under attack upon the ground that it was not a business, within the meaning of the law, which could be subjected to the payment of a license.

So, a license fee of 25 cents for every load of vegetables in carts or wagons sold at a public market, to meet the expense of issuing a license authorizing the licensee to back his wagon against the banquette, and of facilities afforded to gardeners of the city, is unreasonable where no shelter is afforded and such payments would amount to about $91 per year each. State v. Blaser, 36 La. Ann. 363 (1884).

And it cannot be deemed an exaction to meet expenses necessary for the preservation of order among wagons and teamsters where it is only imposed upon persons not occupying stalls therein. *Ibid.*

And a license fee of $10 per month, imposed solely on street peddlers of fresh meat selling less than a specified quantity in a village having no market and therefore no market regulations, would be excessive and unreasonable and in restraint of trade. Chaddock v. Day, 4 L. R. A. 809, 75 Mich. 527 (1889).

But a license fee of $15 per year for the right to sell meats in the city of Chicago would be sustained under a power to regulate, even if the narrow rule were followed that under the power to regulate the license fee cannot exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers. Kinsley v. Chicago, 124 Ill. 359 (1888).

And a monthly license of $5 charged by a municipality for vending fresh meats outside of the public markets, at private markets, will not be deemed an abuse of power or an unauthorized attempt to raise revenue, where such sales require daily inspection and supervision for the protection of the public health. Atkins v. Phillips, 26 Fla. 281, 10 L. R. A. 158 (1890).

And a license fee of $5 for keeping a stall for the sale of fresh meats outside of a public market may be required by a municipal corporation in the exercise of its police power for the maintenance of the public health. Ash v. People, 11 Mich. 347, 83 Am. Dec. 740 (1863).

And in *Ex parte* Heylman, 92 Cal. 492 (1891), a municipal ordinance taxing a license fee for selling meat from vehicles or baskets at $75 per quarter, and for selling fish, vegetables, fruit, game, poultry, etc., from vehicles or baskets at $10 per quarter, was held to be valid, but the ground upon which it was attacked does not appear.

So, a license tax imposed upon water companies without regard to their respective use of the city streets or the labor cast upon the city by such use, or anything to indicate that the fee is exacted for any additional police supervision made necessary by such use, is not authorized by the police power conferred upon the city by the general welfare clause of its charter. Wilkesbarre v. Crystal Springs Water Co. 7 Kulp, 31 (1895).

But a city ordinance imposing upon telegraph companies a license tax of $1 per year for each pole is not so unreasonable in amount as to justify the court in interfering with the discretion of the municipal authorities. Chester City v. Western U. Teleg. Co. 154 Pa. 464 (1893).

And in New Orleans v. Louisiana Sav. Bank, 31 La. Ann. 637 (1879), a license tax of $1,000, imposed by a city upon banks was upheld under a claim by a savings bank that such tax was included in a charter exemption from taxation except on real estate.

contains the following: "Any itinerant vendor of any drug, nostrum, ointment, or appliance of any kind intended for the treatment of diseases or injury, who shall by writing or printing or by any other method publicly profess to cure or treat diseases or injury or deformity by any drug, nostrum, or manipulation, or other expedient, shall pay a license of $100 per annum, to be paid to the treasurer of the commission of pharmacy. . . . Any person violating this section shall be deemed guilty of a misdemeanor and shall upon conviction pay a fine of not less than $100 and not more than $200." In July, 1894, the defendant was engaged in the business of selling on commission proprietary medicines which were manufactured in the state of Minnesota by J. R. Watkins, and were owned by him until sold. He was a resident of Minnesota, and the medicines were placed in glass bottles, securely corked, sealed, and capped, and were brought into the state, and sold in the original packages in which they were placed by the manufacturer. The medicines as prepared, and as received in this state by the defendant, were a legitimate subject of commerce, and were not injurious to the public health. They were transported by Watkins from the place where they were manufactured to Harlan, in this state, where they were received by the defendant, and there offered for sale. In making the sales he traveled from place to place with a team and wagon, and, while so engaged, sold one of the packages to one M. B. Howe, in Shelby county,

---

And in Chicago Pkg. & P. Co. v. Chicago, 88 Ill. 221, 30 Am. Rep. 545 (1878), a charge of $100 per annum for a license for running a slaughter house was upheld, but the question upon which the case turned was that of the power to require it under a statute giving cities and villages power to regulate the management, etc., of such houses within their limit and to the distance of 1 mile beyond, where the slaughter house in question was situated outside the city but within the mile limit and in another town by which it was required to pay a license.

So, a fee of $300 for an auctioneer's license is unreasonable as a police regulation in a city of 6,000 or 7,000 inhabitants whose trade is chiefly local and at retail, and where it proves to have prevented all auction sales from the date of its requirement. Mankato v. Fowler, 32 Minn. 364 (1884).

And a license tax of $10 per day for not less than ten days, imposed upon persons selling or exposing for sale at auction any bankrupt or other stock of goods in a city containing more than 5,000 inhabitants, is invalid, as being oppressive, prohibitive, and unreasonable considering the nature of the business. Caldwell v. Lincoln, 19 Neb. 569 (1886).

But a license tax of $5 per day for sales by auction is not so high that the courts will adjudge it unreasonable and oppressive and in restraint of trade when the city contains more than 2,000 inhabitants and it is matter of common knowledge that permanent auction stores are scarcely ever found therein. Fretwell v. Troy, 18 Kan. 271 (1877).

And an ordinance authorizing the mayor to fix the amount of a license for selling at auction at not to exceed $25 for the first day of the auction and $20 for subsequent days, enacted under a power to regulate and license, is not subject to the objection that it is not definite as to the amount required to be paid, or unreasonable, oppressive, or in restraint of trade. Decorah v. Dunstan Bros. 38 Iowa, 96 (1874).

So, a city ordinance imposing a license fee on each carriage used in the streets, varying from $1 to $20 according to the kind of carriage and stand kept, is not authorized under a power to adopt rules and ordinances for the regulation of omnibuses, stages, etc., as the dissimilarity in the sums required precludes the assumption that it is required to meet the expenses incident to giving a license. Com. v. Stodder, 2 Cush. 562, 48 Am. Dec. 679 (1848).

In Com. v. Stodder, *supra*, Boston v. Schaffer, 9 Pick. 415 (1830), in which a money license for a theatrical exhibition was held valid, was distinguished upon the ground that power to make the imposition was clearly conferred by statute.

But a license tax on vehicles, graduated at $5 on those drawn by one horse, and $8 on those drawn by two horses, and $12 on those drawn by three or more, is not unreasonable. Gibson v. Coraopolis, 22 Pitts. L. J. N. S. 64, 8 Lanc. L. Rev. 359 (1891).

And $3 will not be deemed an unreasonable fee for issuing a license to a drayman or backman and keeping the necessary registers, in the absence of any showing on the subject. Cincinnati v. Bryson, 15 Ohio, 625, 45 Am. Dec. 593 (1846).

And a license tax imposed by a municipality, of $10 for each vehicle drawn by more than two animals, is not unreasonable or in restraint of trade as to one who constantly uses heavy wagons with four-horse teams heavily loaded in the streets. Gartside v. East St. Louis, 43 Ill. 47 (1867).

And an ordinance requiring a license fee not otherwise unreasonable is not rendered unreasonable by the fact that the law requires the fees provided for to be used for other purposes and not for the purpose of enforcing the ordinance, funds for which are provided by taxation. Littlefield v. State, 42 Neb. 223, 28 L. R. A. 538 (1894).

So, a prohibitive license tax is usually deemed unreasonable, though it may be large enough to act as a restraint when the business is one which might become an evil if unrestrained.

Thus, an ordinance fixing a license fee for selling goods at retail from house to house at not less than $1 nor more than $25 for a fixed time, in the discretion of the mayor, is void for unreasonableness as the time for which the sum fixed may be changed is left wholly with the mayor, and he might fix so short a time as to amount to a refusal to license at all. State Center v. Barenstein, 66 Iowa, 249 (1885).

And an ordinance requiring a license fee of $25 per day for selling goods, wares, and merchandise at auction is invalid as being unreasonable, prohibitive, and in restraint of trade, and opposed to public policy. Sipe v. Murphy, 49 Ohio St. 536, 17 L. R. A. 184 (1892).

So, a municipal ordinance requiring a hawker or peddler who travels on foot to pay a license of $10 for the first day and $5 for each subsequent day, and if he travels with one horse, $20 for the first day and $15 for each subsequent day, and if he travels with two or more horses $25 for the first day and $15 for each subsequent day,—is invalid as unreasonable and in restraint of trade. Brooks v. Mangan, 86 Mich. 576 (1891).

And an ordinance requiring the payment of a license fee of $50 per day from each transient dealer doing business in the city, enacted under a police power, is invalid as being unreasonable, prohibitive, in restraint of trade, and against public policy, and tending to create a monopoly. Glaser v. Cincinnati, 31 Ohio L. J. 243 (1893).

And in People v. Russell, 49 Mich. 617, 43 Am. Rep. 478 (1883), it was held that a license fee of $15 per year, imposed upon peddlers by municipal ordinances, is unreasonable and excessive where the charter gives power to license and regulate but not to tax them.

in the condition in which it was sent from Minnesota. He did not at that or any other time represent himself to be a physician, nor assume to determine the ailments of the people; but he distributed printed circulars of Watkins', which represented the medicines to be a cure for certain diseases named in the circulars, and the defendant represented that the medicine sold by him was as stated in the circular. At the time the business described was carried on, and the sale specified was made, the defendant did not have a license as contemplated by the statute, nor was he a physician or registered pharmacist. At that time Howe was a resident of this state.

The appellant contends that the acts under which he was convicted are repugnant to that part of section 8 of article 1 of the Constitution of the United States which provides that the Congress shall have power to regulate commerce among the several states, and the only question we are required to determine is whether the claim thus made is well founded. The record clearly shows that it must be regarded, for the purposes of this case, as conceded that the defendant was an itinerant vendor of drugs and nostrums, without a license, within the meaning of the statutes of this state which we have set out, and that the medicines he sold were in the original packages in which they were shipped into this state. It is true that the power vested in Congress to regulate commerce among the several states is a power complete in itself to prescribe the rules

---

But in *Re* White, 43 Minn. 250 (1890), it was held that a license fee of $3 a day, required of hawkers or peddlers, cannot be said to be excessive in view of the character of the business and the short period for which such business usually runs.

And in Cherokee v. Fox, 34 Kan. 16 (1885), an ordinance requiring a license fee of $2.50 per day of professional hawkers and peddlers for selling or offering for sale any article of merchandise or traffic kept by any merchant or manufacturer in the city, at retail, was upheld when attacked as class legislation, and as partial and oppressive in its operation, and as making unjust discriminations and being inconsistent with public policy.

And in Chicago v. Bartee, 100 Ill. 61 (1881), a license fee of $5 per annum, imposed upon persons engaged in selling and delivering milk from wagons or other vehicles was upheld, but the ground of attack was that it was not authorized by a charter conferring power to license and regulate hawkers and peddlers. See also, in this connection, the principal case, STATE v. WHEELOCK.

So, a by-law of a town fixing the price of a license for retailing liquors at $1,000, is prohibitory in its nature and cannot be justified under a power to grant licenses, or as an exercise of one of the incidental powers of a municipal corporation. Craig v. Burnett, 32 Ala. 728 (1858); *Ex parte* Burnett, 30 Ala. 461 (1857).

But a municipal ordinance establishing a license tax of $25 per month for the sale of spirituous and fermented liquors is not void because unreasonable, oppressive, or in restraint of trade. *Ex parte* Benninger, 64 Cal. 292 (1883).

And a municipal ordinance of the city of Eureka, requiring a license fee of $50 per quarter or $200 per year for the sale of spirituous liquors, is not oppressive or unreasonable, or prohibitory of the business of retailing intoxicating liquors. *Ex parte* McNally, 73 Cal. 632 (1887).

So, a license tax of $150, imposed upon groceries, confectioneries, and coffee houses opened for the purpose of retailing spirituous liquors, under a power to tax privileges, will not be held to be oppressive or unequal where it does not appear that extensive improvements are not in progress and that other privileges are not also paying high taxes. Columbia v. Beasly, 1 Humph. 232, 34 Am. Dec. 646 (1839).

And a license fee of $100 for keeping a saloon, placing no restrictions upon the saloon keeper as to the stock he deals in, will not be held to be excessive, although the sale of liquor is prohibited by general law. Wolf v. Lansing, 53 Mich. 367 (1884).

And in Mason v. Lancaster, 4 Bush, 406 (1868), a fee of $125 exacted by a municipality for a liquor license under a charter provision conferring the right to license and providing that the tax therefor shall be fixed at not to exceed $200 per annum, was upheld, but the question considered was as to the constitutionality of the charter provision by which the power was delegated.

So, a license fee of $300 exacted by a municipality for keeping billiard tables, is not subject to the objection that it is extravagant, unreasonable, and prohibitive, as the business licensed is not a matter of necessity, but of mere pleasure or luxury. *Re* Neilly, 37 U. C. Q. B. 289 (1875).

And in Church v. Richards, 6 U. C. Q. B. 563 (1849), a municipal charge of £10 for keeping billiard tables in addition to the provincial duty was not looked upon as too burdensome.

So, a provision of a city ordinance imposing a license fee of $50 per day upon every transient dealer or person who opens a store or place for the temporary sale of goods, wares, and merchandise is an unreasonable exercise of a power granted to a city to provide for licensing transient dealers or persons opening temporary stores or places of sale, and is invalid. Glaser v. Cincinnati, 31 Ohio L. J. 243 (1893).

But in Wynne v. Wright, 1 Dev. & B. L. 19 (1834), a license tax of $20 on every vehicle employed by a person in carrying jewelry from county to county for sale was upheld under attack as being unconstitutional and invalid, but the question of amount was not raised.

And a requirement by a municipality that persons owning vehicles for hire within its limits, and who have paid their city licenses, shall obtain from the city plates which are required by ordinance for the convenient identification of the vehicles and pay therefor from 8 to 150 times their cost, is another license in disguise and is exorbitant and unreasonable. Walker v. New Orleans, 31 La. Ann. 828 (1879).

And a license fee of $50 per day, charged by the city of Chicago for the privilege of operating the Ferris Wheel, is unreasonable and invalid. Ferris Wheel Co. v. Chicago (Ill.) 27 Chicago Leg. News, 309 (1894).

But a license tax of $5 per month, imposed as a police regulation on each stall in a public market, is not excessive. Jacksonville v. Ledwith, 26 Fla. 163, 9 L. R. A. 69 (1890).

And a license tax of $63.50 for permission to give theatrical exhibitions for six months, and a fee of $1 for the officer issuing the license, is not an illegal exaction under power to license and regulate, as such exhibitions require inquiry as to their character, and may require additional attention to prevent disorder and disturbances. Baker v. Cincinnati, 11 Ohio St. 534 (1860).

In Baker v. Cincinnati, *supra*, Mays v. Cincinnati, 1 Ohio St. 268 (1853), was distinguished upon the ground that the extent of the power of taxation vested in the general assembly was not drawn in question in that case.

So, a license fee of $200 imposed upon pawnbrokers, will not be deemed unreasonable because of

by which that commerce is to be governed; that it is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but enters it, and is capable of authorizing a disposition of articles of commerce so that they become a part of the common mass of the property within the state. *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36. But it has been held that state laws which do not discriminate between residents and products of a state and those of another state; which are not designed to interfere in any manner with interstate commerce, as those which are in the nature of a simple tax upon sales of merchandise, imposed alike upon all persons, whether residents or nonresidents of the state,—are not repugnant to the constitutional provision in question. Thus, in *Hinson* v. *Lott*, 75 U. S. 8 Wall. 148, 19 L. ed. 387, a statute which imposed a tax of 50 cents per gallon on each gallon of spirituous liquors offered for sale in the state, to be paid by the dealer introducing it, was sustained, it appearing that a like tax on such liquors produced in the state was exacted. In *Woodruff* v. *Parham*, Id. 123, 19 L. ed. 382, a tax imposed by the city of Mobile on auction sales and sales of merchandise was sustained as to sales of property brought from other states, and sold at wholesale in unbroken packages. In *Howe Mach. Co.* v. *Gage*, 100 U. S. 676, 25 L ed. 754, a statute of the state of Missouri requiring all peddlers of sewing machines, without regard to the place of growth or produce of

its magnitude, as the question of amount does not admit of nice calculations, and the business of pawnbroking gives rise to heavy city expense. Van Baalen v. People, 40 Mich. 258 (1879).

And in Grand Rapids v. Braudy (Mich.) 64 N. W. Rep. 29 (1895), it was held that a license fee of $50 upon pawnbrokers, and of $25 upon junk dealers, under a power to license and regulate pawnbrokers, junk dealers, and dealers in second-hand goods, is not unreasonable.

And in Moore v. St. Paul, 48 Minn. 331 (1892), it was said that a uniform license fee of $150 per year for carrying on the business of an intelligence office for males would not be so excessive or unreasonable as to justify holding it void, but the ordinance in question was held invalid because it required that amount until the first of January next following the day of the application.

And in *Ex parte* Burnett, 30 Ala. 461 (1857), it was said that a municipal corporation may, in the exercise of its incidental powers, transcend the limit fixed by the general law upon the price of a license to retail liquors, provided its ordinances are not in their nature prohibitory.

The business of a railroad ticket broker or scalper, however, is not *per se* injurious to the public, and a license tax of $500 imposed upon it, which would have the effect to prohibit the business, is excessive and illegal. Hirshfield v. Dallas, 29 Tex. App. 242 (1890).

It is thought that a growing tendency on the part of the courts may be discovered from the cases, particularly the later ones, throughout this whole subject of limitations under a power to regulate, to break away from the strict rule that the fee must not exceed what is necessary for regulation. And to adopt the more liberal one that it must be reasonable in view of all the circumstances including the character of the business and the value of the privilege.

d. *Under a power to restrain or prohibit.*

The number of cases in which the question of the existence or extent of a limit upon the amount of license fees fixed under a power to restrain or prohibit is so small as to render it impossible to locate any general rules comprising the subject. It would seem, however, that it must necessarily be considerably wider than the limit under a mere power to regulate.

Thus, a municipal ordinance imposing a penalty for selling intoxicating drinks without a license, which exceeds that fixed by the general law, is not unreasonable or invalid under a charter provision empowering the municipality to suppress and prohibit the sale thereof as well as to license. Deitz v. Central, 1 Colo. 323 (1871).

And an ordinance requiring hawkers and peddlers of meat to pay a license fee of $30, enacted under a power to restrain, regulate, or license hawking and peddling, is not an invalid exercise of the power, though the fee exacted is also a tax. Ballston Spa v. Markham, 58 Hun, 238 (1890).

And a license tax of $50 per annum, imposed upon bowling saloons under a power to regulate and restrain, is authorized. Smith v. Madison, 7 Ind. 86 (1855).

So, a considerable license fee imposed upon saloons is not an unreasonable restraint of trade although the sale of intoxicating liquors is prohibited by law, where it is required under a charter contemplating that public policy requires the business of keeping places of resort for eating and drinking to be restrained. Kitson v. Ann Arbor, 26 Mich. 325 (1873).

And a license fee may be required for keeping a saloon, of such an amount as will produce a considerable revenue in excess of the amount required for regulation, where the object is to restrain the number of places and keep the business within control. *Ibid.*

And an ordinance requiring a license fee of $500 per year for the sale of intoxicating liquor by the measure will not be declared invalid as unreasonable and amounting to a prohibition under a power to suppress and levy a license tax on liquor sellers, when there are no statutory restrictions as to the amount. Elk Point v. Vaughn, 1 Dak. 113 (1875).

So, the amount charged for a license to wholesale liquor dealers under a power to license, regulate, and prohibit the selling or giving away of any intoxicating or spirituous liquors is not a tax but a burden imposed as the price of a privilege which a municipality has power to restrict or deny altogether. Dennehy v. Chicago, 120 Ill. 627 (1887).

But authority under a municipal charter to license, control, regulate, or prohibit a business or traffic gives no power to impose a tax for revenue purposes,—especially where such tax discriminates against nonresidents. State v. Long Branch Comrs. 42 N. J. L. 364, 36 Am. Rep. 518 (1880).

And a license fee of $100 per quarter, exacted by a municipality for the privilege of selling spirituous and fermented liquor within a city but 2 or 3 miles away from the settled portion, where there are no streets, lots, or blocks, and where no police or other supervision is exercised, is not valid under a power to license, regulate, or restrain. Salt Lake City v. Wagner, 2 Utah, 400 (1879).

e. *Under a power to tax and license.*

The general assembly may constitutionally impose, or authorize the county courts to impose, a tax by conferring on them the power to grant licenses as a means of raising revenue for county purposes. Washington v. State, 13 Ark. 752 (1853).

And the state may confer power upon cities to require a license fee for carrying on a particular branch of business for revenue purposes, and such a license required by the city for such purpose is valid

material of manufacture, to pay a tax, was sustained as against a peddler who sold machines made in Connecticut. In *Webber* v. *Virginia*, 103 U. S. 344, 26 L. ed. 565, it was said that there is no objection to state legislation requiring a license for the sale of sewing machines, by reason of the grant of letters patent for the invention, when there is no discrimination against nonresidents or their agents. In *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, the power of a state to levy a tax on coal mined outside the state and brought within it to be there sold, was affirmed. In *Plumley* v. *Massachusetts*, 155 U. S. 461, 39 L. ed. 223, a statute of the state of Massachusetts which prohibited the manufacture and sale of imitation butter, in imitation of yellow butter, produced from pure, unadulterated milk, or cream of such milk, was sustained, and held to apply to the prohibited article when brought for sale from another state, where it was manufactured. Some of these cases arose under the provision of the Federal Constitution which forbids states, without the consent of Congress, to lay any imposts or duties on imports or exports, but all are applicable to the facts in this case. Some of the cited cases recognize the rule that state laws of the general nature of those approved are invalid so far as they discriminate in favor of the residents and products of the state, and against the residents and products of other states. There is no discrimination in the statutes of this state under consideration. They apply alike to itinerant

---

though it operates incidentally as a tax upon the dealer or consumer. Wiley v. Owens, 39 Ind. 429 (1872).

So in United States Distilling Co. v. Chicago, 112 Ill. 19 (1884), citing Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560 (1882), it was said that license fees may be imposed for substantial municipal revenue.

And municipalities have power to impose licenses for the purpose of regulation or revenue or both, under Cal. Const. art. 11, §§ 11, 12, providing that they may make and enforce within their limits all such local, police, sanitary, and other regulations as are not in conflict with general laws, and that the legislature may by general laws vest in the corporate authority thereof power to assess and collect taxes for municipal purposes. *Re* Guerrero, 69 Cal. 88 (1886).

And a statute authorizing municipal authorities to license and regulate empowers the municipality to exact licenses for the purpose of revenue as well as for the purpose of regulation, when the whole charter and the general legislation of the state warrant such construction. *Ex parte* Frank, 52 Cal. 606, 28 Am. Rep. 642 (1878); San José v. San José & S. C. R. Co. 53 Cal. 481 (1879).

So, a charter provision empowering a municipal body to regulate and prohibit the sale of spirituous liquors and fix the amount of the assessment to be paid for a license, but directing that it be paid into the city treasury for the use of the city, confers power to tax and fix the fee with a view to revenue as well as regulation. State v. Plainfield, 44 N. J. L. 118 (1882).

And a charter provision empowering a municipal body to regulate and prohibit the sale of spirituous liquors and fix the amount to be paid for a license, directing payment into the city treasury for the use of the city, confers power to tax for revenue purpose. *Ibid.*

And a city may lawfully charge a license fee fixed with the view to raise revenue for the franchise or privilege of keeping a ferry for transporting persons across a river upon which it is situated, under a power to license, continue, and regulate ferries, and to prescribe a sum of money to be paid for licenses. Chilvers v. People, 11 Mich. 43 (1863).

If a power be granted with a view to revenue, the amount of the tax if not limited by charter is left to the discretion and judgment of the municipal authorities. State v. Hoboken, 41 N. J. L. 71 (1879) (*dictum*).

The taxing power knows no limit except the necessities of the public treasury and the discretion of the taxing power, and the amount of a license tax imposed for the purpose of revenue does not prove its invalidity. Fretwell v. Troy, 18 Kan. 271 (1877).

Before an authorized ordinance for the raising of revenue by license will be declared void on account of the amount thereof, it must appear that the necessities of the city do not require so large a revenue, or that there has been an unjustifiable attempt to discriminate against certain kinds of business by casting the whole burden of taxation upon them. Fretwell v. Troy, *supra (dictum)*.

Thus, an ordinance imposing a license tax, the amount of which is graduated, being greater upon some employments than upon others, enacted under a power to tax as well as to regulate, cannot be judicially declared invalid because it is impracticable, unjust, or unequal. Hadtner v. Williamsport, 15 W. N. C. 138 (1883).

So, a power to license, tax, regulate, and restrain bar rooms and drinking shops authorizes municipal authorities to fix the terms and conditions upon which licenses shall issue, and fix the amount of the tax to be imposed. Portland v. Schmidt, 13 Or. 17 (1885).

And a city ordinance requiring the payment of a license fee of $50 per month for carrying on the business of selling intoxicating liquor, enacted under a power to license either for revenue or regulation, cannot be determined as a matter of law, from the amount thereof, to be oppressive, unreasonable, or prohibitory of trade. *Re* Guerrero, 69 Cal. 88 (1886).

Nor is a license fee of $300 for a saloon and $200 for a hotel invalid when required under such a power. State v. Plainfield, 44 N. J. L. 118 (1882).

And in Portland v. Schmidt, 13 Or. 17 (1885), it was held that the amount required to be paid for a liquor license under a power to regulate and tax is left to the determination of city authorities and cannot be controlled by courts unless it is of so large a sum as to make it evident that it was intended as a prohibition; and an exaction of $500 per year for a license to sell liquor was upheld.

And a license fee of $500 per annum imposed by ordinance upon each brewery and distillery, is valid under a statute authorizing cities and villages to tax, license, and regulate brewers, distillers, etc., and not subject to the objection that it is unreasonable, as under such a grant of power payment may be required for the privilege, and the amount would seem to be within the discretion of the body imposing it. United States Distilling Co. v. Chicago, 112 Ill. 19 (1884).

So, a license fee of $50 per year, required by a city of any person or corporation carrying on insurance business therein, is valid though charged for revenue purposes, where the power to tax as well as to license is given in express terms. St. Joseph v. Ernst, 95 Mo. 360 (1888).

And a municipal ordinance requiring every life and fire insurance company intending to do business in the city to first obtain a license to be paid for at the rate of $50 for fire insurance companies and $100 for life insurance companies is authorized and valid under the Kansas act of 1870 giving cities of the first class power to levy and collect a license tax

vendors of drugs and nostrums produced in this state, and to those which come from without it; to residents and nonresidents of the state; to those who sell their own wares; and to those who act for others. The primary object of the acts is not to derive a revenue for the use of the state, but in large part, at least, to protect its citizens against solicitations and harmful practices of irresponsible and unknown traveling vendors of drugs and other articles intended for the treatment of diseases or injury, who, in carrying on their business, publicly profess to cure or treat diseases, injuries, or deformities, and thus promote the sale of their wares to the credulous. The prohibited act may be committed without any actual sale. *State* v. *Blair* (Iowa) 60 N. W. Rep. 486.

That the enactment of the laws in question was within the police power of the state is affirmed in principle by numerous authorities, some of which are of long standing, and cannot now be successfully questioned. In *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572, it was said that "the power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation legitimately for police purposes, as not, in the sense of the Constitution necessarily infringing upon any right

---

on fire or life insurance companies or agencies. Leavenworth v. Booth, 15 Kan. 627 (1875).

So, a license fee required of a ferry, of $50 for each boat for one year, is a charge for the privilege of carrying on a ferry business in the jurisdiction, and not a tax within constitutional restrictions upon the power to tax, and is justified under a charter provision giving the city power to license, tax, and regulate ferries. Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560 (1882). Dickey, J., dissented on the ground that the city had no power to exact such a license fee for the mere purpose of revenue, for a privilege already held by irrevocable grant from the state.

And an ordinance requiring a license fee of $200 per annum of auctioneers, and requiring a bond with two sureties in the penal sum of $1,000 for the due observance of the conditions of the ordinance, and providing for forfeiture for violation thereof, is reasonable and valid under a charter provision giving power to tax, license, and regulate. Wiggins v. Chicago, 68 Ill. 372 (1873).

And N. J. act May 2, 1885, providing that the fees for certain licenses may be imposed for revenue, includes hawkers and peddlers, and authorizes the passage of ordinances imposing such fees for revenue. State v. Orange, 50 N. J. L. 389 (1888).

So, in *Ex parte* Mirande, 73 Cal. 365 (1887), it was held that a county ordinance of Mono county requiring all persons engaged in raising, grazing, herding, or pasturing sheep therein to annually procure a license and pay therefor at the proportionate rate of $50 for every 1,000 sheep in their possession or under their control, and providing that a violation thereof shall constitute a misdemeanor punishable by fine not exceeding $200, is not unjust, excessive, oppressive, discriminating, special, unequal, or partial, and is valid whether imposed for the purpose of revenue or regulation, or both.

And in *Ex parte* Gregory, 20 Tex. App. 210, 54 Am. Rep. 518 (1886), it was said that a license fee of $8 annually for each hack, imposed upon owners of hacks under a power both to license and tax, cannot be held to be excessive or unreasonable where it provides numerous regulations the enforcement of which must necessarily demand the constant services of the police and the careful attention and supervision of the municipal government.

But even under such a power it would seem that, at least so far as callings which are not obnoxious are concerned, the municipality must stop short of prohibition.

Thus, a county cannot impose a prohibitive license tax under a power to impose license taxes upon a business for the purposes of revenue and regulation. Merced County v. Helm, 102 Cal. 159 (1894).

And prohibitive ordinances are not authorized under a power to tax, license, and regulate, nor are such as would be oppressive or highly injurious. Wiggins v. Chicago, 68 Ill. 372 (1873).

And a license tax of $500 per year, levied by ordinance upon druggists having a permit from the probate judge to sell intoxicating liquors, enacted under authority to levy and collect a license tax upon druggists which shall be just and reasonable, is not for revenue but for destruction, and is unreasonable and void when imposed in a city containing only 1,600 inhabitants, and in which the gross receipts of such a druggist are only about $1,000 per year. Lyons v. Cooper, 39 Kan. 324 (1888).

A charter provision authorizing a municipality to provide for licensing, taxing, and regulating vendors of lottery tickets, however, justifies the imposing of a license tax, although it may be so high as to amount in effect to a prohibition. France v. Washington, 5 Cranch, C. C. 667 (1840).

So, in Hirshfield v. Dallas, 29 Tex. App. 242 (1890), it was said that power to tax occupations for revenue seems to be limited in amount only by the nature and character of the occupation sought to be taxed and the extent to which the occupation may be injurious to the public.

1. When discretion is expressly conferred.

It is competent for the legislature within proper limits to leave the sum which should be required for licenses to the discretion of the municipal authorities. St. Paul v. Colter, 12 Minn. 41, 90 Am. Dec. 278 (1866) (*dictum*).

And a license tax imposed by a municipality endowed with discretion on the subject will not be declared unreasonable by the courts merely because they deem it unwisely large. Cooper v. District of Columbia, 4 MacArth. 250 (1880).

And evidence that the amount fixed by them is not reasonably necessary to regulate the business is not admissible, and it cannot be shown that it was imposed solely for the purpose of revenue. St. Paul v. Colter, *supra*.

So, a municipal requirement of a license fee is not invalid because excessive, or oppressive, or in restraint of trade, where it is authorized by the legislature and not forbidden by the Constitution. *Ibid.*

And it is not subject to the objection that it is so large as to be in restraint of trade where full power to impose it is granted. Cooper v. District of Columbia, *supra*.

And when the legislature confers upon a municipal corporation the power to pass ordinances of a special and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed in pursuance thereof cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental powers of the corporation or un-

which has been confided expressly or by implication to the national government." The cases of *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, and *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, upon which the defendant relies in this case, were considered, and the fact noted that the laws on which they were based "inhibited the receipt of an imported commodity or its disposition before it had ceased to be an article of trade between one state and another, or another country and this." In *Plumley* v. *Massachusetts*, *supra*, the case of *Leisy* v. *Hardin*, was again considered, and held not to be an authority for the claim that oleomargarine—a recognized article of commerce—may be introduced into a state, and there sold in original packages, without any restriction being imposed by the state upon such sale. The recent case of *Emert* v. *Missouri*, 156 U. S. 296, 39 L. ed. 430, fully sustains the conclusion we now reach. That case involved the validity of a statute of the state of Missouri which provided that no person should deal as a peddler without a license, as applied to a peddler of sewing machines manufactured in another state; and the review of the authorities, and the interpretation placed upon the constitutional provision involved, are in point.

The amount of the license fee required by the statutes under consideration is not excessive, and the regulations adopted by them are reasonable. The sale of drugs, nostrums, and other articles manufactured in another state, and brought into this state, whether brought

---

der a grant of power general in its nature. *Ex parte* Chin Yan, 60 Cal. 78 (1882).

A municipal charter granting power to license certain callings and authorizing the municipal council to charge such sums therefor as they shall deem fit and reasonable, authorizes the use of the power for the purpose of taxation, and justifies an ordinance requiring a license fee larger than is necessary for the purpose of regulation, though it enumerates useful occupations which cannot usually be taxed under a power to license, and those of amusement without distinction. Adams Exp. Co. v. Owensboro, 85 Ky. 265 (1887).

Thus, a municipal ordinance fixing $500 as the fee for a retail liquor license is authorized and valid under a charter provision authorizing the passage of any by-law, regulation, or ordinance that shall appear necessary and proper for the welfare and interest of the city and for preserving peace, health, and good order, and the licensing of the sale at retail of intoxicating liquors and prohibiting such sale without a license, it being manifest that the intent was to entrust the whole matter to the city authorities. Perdue v. Ellis, 18 Ga. 586 (1855).

So, an ordinance prohibiting the sale of spirituous or intoxicating liquors within the city without having first obtained a license, enacted under a charter provision that licenses for vending spirituous liquors shall not be less than $75 nor more than $200 per year, is not invalid as in restraint of trade. Rochester v. Upman, 19 Minn. 108 (1872).

And in Goldsmith v. New Orleans, 31 La. Ann. 646 (1879), it was held that as the law lays down no rule by which the amount of a license tax upon bar rooms or coffee houses in which concert saloons are conducted shall be fixed, it is a question of expediency and of police regulation of which the city authorities are the sole judges, and the judicial tribunals have no power to control them in the exercise of this discretion.

So, a license fee of $200, imposed upon the business of vending butcher's meats, is not unauthorized, oppressive, or in restraint of trade, when required under a statute empowering municipalities to fix the fee for licenses at from $5 to $500. St. Paul v. Colter, 12 Minn. 41, 90 Am. Dec. 278 (1866).

And a fee of that amount for selling meat in a private stall, in addition to the 7½ per cent business tax levied upon all traders under another by-law, is not objectionable as being excessive in amount where the legislature authorized the city council to impose such charges as it should think reasonable without any reference to the payment being by way of indemnity for the trouble and expense of issuing the license. Pigeon v. Montreal Recorder's Ct. 17 Can. S. C. 495 (1890).

So, a municipal requirement of a license fee of $1,000, for theatrical exhibitions is authorized by a power to license such exhibitions on such terms and conditions as to the mayor and aldermen may seem just and reasonable. Boston v. Shaffer, 9 Pick. 415 (1830).

And there is no limit to the power of a city to impose fees for a license upon foreign insurance companies under a charter authorizing it to regulate agencies of all insurance companies and to license and regulate agents of insurance companies doing business in it, unless it might be that the ordinance imposing them should be reasonable. Walker v. Springfield, 94 Ill. 364 (1880) (*dictum*).

So, in Wiley v. Owens, 39 Ind. 429 (1872), it was held that when the statute conferring the authority does not limit the amount to be charged for a license, it may charge any amount deemed proper by the council, unless controlled by other considerations.

And in Wolf v. Lansing, 53 Mich. 367 (1884), it was held that where the power to fix a license fee is given by law to a municipal council, its discretion in fixing the amount is not reviewable by the courts.

And in Van Baalen v. People, 40 Mich. 258 (1879), it was held that municipal discretion in fixing the amount of a license fee will not be reviewed by the court, unless made a pretext for a violation of constitutional rights.

Some of the cases, however, have stopped slightly short of the broad rules above announced, on the theory that such a power can be abused and does not authorize absolute prohibition.

Thus, in St. Paul v. Colter, 12 Minn. 41, 90 Am. Dec. 278 (1866), and Denver City R. Co. v. Denver, 2 Colo. App. 34 (1892), it was held that the courts will not interfere with the discretion of municipal bodies in fixing the amount of license fees, unless there is an evident abuse of power.

So, that the discretion of the city authorities in fixing the amount of the license fee required of insurance companies doing business in the city, conferred by a power to grant or refuse licenses and charge such sums as they may deem expedient and just, will not be interfered with unless an abuse thereof clearly appears, was held in Burlington v. Putnam Ins. Co. 31 Iowa, 102 (1870).

In Marion v. Chandler, 6 Ala. 899 (1844), however, it was held that an ordinance of a town prohibiting the retailing of spirituous or fermented liquor without first paying $1,000 for a license for one year, and providing for a penalty of $10 per day for selling without a license, is prohibitory in nature, but is authorized under a charter provision authorizing the corporation to grant licenses to retailers of spirits and liquors and to regulate and restrain them when deemed a nuisance.

And in Perdue v. Ellis, 18 Ga. 586 (1855), an ordinance imposing a license fee was upheld upon the ground that it was authorized by charter, although it was in effect a prohibition. F. H. R.

into this state in original packages or otherwise, is not prohibited; but such medicines may be brought into the state and sold freely. Their importation and sale are not in any manner prohibited. But if its owner select as their agent an itinerant who, to promote sales, publicly professes to cure and treat diseases, injuries, and deformities, it is proper that some evidence and guaranty of his responsibility be required. It was said in *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 443, 6 L. ed. 687, that "The right of sale may very well be annexed to importation, without annexing to it also, the privilege of using the officers licensed by the state to make sales in a peculiar way." So it may be said in this case that the right to sell, in original packages, medicines brought into this state from another, does not include the right to have it sold by an unlicensed itinerant, who, to make sales, professes knowledge of the art of healing. The statutes which apply to such sales are not, in any sense, regulations of interstate commerce, but a reasonable exercise of the police power of the state, which may be applied as well to articles of interstate commerce in the hands of a vendor, and offered for sale in the original packages, as to articles produced within the state.

We conclude that *the judgment of the District Court is right, and it is affirmed.*

MISSISSIPPI SUPREME COURT.

Ellen BAUM, Exrx., etc., of J. F. Baum, Deceased, *Appt.*,
v.
Mary Grace Devine LYNN.

(72 Miss. 932.)

1. **Oral evidence as to the consideration recited in a written agreement** is inadmissible when the stipulation as to the consideration is contractual, as in a case where a conveyance expressly recites that it is made for the settlement and release of specified claims.
2. **Oral proof of a separate agreement, to show that the consideration of a conveyance** which recited that it was in settlement and release of the claims of a guardian and ward against the grantor included also a release of the ward's claim against the guardian, is inadmissible.
3. **An appellant cannot assign for error** matters which affect other defendants who refused to join in the appeal.

(April 8, 1895.)

APPEAL by defendant, administratrix of one of the sureties on plaintiff's guardian's bond, from a decree of the Chancery Court for Warren County in favor of plaintiff in an action brought to enforce the sureties' liability on the bond. *Affirmed.*

The facts are stated in the opinion.

Mr. **M. Marshall** for appellant.

Mr. **L. W. Magruder** for appellee.

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

In May, 1873, John A. Klein was appointed guardian to the appellee by the chancery court of Warren county, and gave bond as guardian in the penalty of $2,000, with George M. Klein and J. F. Baum, appellant's testator, as sureties. In May, 1874, the appellee became entitled to receive in distribution from the estate of a relative another considerable sum of money, and the chancellor required the guardian to execute an additional bond in the penalty of $6,100, which he did with the said George M. Klein and one D. W. Floweree, now deceased, as sureties. The guardian, John A. Klein, died without having made a final account as guardian, and the appellee exhibited her bill in the chancery court of Warren county against the executrix of the guardian, and against George M. Klein, the surviving surety, and the personal representatives of the deceased sureties. The prayer is that the executrix of the guardian be required to render his final account as guardian, and that a decree be rendered against her therefor, and that decrees be made against George M. Klein, the surviving surety, and against the representatives of the deceased sureties, according to their liability. Upon final hearing the court found the guardian to be indebted to his ward in the sum of $6,247.80, for which a decree was entered against his representatives; and decrees were made against George M. Klein and Ellen Baum, executrix of J. F. Baum, for $2,000, the penalty of the bond on which they were sureties, and against George M. Klein and L. M. Lowenburg, administrator of the estate of D. W. Floweree, for $6,100, the penalty of the bond on which they were sureties. From this decree Mrs. Baum alone appeals, and assigns error.

The objection most strenuously urged to the decree rests upon the following facts, proved or offered to be proved by appellant: The guardian had loaned a part of his ward's money to Mrs. Mary Irving. In June, 1884, the guardian being then dead and his estate hopelessly insolvent, the appellee, who then resided in the state of Texas, came to this state to look after the estate. On the 16th of June, Mrs. Irving made to her a conveyance in the following language: "This indenture made and entered into this day, the 16th of June, 1884, by and between Mary Irving, of the city of Vicksburg, county of Warren, and state of

---

NOTE.—As to the admissibility of oral evidence respecting the consideration of a written contract, see *note* to Durkin v. Cobleigh (Mass.) 17 L. R. A. 270, presenting a large number of the authorities on the question.

As to such evidence of the consideration of a deed, see *note* to Velten v. Carmack (Or.) 20 L. R. A. 101.

Mississippi, party of the first part, and Mary Grace Lynn, of the state of Texas, party of the second part, witnesseth: That whereas, John A. Klein, late of the city of Vicksburg, did, on or about the 14th day of February, 1874, loan the said Mary Irving certain moneys then in his hands as guardian of the said Mary Grace Lynn, then Mary Grace Devine; and whereas, the said Mary Irving now desires to settle in full any balance that may be due her; Now, therefore, for and in consideration of the premises, and the consideration of the full acquittal, discharge, and release of the said Mary Irving from any and all liability to the said John A. Klein as guardian, or the said Mary Grace Lynn for and on account of said loans, and the further consideration of $10 in hand paid, the receipt of which is hereby acknowledged, the said party of the first part does hereby convey and warrant to the party of the second part, her heirs and assigns, in fee simple, the following-described real estate in the said city of Vicksburg,"—describing the property, and concluding with the usual habendum. The appellant took the deposition of Mr. Irving, who was the husband of the grantor, she being now dead, and that of George M. Klein, and of Mr. Smith, the attorney who prepared the conveyance, all of whom testified that the conveyance was made by Mrs. Irving, and accepted by Mrs. Lynn, in full satisfaction and settlement, not only of the debt due by Mrs. Irving to Klein as guardian, but also in discharge and settlement of liability on the part of the guardian to his ward, which liability Mrs. Lynn agreed to discharge and release as a part of the consideration for the conveyance. The complainant moved to suppress these depositions, and objected to them when offered in evidence, upon the ground that it was incompetent to vary by parol proof the written contract of the parties as shown by the deed. It does not appear that the chancellor made any order on the motion to suppress, or ruled upon the objection interposed to the evidence when offered. As the note of evidence, however, shows that these depositions were read on the hearing, we assume that the chancellor held them to be competent. In opposition to this evidence the complainant introduced her own testimony and that of her husband, by which it is denied that the conveyance was accepted in discharge of any other obligation than that of Mrs. Irving and that of the guardian for the amount loaned to her. The defendant in turn objected to the testimony of the complainant on the ground that she was not a competent witness in a suit against the estate of a deceased person to establish her claim resting upon a transaction occurring in his lifetime. As the court below did not rule upon these objections, we cannot know whether it disregarded all the testimony, or, considering it, thought the fact not proved that Mrs. Lynn agreed to accept the conveyance in discharge and satisfaction of her entire demand against her guardian. The complainant is, however, entitled to the decree if, upon either of these reasons, it is correct. The text-books and decisions abound in confused and confusing writing upon the subject of the admissibility of parol evidence introduced for the purpose of showing the consideration of written contracts, or of proving what are called "collateral contracts," *i. e.*, contracts not evidenced by the written one, but which constitute the consideration upon which the written one in turn rests, or which are separate and disconnected from the written one, not covered by nor inconsistent with its terms. Mr. Stephen, in his admirable Digest of the Law of Evidence, p. 104, thus formulates the rule and its limitations: "When any judgment of any court or any other judicial or official proceeding, or any contract or grant, or any other disposition of property, has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant, or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible. . . . Nor may the contents of any such document be contradicted, altered, added to, or varied by oral evidence. Provided that any of the following matters may be proved: (1) Fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law, or any other matter which, if proved, would produce any effect upon the validity of any document, or any part of it, or which would entitle any person to any judgment, decree, or order relating thereto; (2) the existence of any separate oral agreement, as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them," etc. It is evident that the proffered testimony for the defendant is competent, if at all, either, (1) because it goes only to prove what was the real consideration of the conveyance, and therefore contradicts, not the contract, but a mere fact recited or admitted in the writing; or (2) because it tended to prove a separate oral agreement within the limitation expressed in clause 2 of the proviso as quoted from Mr. Stephen.

In *Gully* v. *Grubbs*, 1 J. J. Marsh. 387, Judge Robertson in an admirable and concise manner states the true principle upon which is based the rule of permitting oral evidence to be introduced to show the true consideration of a deed in opposition to that recited, as well as the limitation of the rule. In 2 Devlin on Deeds, § 830, this opinion is given at length as containing an accurate statement of the law. The writers upon evidence have strangely omitted any reference to it. Somewhat compressed, Judge Marshall's opinion may be thus stated: Wherever, in a deed, the consideration, or an admission of its receipt, is stated merely as a fact, that part of the deed is viewed as a receipt would be, and the statement is subject to be varied, modified, and explained; but, if the stated consideration is in the nature of a contract,—that is, if by it a right is vested, created, or extinguished,—the terms of the contract thereby evidenced may not be varied by parol proof, but the writing is its own sole exponent. Judge Robertson illustrates his own views by noting the difference between the

mere statement of a fact (*e. g.* the admission of the receipt of the purchase price) and the vesting, creating, or extinguishing a right (*e. g.* by the execution of a release), in the following language: "A party is estopped by his deed. He is not to be permitted to contradict it. So far as the deed is intended to pass a right, or to be the exclusive evidence of a contract, it concludes the parties to it. But the principle goes no further. A deed is not conclusive evidence of everything it may contain. For instance, it is not the only evidence of the date of its execution, nor is its omission of a consideration conclusive evidence that none passed, nor is its acknowledgment of a particular consideration an objection to other proof of other and consistent considerations; and, by analogy, the acknowledgment in a deed is not conclusive of the fact. This is but a fact, and testing it by the rationality of the rule we have laid down, it may be explained or contradicted. It does not necessarily and undeniably prove the fact. It creates no right; it extinguishes none. A release cannot be contradicted or explained by proof, because it extinguishes a pre-existing right. But no receipt can have the effect of destroying *per se* any subsisting right. It is only evidence of a fact. The payment of the money discharges or extinguishes the debt. A receipt for the payment does not pay the debt. It is only evidence that it has been paid. Not so of a written release. It is not only evidence of the extinguishment, but is the extinguishment itself." The deed now under examination contains, as is clearly to be seen, no mere recital of a consideration paid or to be paid. Its recital is only of the facts necessary to be stated to intelligently apply the contract of the parties to the subject-matter. Having set out the relationship of debtor and creditor, and the history of the transaction from which it arose, the deed then proceeds to state what the parties agreed, contracted, and did in reference to the dissolution of the relationship. Mrs. Irving did something. She conveyed the land to Mrs. Lynn. Mrs. Lynn did something. She released the debt to Mrs. Irving. One transferred a right; the other released a right. If it be said that the release was a mere recited consideration for the conveyance, it may with equal accuracy be replied that the conveyance was a mere recited consideration for the release; and therefore, if one of the terms of the contract may be varied by parol, because it is a consideration, so also may the other for the same reason, and by this process a solemn and executed written contract would be totally eaten away. The true rule is that a consideration recited to have been paid or contracted for may be varied by parol, while the terms of a contract may not be, though the contract they disclose may be the consideration on which the act or obligation of the other party rests. When the stipulation as to consideration becomes contractual, it, like any other written contract, is the exclusive evidence, and cannot be varied by parol. *Hubbard* v. *Marshall*, 50 Wis. 322; *Van Wy* v. *Clarke*, 50 Ind. 259.

The testimony was not admissible for the purpose of proving a separate oral agreement as to which the writing was silent. In the multitude of cases in which the question of the admissibility of extrinsic evidence to prove a separate oral agreement made before or contemporaneously with a written contract is determined, decisions may be found which would warrant the introduction of the evidence offered by the defendant; but such decisions, we think, rest upon a misapplication of legal principles to the facts of the particular transaction. A very full collection of the authorities, accurately grouped, may be found in the note to *Ferguson* v. *Rafferty* (Pa.) 6 L. R. A. 33. We refer to only a few, which will illustrate the principle we are considering. Before referring to these cases, it is well to note that the rule excluding extrinsic evidence is "directed only against the admission of any other evidence of the language employed by the parties in making the contract, than that which is furnished by the writing itself." 1 Greenl. Ev. § 277. In *Lindley* v. *Lacey*, 17 C. B. N. S. 578, there was a written sale of the fixtures, furniture, and goodwill of a business. The seller was indebted to one Chase, who had entered an action against him. The written contract contained a clause authorizing Lacy, the buyer, "to settle the case of *Chase* v. *Lindley*." The plaintiff was permitted to prove that there was a distinct and separate promise by Lacey, in consideration of the plaintiff's signing the agreement, that he, the defendant, would pay the debt to Chase; the court saying that this was a distinct collateral agreement, not inconsistent with the written contract, and in fact constituting the consideration or condition on which Lindley executed the written agreement. In *Ayer* v. *Ball Mfg. Co.* 147 Mass. 46, a written order for goods, signed by the lawyer only, set forth the kind of goods, and the price, and contained stipulations for rebates. It was held that the writing was not intended to set forth the whole contract of the parties, and that evidence might be given of a parol contemporaneous contract by the seller to advertise the goods as inducing cause of the purchase. To the same effect are *Bonney* v. *Morrill*, 57 Me. 368; *Morgan* v. *Griffith*, L. R. 6 Exch. 70; *Singer Mfg. Co.* v. *Forsyth*, 108 Ind. 334; *Basshor* v. *Forbes*, 36 Md. 154; *Welz* v. *Rhodius*, 87 Ind. 1, 44 Am. Rep. 747. In some cases evidence of a parol contemporaneous agreement has been permitted to be proved, even though its effect was to vary, change, or reform the written agreement. In *Erskine* v. *Adeane*, L. R. 8 Ch. App. 756, the landlord executed a written lease, in which he reserved the right to keep game on the leased land. The tenant was permitted to recover damages for breach of contemporaneous oral agreement on the part of the landlord to kill some of the game. But in such cases it is said the oral agreement must be clearly and indisputably and precisely established. *Thomas* v. *Loose*, 114 Pa. 35; *Cullmans* v. *Lindsay*, 114 Pa. 166. This seems to be upon the principle of reforming the written agreement, and it may be doubted whether the evidence would be competent at law, in those jurisdictions in which legal and equitable proceedings are yet distinct. But if the parties have reduced their contract to writing in all its parts, it is not competent to add to its terms by extrinsic evidence; and the presumption is that a

formal written contract was intended by the parties, nothing to the contrary appearing on its face, to contain their whole agreement. In *Langdon* v. *Langdon*, 4 Gray, 186, one Goodenow received the note sued on from the payee thereof, and executed the following writing: "Received a note [describing it] for which I am to collect and account to the said payee the sum of $110 when the note is collected, or return said note back to said payee, if I choose." After notice that the note was held by Goodenow, the maker paid the same to the payee. Goodenow sued on the note in the name of the payee for his use, and on the trial offered parol evidence of conversations had between the payee and himself, tending to explain and qualify the writing, and to show what the parties intended thereby. The court held the evidence incompetent, saying: "This paper, though called a receipt, and beginning with the word 'received,' is not a receipt for money, within the rule allowing a receipt to be controlled or explained by parol evidence. It was a written instrument stating the terms on which the possession of the note was intrusted to Goodenow." *Parker* v. *Morrill*, 98 N. C. 232, presented circumstances much like those of the present case. In that case, on a settlement between a court ward and her guardian, a release was executed in consideration that the guardian should invest a certain sum—agreed to be the balance due by him—in lands in his own name as trustee for the separate use of the ward. This the guardian did. After his death the ward brought an action to recover a balance claimed to be due in addition to the sum named in the release. The plaintiff alleged that the guardian in truth had in lands at the time of the release $2,500 belonging to her, but represented that he only had $1,500; that upon the guardian's agreement to invest this sum for the plaintiff, as stated in the written agreement, and that he would by his last will settle other property upon her, the plaintiff agreed to release him; and that he had died, not having made the provision in his will as stipulated. Evidence of the agreement to make provision by will for the plaintiff was excluded, the court saying: "When the parties to a contract in writing thus refer in it to matters constituent of it, it must be taken that the whole of the material parts of such matters are mentioned, nothing to the contrary appearing; and parol evidence will not be received to contradict, add to, take from, or modify what the parties have thus put in writing." The subject is fully discussed with great clearness by Judge Finch, in *Eighmie* v. *Taylor*, 98 N. Y. 288. The recitals of the conveyance now under consideration show very clearly that the minds of the parties were directed to the precise matter to which their negotiations referred. It was a settlement of a sum due by Mrs. Irving that was in view, and the language of the writing, while consisting perfectly with their understanding, when applied to this matter, is incapable of being so enlarged as to include the release of the general liability of the guardian, without importing a new element into the contract. No more precise and accurate statement of the rule has been made than that contained in the opinion of Judge Campbell in *Cocke* v. *Blackbourn*, 58 Miss. 537, that: "Where parties embody their mutual agreements in a formal written instrument, it must be taken as containing all they then desired to preserve the evidence of, and that it is not competent afterwards, in a trial at law, to add to or subtract anything from it, by parol evidence of something which it should have contained or omitted." While the present proceeding is in chancery, the pleadings do not seek a reformation of the instrument, nor suggest any circumstances that would entitle the defendant to that relief. The same rule is therefore applicable as would be in a legal action. The appellant's contention that the rule excluding oral evidence to vary the terms of the contract cannot be applied here because her testator was not a party to the contract, is answered by the fact that the claim she asserts is under the contract. If appellant is a stranger to the contract, while she is not bound, she can take nothing by it. If she claims under the contract, she must take under and according to its terms. The first guardian's bond was not discharged by the second one, directed to be given when the ward's estate was augmented by a new inheritance. *McWilliams* v. *Norfleet*, 60 Miss. 987. The appellant cannot assign for errors matters which affect other defendants who refuse to join in the appeal. Code, § 4378.

We find no error in the decree, and it is affirmed.

J. A. SHINGLEUR & COMPANY *et al.*, *Appts.*,
v.
WESTERN UNION TELEGRAPH COMPANY.

(72 Miss. 1030.)

A mistake in a telegram directing an agent to sell property, in reliance on which he makes a contract for such sale in his own name and not binding on the principal, will not give the latter a right of action, where he voluntarily carries out the contract after notice of the mistake, in order to protect his agent, instead of leaving the latter to his remedy against the telegraph company.

(June 3, 1895.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Hinds County in favor of defendant in an action brought to recover damages for defendant's negligence in changing a telegram which had been delivered to it for transmission. *Affirmed.*

Plaintiffs were cotton brokers and had 500 bales of cotton for sale; they delivered a cipher message to defendant directed to their agents in Boston authorizing a sale at 8¼ cents per

NOTE.—The decision in the above case, while somewhat unusual, is clearly based on the theory that the sendee of a telegram has a right of action against the company for damages sustained on account of errors in the transmission of the message. On this point, see Western U. Teleg. Co. v. Adams (Tex.) 6 L. R. A. 844; Milliken v. Western U. Teleg. Co. (N. Y.) 1 L. R. A. 281; International Ocean Teleg Co. v. Saunders (Fla.) 21 L. R. A. 81, and (limiting the right) Western U. Teleg. Co. v. Wood (C. C. App. 5th C.) 21 L. R. A. 706.

See also 34 L. R. A. 492; 38 L. R. A. 684.

pound; the company altered the word which signified 8¼ so that as delivered it meant 8⅝; the agents entered into a contract at that price and plaintiffs considering themselves bound by the contract delivered the cotton under it, thereby losing $470.

Further facts appear in the opinion.

Messrs. **Calhoon & Green,** for appellants:

Prior to the Constitution of 1890 declaring telegraph companies common carriers and liable as such, it was held that the telegraph company was liable for an injury resulting from the delivery of an altered message.

Western U. Teleg. Co. v. *Allen*, 66 Miss. 555.

The declaration that a telegraph company owed and performed a duty to the public in the reception and transmission of messages brings it clearly within the principle applied to common carriers, that it is contrary to public policy to permit a stipulation limiting liability for negligence, or for a smaller amount than the real injury.

Chicago, St. L. & N. O. R. Co. v. *Moss*, 60 Miss. 1011, 45 Am. Rep. 428; *Chicago, St. L. & N. O. R. Co.* v. *Abels*, 60 Miss. 1017; *Southern Exp. Co.* v. *Seide*, 67 Miss. 609.

Alexander v. *Western U. Teleg. Co.* 66 Miss. 161, 3 L. R. A. 71; *Western U. Teleg. Co.* v. *Allen*, *supra*; and *Western U. Teleg. Co.* v. *Clifton*, 68 Miss. 307,—all arose prior to the Constitution of 1890, and under these the principle of defendant's liability is established.

See also Gray, Communication by Telegraph, §§ 104 *et seq.*

But the case at bar is governed by § 195, Const. 1890, whereby telegraph companies are declared to be common carriers and liable as such.

The settled construction of the law of common carriers in this state at the time of the promulgation of the Constitution was that they could not stipulate by special contract against damages caused by their own negligence.

Chicago, St. L. & N. O. R. Co. v. *Moss*, and *Chicago, St. L. & N. O. R. Co.* v. *Abels*, *supra*.

That the telegraph company was a foreign corporation is immaterial.

Paul v. *Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Fire Assn. of Philadelphia* v. *New York*, 119 U. S. 110, 30 L. ed. 342; *Doyle* v. *Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; *Runyan* v. *Coster*, 39 U. S. 14 Pet. 129, 10 L. ed. 386; *Bank of Augusta* v. *Earle*, 38 U. S. 13 Pet. 595, 10 L. ed. 311; Sutherland, Stat. Constr. § 471, p. 613; *Louisiana Bank* v. *Williams*, 46 Miss. 624.

Either party injured can recover.

Gray, Communication by Telegraph, § 104, and cases; *Western U. Teleg. Co.* v. *Allen*, 66 Miss. 549; *Daughtery* v. *American U. Teleg. Co.* 75 Ala. 170, 51 Am. Rep. 435.

The rule of liability should be enforced in favor of the sender.

Rose's Case, Allen, Teleg. Cas. p. 337.

Nor does it avail if the message was in cipher.

Southern Exp. Co. v. *Seide*, 67 Miss. 609; *Alexander* v. *Western U. Teleg. Co.* 66 Miss. 173, 3 L. R. A. 71; *Daughtery* v. *American U. Teleg. Co.* 75 Ala. 168, 51 Am. Rep. 435; *Western U. Teleg. Co.* v. *Fatman*, 73 Ga. 285, 54 Am. Rep. 877; *Western U. Teleg. Co.* v. *McLaurin*, 70 Miss. 26; *Primrose* v. *Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 883.

Messrs. **Mayes & Harris** for appellee.

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

The first contention of appellee is that the sender does not make the telegraph company his agent in such sense that it renders him liable to the sendee in case an altered message is delivered to the sendee. The negative of this proposition is maintained by the English courts, which hold that the liability of the telegraph company arises out of the contract, and hence that the sendee, not being in privity with the company, can never sue the company. *Playford* v. *United Kingdom Electric Teleg. Co.* Allen, Teleg. Cas. 437; *Henkel* v. *Pape*, Id. 567. This view is also urged with great clearness and power in Gray, Communication by Telegraph, §§ 68, 104 *et seq.*, and in Bigelow, Torts, pp. 621–626, but the strongest reasoning in support of this view which we have found in any case, English or American, is in *Pepper* v. *Western U. Teleg. Co.* 87 Tenn. 554, 4 L. R. A. 660, decided in 1889. This case contains an exhaustive review of the authorities, and holds that the minds of the parties in case of an altered message have never met, and that neither can be bound to the other unless the telegraph company is the agent of the sendee, and this is repudiated on principle and authority. The English view, in so far as it predicates the right of the sendee to sue on contract alone, leads to one very manifestly unjust result, to wit, that since the sendee cannot sue the company (as held in *Playford's Case*, *supra*), nor the sender (as held in *Henkel's Case*, *supra*), he is remediless. According to what is called the "American doctrine" (Gray, Communication by Telegraph, § 104, note 3; Thompson, Electricity, § 426), the affirmative of the proposition under discussion is maintained; representative among the cases so holding being *Rose's Case*, Allen, Teleg. Cas. p. 337, in which case the principal was disclosed, and the agent not bound. In *De Rutte* v. *New York, A. & B. Electro-Magnetic Teleg. Co.* 30 How. Pr. 403, it was held that the party interested in the despatch, whether sender or sendee, was the one who really contracted with the company, and that such person could sue in contract. In *Dryburg's Case*, 35 Pa. 298, 78 Am. Dec. 338, the supreme court held that the company was the agent of both sender and sendee (upon very unsatisfactory reasoning), and hence either could sue in contract.

Turning from this view of the right of the sendee to sue the company in contract, and putting the right to sue on the ground that, in case of delivery of an altered message, upon which the sendee has acted to his damage, the sendee's right to sue is in tort for the injury to him, the wrong and the consequent damages, we find this view clearly and universally upheld by the American authorities. Gray, Communication by Telegraph, § 78; Thompson, Electricity, §§ 427, 428, 430, 443; *Dryburg's Case*, *supra*, *Sharswood's Opinion*; *Rose's Case*, Allen, Teleg. Cas. p. 340; Bigelow, Torts, pp. 614 *et seq*; *Pepper* v. *Western U. Teleg. Co.* 87 Tenn. 554, 4 L. R. A. 660. *Rose's Case*, in so far as it held that the sendee could not sue in that case because the principal was the injured party, and could himself alone sue, is said by Mr. Gray (sec. 78) to be open to criticism, and is held unsound on that ground by

other authorities. Mr. Thompson suggests in section 424 an additional reason why the sendee should be allowed to sue, and in section 427 puts the matter on the true ground. He says: "The true view, which seems to sustain the right of action in the receiver of the message, or in the person addressed, where it is not delivered, is one which elevates the question above the plane of mere privity of contract, and places it where it belongs upon the public duty which the telegraph company owes to any person beneficially interested in the message, whether the sender, or his principal, where he is agent, or the receiver, or his principal, where he is agent." This is the doctrine of this court in *Allen's Case*, 66 Miss. 549. This review of the authorities will sufficiently indicate how the courts, in dealing with this purely modern agency, have been groping their way in their search for the true ground of liability, uselessly conjuring up analogies that do not exist, and misled by the apparent applicability of the doctrine of agency as existing between private individuals. This view last above given discards absolutely the doctrine of agency, as applicable between private individuals, as suiting the case of the liability of the telegraph company to sendee or to sender. It treats the telegraph company as an institution *sui generis*, a system unto itself, an independent transmitter of intelligence, an independent contractor, or (as Mr. Bigelow and Judge Sherwood most simply and best put it) as an independent principal. It is liable to the sendee in tort alone, as principal. It is liable to the sender in contract or in tort, as principal. It is not liable to either as agent in any proper sense. *Western U. Teleg. Co.* v. *Brown*, 108 Ind. 538; *Western U. Teleg. Co.* v. *Hope*, 11 Ill. App., at page 289, and authorities cited. "Whether the agency is general or special, the authority delegated governs in all questions arising between the principal and his agent, out of the agency. Whether the agency is general or special, a principal is responsible to a third person dealing bona fide with his agent, either where the agent acts within the scope of the authority actually conferred upon him by the principal, or where the agent acts within the scope of the authority which he has been held out by the principal as possessing. But whether the agency is general or special, a principal is not responsible to a third person dealing with his agent, where that agent acts beyond the scope of both these authorities. . . . It is clear that a telegraph company is actually authorized by its employer to communicate a certain message (and a certain message) only. It is also clear it seems that it is not held out by him as possessing an authority to communicate any, as distinguished from a certain message." Gray, Communication by Telegraph, § 105. The delivery, therefore, of an altered message, is the delivery of a message which the company, neither as general nor special agent, had, or was held out as having, any authority to deliver; and the liability to the sender is that of an independent principal. It is perfectly obvious that the company is not the servant of the sender; the sender has no authority to control the company as to the manner in which it does the act. Gray, Communication by Telegraph, §§ 104 *et seq.* The steady growth of this view is shown by the statutes of all the states imposing upon the company the duty of receiving and sending messages for all persons, with the various regulating provisions embraced in these statutes; thus making what had been, prior to such statutes, merely the duty imposed by the law from the peculiar nature of the business of telegraphy, after such statutes, a statutable public duty. And now we have gone the further and completer step indicated in section 195 of the Constitution of 1890; all which enforces the justness of the declaration in *Western U. Teleg. Co.* v. *Allen*, 66 Miss. 555: "The courts then [in the early history of the English law, dealing with the common carriers], as the courts now, conscious of the needs of the public, expanded the principles of the law, fitted them to the exigencies of the occasion, and imposed a degree of liability unknown to other contract relations, but required for the safety and protection of the public."

It is also true that the sender may sue the company in tort as well as in contract, in the case of an altered message. Mr. Cooley says: "In many cases an action as for a tort or an action as for a breach of contract may be brought by the same party, on the same state of facts." Cooley, Torts, pp. 103, 104. So Mr. Bigelow says: "The fact that a contract existed, and was broken at the same time and by the same act or omission by which the plaintiff's cause of action arose, is only one of the accidents of the situation. The defendant owed, in respect of the same thing, two distinct duties; one of a special character to the party with whom he contracted, and one of a general character to others. . . . The duty, therefore, does not grow out of the contract, but exists before and independently of it." Again: "What does it mean when it is said that even this contractee [appellant here answering to the contractee] may sue in tort or in contract for his damages? Certainly nothing, unless that the original duty which the defendant, before the contract, owed to all alike still survives, even towards his contractee." And without prolonging this opinion on this point, it is sufficient to refer to Bigelow, Torts, pp. 586, 587, 614, and to the elaborate discussion in *Rich* v. *New York C. & H. R. R. Co.* 87 N. Y. 382. But, whether looked at in the light of contract or of tort, plaintiff's case comes inevitably to this: That plaintiff, at a time when he knew fully of the mistake in the telegram, and when he could have delivered or refused to deliver the cotton, and when, the minds of plaintiff and of Appleton, Dickson & Co. never having met, and there being, as to this sale, no contract made between them, plaintiff was, therefore, under no legal liability to deliver the cotton, nevertheless, acting on the "sentiment" that he would himself protect his agent (already fully protected by the liability in tort of the company to such agent), and maintain his business credit, did deliver the cotton, anyhow, and having done so, now seeks to hold the company,—can the action be maintained? The only case holding that the action can be maintained, so far as our research has gone, is *Western U. Teleg. Co.* v. *Shotter*, 71 Ga. 767, 768. The facts in this case are identical with those in *Pepper* v. *Western U. Teleg. Co. supra*,

where the court, after an elaborate review of the American authorities, says: "As already stated, Mr. Gray not only shows that upon principle the English holding is the correct one, but, while listing the cases above mentioned as indicating a contrary view, he states that most of them are *dicta*. There is but one case referred to by him, . . . which directly adjudges that the sender of a telegram is bound to the receiver by the terms of the message as negligently altered by the company. That is the case of *Western U. Teleg. Co.* v. *Shotter*, 71 Ga. 760. With great respect for the high character of that learned tribunal, we cannot approve the line of reasoning pursued, nor the conclusion therein reached. . . . The learned judge delivering the opinion places his conclusion in part on the fact that in England the government has charge of the telegraph lines, and upon the idea that a merchant, or business man, would lose credit and commercial standing were he to refuse to make good to his correspondent the contract contained in his message as delivered. We cannot see how the fact of governmental charge of the telegraph system can make any difference, for in this country the sender is as impotent to control and direct the movements and conduct of the telegraph company as if it were under the government. . . . Nor can we see how the commercial standing of the sender who remits his correspondent to his recourse on the telegraph company for such injury as may result from the erroneous message can be affected." So the case of *Harrison* v. *Western U. Teleg. Co.* (Tex.) 10 Am. & Eng. Corp. Cas. 600, is a case directly in point, and stronger in its facts for plaintiff than this case. There plaintiffs, in Texas, wired Latham, Alexander & Co., in New York, to purchase 100 bales of cotton. As delivered, the telegram directed them to sell 100 bales. Latham, Alexander & Co. sold without plaintiff's knowing anything of the error, and a loss resulted of $129.50, which later, on settlement with Latham, Alexander & Co., plaintiffs paid, claiming they were compelled to pay. The court says: "The mistake which occasioned the loss . . . was a mistake of the telegraph company, and not of plaintiffs, and plaintiffs were not bound to pay or make good said loss to Latham, Alexander & Co. and if they made such payment, were not responsible or liable therefor; they could not hold the company liable over to them for repayment." This, too, in a case where the loss had been sustained without knowledge on plaintiff's part of the error. To the same effect are *Henkle* v. *Pape*, Allen, Teleg. Cas. p. 567, and *Verdin* v. *Robertson*, Id. 697. It is not necessary to go so far, and we express no opinion as to what would be the law had plaintiff here not known, before he acted, all about the mistake. In *Pepper's Case* and *Shotter's Case* the goods had been shipped to the place of residence of the sendee, and loss to some extent was inevitable to the sendee. As held in *Pepper's Case*, it was the plaintiff's duty, in view of all the circumstances, to make the loss as small as possible, and that he could then recover for such loss, as being himself to that extent—a loss thus legally sustained—the injured party. Mr. Gray correctly remarks (Communication by Telegraph, p. 185, note) that *Shotter's Case* put the liability upon a "moral and not a legal, ground." Here appellant had shipped no goods, had incurred no legal liability, had merely to refuse to comply with the terms of a contract he had never made, and remit Appleton, Dickson & Co. to their adequate remedy against the company. His payment was voluntary and gratuitous, and cannot, on any sound or just principle, create for him a cause of action where none existed prior to such voluntary payment. The declaration in this case recognizes the fact that plaintiff would have to be legally bound to Appleton, Dickson & Co., and alleges that plaintiff was so bound. Appellant, in his testimony, says: "There was no agreement that they (Appleton, Dickson & Co.) could or could not enforce a contract with us to deliver cotton where there was a mistake in a telegram. That is a mere business obligation, and we had to fulfil or lose our credit. It was a moral sentiment. It was to our interest to do it." Under the view we have taken, it becomes unnecessary to consider the stipulations in the telegram, nor section 195 of the Constitution.

The judgment is affirmed.

Cooper, Ch. J., dissents.

NEBRASKA SUPREME COURT.

AMERICAN WATERWORKS COMPANY, *Plf. in Err.*,
v.
STATE of Nebraska *ex rel.* W. L. WALKER.

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

***1. A demurrer to a pleading** admits the truth of the facts well pleaded, for the purpose of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law drawn therefrom by the pleader.

2. A private corporation which procures from a municipal corporation a franchise for supplying the latter and its inhabitants with water, and by virtue of which franchise it is permitted to and does use the streets and alleys of such municipal corporation in the carrying on of its business, becomes thereby affected with a public use, and assumes a public duty. That duty is to furnish water at reasonable rates to all the inhabitants of the municipal corporation, and to charge each inhabitant, for water furnished, the same price it

*Headnotes by RAGAN, C.

NOTE.—For power to compel corporation to furnish water supply to individual, see *note* to Rushville v. Rushville Nat. Gas Co. (Ind.) 15 L. R. A. 321; also Wood v. Auburn (Me.) 29 L. R. A. 376.

See also 32 L. R. A. 697; 33 L. R. A. 59; 37 L. R. A. 675; 40 L. R. A. 171.

charges every other inhabitant for the same service under the same or similar conditions.

3. **Such a corporation has a right to adopt all such rules** for its convenience and security as are reasonable and just, and to decline to furnish water to any inhabitant who refuses to comply with such reasonable rules.

4. **For such a rule to be valid and enforceable,** it must, in itself, be lawful and just, and must not be discriminatory in its nature.

5. **A rule of a private corporation engaged in supplying a city and its inhabitants with water** in pursuance of a franchise granted by such city provided: "Water rents will be due and payable on the first days of January and July of each year, in advance, at the company's office. . . . If not paid within thirty days after they fall due, the water will be turned off, and not turned on again until all back rents are paid, including a charge of $1 for turning the water off and on." *Held*, that so much of said rule as required a patron in default for water rents to pay $1 as a condition precedent to his right to again be furnished with water was unreasonable and discriminatory and void.

6. **A patron of such corporation failed to pay his water rent** on July 1. His default continued to August 17, when the corporation shut the water off from the patron's premises. August 18 the patron tendered the corporation the water rent fixed by its rules from July 1 to December 31, and requested that the water might again be turned on, but refused to pay the $1 required by the rule for turning on and off the water. *Held*, (1) that the corporation would be compelled, by mandamus, to turn the water on the patron's premises; (2) that the inability of the corporation to collect the $1 from the patron by the ordinary process of law, because of the latter's insolvency, afforded no excuse to the corporation for not supplying the patron with water.

7. **State v. Nebraska Teleph. Co.** 17 Neb. 126, 52 Am. Rep. 404, followed and reaffirmed.

(October 15, 1895.)

ERROR to the District Court for Douglas County to review a judgment in favor of plaintiff in a mandamus proceeding to compel defendant to furnish relator with water for use at his residence. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. **Connell & Ives** for plaintiff in error.

Mr. **Charles A. Goss,** for defendant in error:

A demurrer admits the truth of such facts as are issuable and well pleaded; but it does not admit the conclusions which counsel may choose to draw therefrom.

Branham v. *San José*, 24 Cal. 585; *Smith* v. *Henry County*, 15 Iowa, 385; *Griggs* v. *St. Paul*, 9 Minn. 246; Bliss, Code Pl. 2d ed. 418.

The courts reserve the right to say, in any particular case, whether or not the rules are reasonable.

Shiras v. *Ewing*, 48 Kan. 170; *Shepard* v. *Milwaukee Gaslight Co.* 6 Wis. 539, 70 Am. Dec. 479; 11 Wis. 234, 15 Wis. 318, 82 Am. Dec. 679.

When a dispute arises between a gas company and a consumer, the latter is entitled to have his rights investigated by the courts, and in such case an injunction will be granted to prevent the cutting off of the supply of gas until the cause can be tried.

Sickles v. *Manhattan Gaslight Co.* 64 How. Pr. 33.

The *Webster Telephone Case* is in point.

State v. *Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404.

Ragan, C., filed the following opinion:

The state of Nebraska, upon the relation of W. I. Walker, filed an application in the district court of Douglas county against the American Waterworks Company (hereinafter called the "water company") for a peremptory writ of mandamus to compel the water company to furnish the relator water for use at his residence in the city of Omaha. The relator alleged in his application that the water company was a corporation doing business in the city of Omaha; that it was a common carrier and furnisher of water to the city of Omaha and its inhabitants; that it had secured a franchise from the city, in and by which it had the right to use the streets, alleys, and public grounds thereof for laying its water mains and erecting its hydrants; that it was in the possession and use of the streets and alleys of said city for the purpose of supplying said city and its inhabitants with water; that the relator occupied a dwelling on Davenport street, in said city, near which dwelling the water company had a water main; that the water company had furnished him water at his premises since the 10th of February, 1890, at the rate charged by the water company, of $11 per year; that he had always paid his water rents promptly on the 1st days of January and July in each year, as required by the rules of the company until the 1st day of July, 1891; that his water rents were paid up to the last day mentioned; that on said date there became due to the water company $5.50, being the water rents from that date to the 1st day of January, 1892; that he was absent from home on the 1st of July, 1891, and remained absent until about the 1st of August of that year; that, by reason of the press of business, he forgot, after his return, to pay his water rents, until the 17th day of August, when the water company shut the water off from his residence; that on the 18th of August he went to the office of the water company, in the city of Omaha, and tendered it the rent from the first day of July, 1891, to the 1st day of January, 1892, and requested the water company to turn on the water at his residence; and that the water company refused to do so. The answer of the water company to the relator's application, so far as material here, alleged that the relator had actual notice of the rules and regulations of the water company; that these rules were reasonable; that they were proper and necessary for carrying on its business and supplying water to its customers, and were enforced against all citizens and customers alike; that among such rules and regulations was the following: "Water rents will be due and payable on the first days of January and July of each year, in advance, at the company's office. . . . If not paid within thirty days after they fall due, the water will be turned off, and not turned on again until all back rents and charges are paid, in

cluding a charge of $1 for turning the water off and on;" that the relator refused to comply with this rule by paying the sum of $1, as required by it, for turning the water off and on at his premises; and that relator was insolvent. The relator submitted a demurrer to this answer, which the district court sustained, and issued the writ prayed for.

1. It is insisted that the judgment of the district court is wrong because the answer alleges, and the demurrer admits, that the charge of $1 demanded of relator for turning off and on the water was a reasonable charge; that the rule itself was reasonable and proper, and necessary to the carrying on of respondent's business; and that relator was insolvent. But we are of opinion that all these averments of the answer, except the one as to the insolvency of the relator, are mere conclusions of law. "A demurrer to a pleading admits the truth of the facts well pleaded, for the purpose of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law therein set out." *Smith* v. *Henry County*, 15 Iowa, 385; *Branham* v. *San José*, 24 Cal. 585.

2. The allegation in the answer that the relator was insolvent, we think, tendered an immaterial issue, as will be seen further on.

3. The water company, though a private corporation, by virtue of the franchise granted it by the city of Omaha, and its user of such franchise, became affected with a public use. By accepting such franchise, and entering upon the business of furnishing water to the city and its inhabitants, it assumed a public duty. That duty was to furnish water at reasonable rates to all the inhabitants of the city, and to charge each inhabitant of the city, for water furnished, the same price it charged every other inhabitant for the like service under the same or similar conditions. *Williams* v. *Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266; *Shepard* v. *Milwaukee Gas Light Co.* 6 Wis. 539, 70 Am. Dec. 479. And we have no doubt but that the water company had and has the right to prescribe all such rules and regulations for its convenience and security as are reasonable and just; and to refuse to furnish water to any inhabitant who refuses to comply with such reasonable rules and regulations. But such rules must be reasonable, just, lawful, and not discriminatory. *Shepard* v. *Milwaukee Gas Light Co. supra.* Is the rule pleaded by the respondent in its answer a reasonable and valid one, with which relator must have complied, as a condition precedent to his right to compel respondent to furnish him water? It is to be observed that the rule provides that, if default shall be made in the payment of water rents, the water shall be turned off, and that it will not be again turned on until two things are done: First, all back rents and charges paid; second, the payment of $1 extra for turning off and on the water. As the relator in this case tendered to the respondent the water rents from the 1st of July, 1891, to the 1st of January, 1892, the question whether that part of the rule requiring one in default for water rents to pay such rents, as a condition precedent to his right to have the water turned on again, is not necessarily involved in this case. The precise inquiry here is whether that part of the rule is reasonable which requires one in default for water rents, in order to procure the use of water, to pay this charge or penalty of $1. To be valid and enforceable, it must, in itself, be lawful and reasonable and just, and it must not discriminate between persons similarly situated. The reasonableness and validity of the rules of private corporations which had assumed the performance of public duties, or by reason of the acceptance of franchises, and engaging in the business of serving the public by supplying it with water, gas, etc., had thereby become public-service corporations, have been frequently before the courts; but, so far as we know, no court has suggested a test for determining whether or not the rules of such a corporation are reasonable. In *Tacoma Hotel Co.* v. *Tacoma Light & W. Co.* 3 Wash. 316, 14 L. R. A. 969, 28 Pac. Rep. 517, it is said in the syllabus: "A rule of a water company which requires water rates to be paid quarterly, adds a penalty of 5 per cent in case of default of payment for ten days, and provides that after a default for fifteen days the water shall be shut off from the premises, is a reasonable regulation." In *Williams* v. *Mutual Gas Co.* (Mich.) 18 N. W. Rep. 236, it was held: "The requirement of a deposit of money to guarantee the payment of the price of the gas used is not an unreasonable one, and the company may discontinue furnishing the gas unless complied with." In *Shiras* v. *Ewing*, 48 Kan. 170, it was held that "a rule of a water company, giving it the right to shut off water from the premises of a consumer who wastes it, is reasonable." In *People* v. *Manhattan Gas Light Co.* 45 Barb. 136, the right of a gas company to refuse to furnish a customer with gas until he paid his past-due gas bills was affirmed. In *Shepard* v. *Milwaukee Gas Light Co. supra*, the reasonableness of several rules of the gas company was considered. The ninth rule authorized the company, by its inspector, to have free access, at all times, to buildings and dwellings, to examine the whole apparatus, and for the removal of the meter and service pipe. The court said: "This regulation is too general and cannot be upheld, or at least a party cannot be required to subscribe to it, to entitle him to be furnished with gas." Rule 14 provided that the company should have the right at any time to shut off the gas, if it should find it necessary to do so to protect itself from fraud. The court said: "Here the company assumes the whole power to decide upon the question of abuse or fraud, either in fact or anticipation without notice, without trial, of their own mere motion. This summary jurisdiction would would not be given to any of the judicial courts in any case, but upon the most urgent emergency. . . . It is no hardship for the company to resort to the same tribunals, upon like process, for protection against fraud as the law provides for individuals." Rule 16 provided that, after the admission of gas into the fittings, they should not be disconnected or opened, either for alteration or repairs or extensions, without a permit from the company, which might be obtained at the company's office free of expense, "and any . . . person who may violate this regulation will be held liable to pay treble the amount of damages occasioned thereby."

The court said: "It is not to be allowed that the gas company can impose penalties in this way, or make the submission to such penalties a condition precedent to the right of the citizen to be furnished with gas. It is singular if the legislature has given to the gas company the right to inhibit the citizen from altering the arrangement of his gas apparatus in his dwelling without its assent first had and obtained, or from extending the same; and still more singular that the company should claim the sovereign right to inflict penalties upon him for doing so." In *Gas Light Co. of Baltimore* v. *Colliday*, 25 Md. 1, it was held that the gas company could not refuse to furnish gas to a person because he refused to pay a former gas bill, or a bill contracted for gas used on other premises. See *Lloyd* v. *Washington Gas Light Co.* 1 Mackey, 331; *New Orleans Gas Light Bkg. Co.* v. *Paulding*, 12 Rob. (La.) 378. In *Sickles* v. *Manhattan Gas-Light Co.* 64 How. Pr. 33, a dispute arose between the gas company and the consumer; and it was held that the latter was entitled to have his rights investigated by the courts, and that the company would be enjoined from cutting off the gas until a trial of the case could be had. In *Rockland Water Co.* v. *Adams*, 84 Me. 472, a rule of the water company provided that users of water should be liable to pay rent for the whole year, whether they actually used it for that length of time or not, and the payments for water should be made yearly in advance; and this rule was held to be unreasonable and void.

In *State* v. *Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404: "During the year 1883, Webster had a telephone in his office, but the telephone company, for some reason, neglected to furnish him a list of its subscribers residing in the city of Lincoln, and other cities and villages reached by its telephone lines. When Webster's telephone rent became due, he refused to pay for that part of the time he had used the telephone, and during which he had been deprived of the list of subscribers. A dispute arose between Webster and the telephone company and the company removed its telephone from Webster's office. Some time after that, Webster requested the telephone company to put a telephone in his office, and tendered the company the sum charged its regular subscribers for such work. It does not appear that Webster tendered his telephone rents in advance, nor that the rents were payable in advance, but it appears from the report of the case that Webster was financially able to pay the telephone rents when they matured. The telephone company refused to put in the telephone, alleging that the telephone had been removed from Webster's office by reason of his refusal to pay his rents. Webster then applied to this court for a mandamus to compel the telephone company to furnish him a telephone, and the court awarded the writ. The court said: "It is insisted that the conduct of the relator—the refusal of Webster to pay the rent of the telephone which had been removed from his office—now relieves respondent from any obligation to furnish the telephone. We cannot see that the relations of the parties to each other growing out of their past transactions, can have any influence upon their rights and obligations in this action. If relator is indebted to respondent for the use of its telephone the law gives it an adequate remedy by an action for the amount due. If the telephone company has become such a public servant as to be subject to the process of the courts in compelling it to discharge public duties, the mere fact of a misunderstanding with those who desire to receive its public benefits will not, alone, relieve it from the discharge of those duties. While either, or perhaps both, of the parties may have been in the wrong so far as the past is concerned, we fail to perceive how it can affect the rights of the parties to this action." This case is decisive of the question under consideration, and also disposes of the issue of relator's insolvency, tendered by the answer of respondent. In the *Webster Telephone Case* respondent refused to furnish a telephone because it alleged that Webster was indebted to it for the rent of a telephone previously furnished to and used by him, and which had been removed because of his failure to pay the rent. In the case at bar the water company refused to furnish relator water because it alleged that the relator was indebted to it for having turned off the water from his premises while he was in default in paying his water rent. The cost and expense of turning off and on the water for a patron enters into, and forms a part of, the semiannual water rent paid in advance by such patron under the rules of the company. It would be unjust to permit the water company to exact payment for this service a second time. An enforcement of the rule would compel a citizen who had once made a default in his water rent, though he afterwards paid all such rents, to pay a greater price or rate for water than that paid by another citizen for the same water under the same conditions.

We reach the conclusion that the respondent in this case has shown no sufficient excuse for not furnishing the relator with water, and that the rule invoked by it to stay the process of the courts is unreasonable and discriminatory in its nature, and therefore void.

The judgment of the District Court is affirmed.

Irvine, C., did not sit.

Petition for rehearing denied January 10, 1896.

Barney McGINN, *Plff. in Err.*,
v.
STATE of Nebraska.

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

***1. The term "calendar month"** is used in section 24, article 3, of the Constitution in the sense in which it was understood prior to the adoption of that instrument.

2. The term "calendar month," whether employed in statutes or contracts, and

*Headnotes by POST, J.

NOTE.—As to the meaning of the word "month," see also Guaranty Trust & S. D. Co. v. Buddington (Fla.) 12 L. R. A. 770, and *note*.

As to computation of time in general, see brief annotation to Pearce v. Denver (Colo.) 6 L. R. A. 541; Kuhn v. Brownfield (W. Va.) 11 L. R. A. 700; Merritt v. Mora (D. C. E. D. Pa.) 11 L. R. A. 724.

not appearing to have been used in a different sense, denotes a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one. If there be no corresponding day of the succeeding month, it terminates with the last day thereof.

3. **The provision of section 895 of the Code** of Civil Procedure, for the exclusion of the first day in computing the time within which an act is to be done, was intended to establish a uniform rule, applicable alike to the construction of statutes and to matters of practice.

4. **The penalty for murder in the first degree** was, by section 3 of the Criminal Code, as originally adopted, death by hanging. By an act approved April 8, 1893, passed without an emergency clause, said section was so amended as to provide that the penalty for the crime therein denounced shall be death by hanging or imprisonment for life, in the discretion of the jury. The legislature of 1893 having adjourned on the 8th day of April of that year,—*Held*, that said amendment took effect on the 9th day of July following.

5. **When the defendant in a criminal prosecution is adjudged guilty** of the crime charged, and subsequently procures a reversal of the judgment of conviction on account of error by the trial court, he will be held to have waived his right to object to further prosecution on the ground that he has been once put in jeopardy.

6. **While the practice of confining persons convicted of capital offenses** from the date of sentence until the day of execution has prevailed from time immemorial, such confinement is not a part of the penalty, although a necessary incident thereof, and the power of the court in that regard does not rest upon any positive provision of statute.

(November 19, 1895.)

ERROR to the District Court for Douglas County to review a judgment convicting defendant of murder. *Reversed.*

The facts are stated in the opinion.

Messrs. **Mahoney, Minahan, & Smith** and **Estelle & Hoeppner,** for plaintiff in error:

It was the duty of the jury, in the event that they should find the defendant guilty of murder in the first degree, to state in their verdict whether the punishment should be death or imprisonment for life.

Laws 1893, chap. 44.

If the act of 1893 governs this case, the pretended verdict returned is no verdict and cannot support a sentence.

In the absence of constitutional or legislative restrictions, all laws take effect as soon as they are approved.

Cooley, Const. Lim. 6th ed. p. 187.

Section 24, article 3, of our Constitution provides that "no act shall take effect until three calendar months after the adjournment of the session at which it passes, unless in case of an emergency, etc."

The session at which the act of 1893 was passed adjourned April 8, 1893, and the act in question therefore took effect on the 9th day of July, 1893.

Glore v. *Hare*, 4 Neb. 131; 1 Bl. Com. 61; 2 Bl. Com. 141; *Migotti* v. *Colvill*, L. R. 4 C. P. Div. 233; *Lacon* v. *Hooper*, 6 T. R. 224; Bis Cont. § 1339.

At the time of the adoption of our Constitution the term "month," used alone, would have been ambiguous, and it was to avoid that ambiguity that the phrase "calendar month" was used. The ambiguity pertains, however, wholly to the length of the period and not to the time when it commenced running.

The provision itself very clearly indicates when the period should commence running. It says, "three calendar months after the adjournment of the session." This can only mean three calendar months after the day of adjournment.

French v. *English*, 7 Neb. 124; *Rocsink* v. *Barnett*, 8 Neb. 146; *Glore* v. *Hare*, 4 Neb. 131; *Brown* v. *Williams*, 34 Neb. 376; *Horn* v. *Miller*, 20 Neb. 98; *Snyder* v. *Warren*, 2 Cow. 518, 14 Am. Dec. 519; *Gross* v. *Fowler*, 21 Cal. 393; *Savings & L. Soc.* v. *Thompson*, 32 Cal. 347; *Guaranty Trust & S. D. Co.* v. *Green Cove Springs & M. R. Co.* 139 U. S. 137, 35 L. ed. 116; *McGuire* v. *Ulrich*, 2 Abb. Pr. 28 (1855); *Com.* v. *Maxwell*, 27 Pa. 444; *Lester* v. *Garland*, 15 Ves. Jr. 248; *Hardy* v. *Ryle*, 9 Barn. & C. 603; *Migotti* v. *Colvill*, L. R. 4 C. P. Div. 233; *Castle* v. *Burditt*, 3 T. R. 623; *Young* v. *Higgon*, 6 Mees. & W. 49; *Watson* v. *Pears*, 2 Campb. 294 (1809); *South Staffordshire Tramways Co.* v. *Sickness & Acci. Assur. Asso.* [1891] 1 Q. B. 402; *Radcliffe* v. *Bartholomew* [1892] 1 Q. B. 161.

On the 29th of December the court pronounced sentence on plaintiff in error, by the terms of which he was to be confined in the county jail of Douglas county, in solitary confinement until the 6th of April, 1894, and then hanged. Under that sentence he was taken to the jail of Douglas county and kept in solitary confinement until the following day, when he was brought into court, the sentence vacated and a new sentence pronounced, fixing his execution at a later date, and his imprisonment at solitary confinement for a different period. This second sentence was absolutely without authority, for the reason that the punishment prescribed by the first being partly borne, the power of the court over it was exhausted.

Re Fuller, 34 Neb. 581; *People* v. *Kelley*, 79 Mich. 320; *People* v. *Mesercey*, 76 Mich. 223; *Ex parte Lange*, 85 U. S. 18 Wall. 163, 21 L. ed. 872; *Re Jones*, 35 Neb. 499; *People* v. *Kelley*, *supra*; *State* v. *Gray*, 37 N. J. L. 368; *King* v. *Ellis*, 5 Barn. & C. 395; *Rex* v. *Bourne*, 7 Ad. & El. 58; *Shepherd* v. *Com.* 2 Met. 419; *Stevens* v. *Com.* 4 Met. 360; *Christian* v. *Com.* 5 Met. 530; *McDonald* v. *State*, 45 Md. 90.

That the judgment of December 29, whereby the prisoner was sentenced to be hanged on the 6th of April, 1894, is erroneous, is not open to debate. Section 503 of the Criminal Code contains the following provision: "When any such conviction is of an offense the punishment whereof is capital, at least 100 days shall intervene between the date of such sentence and judgment, and the day appointed for the execution thereof." The sentence pronounced gave the prisoner but 97 days intervening between the day of sentence and the date fixed for execution.

This error did not occur during the trial; it was an error in the pronouncing of the judg-

ment itself. A new trial, therefore, could not cure it.

King v. *Ellis*, 5 Barn. & C. 395; *Rex* v. *Kenworthy*, 1 Barn. & C. 711; *Rex* v. *Bourne*, 7 Ad. & El. 58 (1837); *Shepherd* v. *Com.* 2 Met. 419 (1841); *Stevens* v. *Com.* 4 Met. 360 (1842); *Christian* v. *Com.* 5 Met. 530 (1843); *People* v. *Taylor*, 3 Denio, 91; *Shepherd* v. *People*, 25 N. Y. 406; *State* v. *Gray*, 37 N. J. L. 368; *McDonald* v. *State*, 45 Md. 90.

Since there is no legal verdict under the law in force at the time of the homicide, the court can have no authority to pronounce sentence.

Plaintiff in error was informed against, was placed on trial, and was put in jeopardy of his life.

To put him on trial again before another jury would be a second jeopardy unauthorized by the law.

State v. *Shuchardt*, 18 Neb. 454; *Conklin* v. *State*, 25 Neb. 784; *Jackson* v. *State*, 102 Ala. 76.

Messrs. **A. S. Churchill,** Attorney General, **George A. Day,** and **George H. Hastings,** for defendant in error:

The effect of legislation has led to the common use of the word "month" in the sense of the calendar month, without the use of the word "calendar."

The word calendar then must have been used in the Constitution for a different purpose than simply to designate a solar month. The purpose and intent were that three months as enumerated in the calendar should elapse after the month in which the session of the legislature which passed the act should adjourn.

See the law dictionaries, and 11 Am. & Eng. Enc. Law, p. 789; *Roesink* v. *Barnett*, 8 Neb. 146; *State* v. *Babcock*, 22 Neb. 37; *State* v. *Yellow Jacket Silver Min. Co.* 5 Nev. 430; *Steinle* v. *Bell*, 12 Abb. Pr. N. S. 172; *Guaranty Trust & S. D. Co.* v. *Buddington*, 27 Fla. 215, 12 L. R. A. 771; *Re Tyson*, 13 Colo. 482, 6 L. R. A. 472; *Ronkendorff* v. *Taylor*, 29 U. S. 4 Pet. 361, 7 L. ed. 886.

Weight should be given the opinion of General Hastings upon this question.

Bishop, Written Laws, § 35; *United States* v. *Lytle*, 5 McLean, 9; *Mathews* v. *Shores*, 24 Ill. 27; *United States* v. *Moore*, 95 U. S. 760, 25 L. ed. 588; *Brown* v. *United States*, 113 U. S. 568, 28 L. ed. 1079; *Hahn* v. *United States*, 107 U. S. 402, 27 L. ed. 527; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727, 28 L. ed. 1137; *Stuart* v. *Laird*, 5 U. S. 1 Cranch, 299, 2 L. ed. 115; *Peabody* v. *Stark*, 16 Wall. 240, 21 L. ed. 311; *Atty. Gen.* v. *Glaser*, 102 Mich. 396, 405; *Westbrook* v. *Miller*, 56 Mich. 151; *Malonny* v. *Mahar*, 1 Mich. 26; *Britton* v. *Ferry*, 14 Mich. 53; *Continental Imp. Co.* v. *Phelps*, 47 Mich. 299; *Pease* v. *Peck*, 59 U. S. 18 How. 595, 15 L. ed. 518; Sedgw. Stat. & Const. L. 214; *Coutant* v. *People*, 11 Wend. 511; *Jackson* v. *Washington County*, 34 Neb. 688.

The error in the first sentence occurring after the trial would not necessitate a new trial.

The supreme court would have set aside the sentence and remanded the case for sentence.

State v. *Shea*, 95 Mo. 85; *Lacy* v. *State*, 15 Wis. 14; *State* v. *Shaw*, 23 Iowa, 316; *State* v. *Nicholson*, 14 La. Ann. 798; *Daniels* v. *Com.* 7 Pa. 371; *King* v. *Kenworthy*, 1 Barn. & C. 711; *Reg.* v. *Holloway*, 5 Eng. L. & Eq. 310; *Benedict* v. *State*, 12 Wis. 314; *Beale* v. *Com.* 25 Pa. 11; *People* v. *Riley*, 48 Cal. 549; *State* v. *Child*, 42 Kan. 611; *State* v. *Redman*, 17 Iowa, 329; *State* v. *Knouse*, 33 Iowa, 365; *State* v. *Tweedy*, 11 Iowa, 350; *People* v. *Olwell*, 28 Cal. 456; *Sutcliffe* v. *State*, 18 Ohio, 469, 51 Am. Dec. 459; *Dodge* v. *People*, 4 Neb. 220; *Bohanan* v. *State*, 18 Neb. 57, 53 Am. Rep. 791; *Vaughan* v. *State*, 83 Ala. 55; Chitty, Crim. L. 722; *Dodge* v. *People*, 4 Neb. 226.

If the latter sentence is void for want of jurisdiction in the court, then the sentence must be set aside and the prisoner remanded for sentence, unless reversed and a new trial granted upon some other ground.

Re Jones, 35 Neb. 499.

The sentence is valid.

State v. *Trezevant*, 20 S. C. 363, 47 Am. Rep. 840; *State* v. *Hoyt*, 47 Conn. 542, 36 Am. Rep. 89; *Kinsler* v. *Territory*, 1 Wyo. Terr. 112.

There is nothing in the statute requiring the party convicted of murder in the first degree to be sentenced to confinement at all.

The statute fixes no such punishment in capital cases, and the retention of the prisoner in the county jail of Douglas county was but an incident to the punishment pronounced by law, and formed no part of the sentence.

King v. *Price*, 6 East, 323; *King* v. *Leicestershire*, 1 Maule & S. 442; *People* v. *Sadler*, 3 N. Y. Crim. Rep. 471; *Com.* v. *Weymouth*, 2 Allen, 144, 79 Am. Dec. 776.

The record of a court may be changed or amended at any time during the same term of the court in which a judgment is rendered.

Co. Litt. 260; Comyns' Dig. Title *Record, F;* Bacon, Abr. title, *Sessions of Justices;* 2 Gabbett, Crim. L. 564; 1 Chitty, Crim. L. 722; *Reg.* v. *Fitzgerald*, 1 Salk. 401; *Turner* v. *Barnaby*, 2 Salk. 567; *King* v. *Price*, 6 East, 327; *King* v. *Leicestershire*, 1 Maule & S. 442; *Darling* v. *Gurney*, 2 Dowl. P. C. 101.

Upon due proof that some error has been made in drawing up the record, amendments have been allowed after the final entry of judgment and the adjournment of the court for the term.

Tilden v. *Johnson*, 6 Cush. 354; *Balch* v. *Shaw*, 7 Cush. 282; *Fay* v. *Wenzell*, 8 Cush. 315; *Stickney* v. *Davis*, 17 Pick. 169; *Rex* v. *Fletcher*, Russ. & R. C. C. 58; *Reg.* v. *Fitzgerald, supra; Com.* v. *Foster*, 122 Mass. 323, 23 Am. Rep. 326; *Brown* v. *Rice*, 57 Me. 57, 2 Am. Rep. 11; *Jobe* v. *State*, 28 Ga. 235; *Lee* v. *State*, 32 Ohio St. 115; 1 Chitty, Crim. L. 722; *King* v. *Price, supra; Ex parte Lange*, 85 U. S. 18 Wall. 163, 21 L. ed. 872; *Bassett* v. *United States*, 76 U. S. 9 Wall. 38, 19 L. ed. 548; *Miller* v. *Finkle*, 1 Park. Crim. Rep. 374.

A court of criminal jurisdiction may vacate or modify a judgment at the same term at which it is pronounced, and before the sheriff has proceeded to execute it.

State v. *Redmon*, 17 Iowa, 329; *State* v. *Mead*, 4 Blackf. 309, 30 Am. Dec. 661; *Wright* v. *State*, 5 Ind. 527; *Marshall* v. *Com.* 5 Gratt. 663; *State* v. *Moran*, 7 Iowa, 236; *Wilson* v. *State*, 20 Ohio, 26; *Ray* v. *State*, 15 Ga. 223; *Webber* v. *State*, 10 Mo. 4; *State* v. *Sutton*, 4 Gill, 494; *Com.* v. *Hatton*, 3 Gratt. 623; *Lawrence* v. *People*, 2 Ill. 414; *People* v. *Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168; *Rex* v. *Keite*,

1 Ld. Raym. 138, Holt, 141. Comb. 406; *Com.* v. *Percaril*, 4 Leigh, 686; *State* v. *Duncan*, 2 McCord, L. 80; 1 Chitty, Crim. L. 611; 1 Bishop, Crim. L. § 673; *State* v. *Callendine*, 8 Iowa, 288; *Rex* v. *Huggins*, 2 Ld. Raym. 1583; *Rex* v. *Burridge*, 3 P. Wms. 439; *Dodge* v. *People*, 4 Neb. 220; *State* v. *Redman*, 17 Iowa, 329; *State* v. *Knouse*, 33 Iowa, 365.

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

The plaintiff in error, Barney McGinn, was at the September, 1893, term of the district court for Douglas county adjudged guilty of the crime of murder in the first degree, which judgment has been removed into this court for review by means of a petition in error, to which further reference will hereafter be made. The prisoner is by the information charged with feloniously and maliciously wounding with intent to kill one Edward McKenna, on the 29th day of July, 1893, from which he, the said McKenna, died two days later, on the 31st day of July. It is unnecessary to examine at length the evidence adduced in support of the allegations of the information. It is sufficient for the purpose of this investigation that the dates of the assault and the death of the deceased were proved as charged by the state. The jury, at the close of the trial, returned a general verdict of murder in the first degree, without assessing the penalty therefor, to which exception was taken both by way of motion for a new trial and in arrest of judgment, and which suggests the first questions presented for our consideration. Prior to the act approved April 8, 1893, entitled "An Act to Amend Section Three (3) of the Criminal Code . . . ," the only penalty for murder in the first degree was death by hanging. But by section 1 of the act above mentioned, section 3 of the Criminal Code was so amended as to read thus: "And upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury." By section 2 of said act the original section is repealed, with a saving clause in the following language: "Provided, however, that such repeal shall not be construed to apply to any offenses committed prior to the taking effect of this act nor shall the same affect any convictions or prosecutions held under said original section." Sess. Laws 1893, p. 386, chap. 44, § 2. The contention of counsel for the prisoner is that the act of 1893 took effect previous to the date charged in the information; hence the district court should have required the jury to fix the penalty, and that it accordingly erred in receiving the verdict over their objections. The constitutional provision which bears upon the subject is found in section 24 of article 3, as follows: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the legislature shall by a vote of two thirds of all the members elected to each House otherwise direct." The twenty-third session of the legislature adjourned on the day the act in question was approved, to wit, April 8, 1893; therefore the precise question presented is, When did the constitutional period of three calendar months after the adjournment of that session terminate? The term "month," at common law, whether employed in statutes or contracts, unless a different meaning was apparent from the context, was held to mean a lunar month of twenty-eight days, except in ecclesiastical affairs and as applicable to commercial paper. 2 Bl. Com. 141; Bishop, Cont. § 1339; *Migotti* v. *Colvill*, L. R. 4 C. P. Div. 233; *Lacon* v. *Hooper*, 6 T. R. 224; *Churchill* v. *Merchants' Bank*, 19 Pick. 532; *Guaranty Trust & S. D. Co.* v. *Green Cove Springs & M. R. Co.* 139 U. S. 137, 35 L. ed. 116. In this country many of the earlier cases follow the rule of the common law. *Vide Ellis's Case*, 8 N. J. L. 286; *Loring* v. *Halling*, 15 Johns. 119; *Stackhouse* v. *Halsey*, 3 Johns. Ch. 74; *Redmond* v. *Glover*, Dudley (Ga.) 107. Later cases have, as a rule, construed the word "month," when it does not appear to have been used in a different sense, to mean a calendar month. *Glore* v. *Hare*, 4 Neb. 132; *Brown* v. *Williams*, 34 Neb. 376, and cases cited. In order to avoid the confusion arising from conflicting constructions of the term, thirty-five states and territories have by legislative enactment declared the term "month," when used without qualification, to mean a calendar month; and in England the common-law rule was abolished by statute in 1850 (13 & 14 Vict. chap. 21). It is said by counsel for the prisoner, referring to the facts of this case, that "the authorities without exception support our contention that the three calendar months should be computed as commencing to run on the 9th day of April and terminating on the 8th day of July." And as that proposition presents the issue to be determined, we will proceed to examine some of the cases cited as bearing upon the subject. In *Glore* v. *Hare*, *supra*, it was held that an appeal taken on the 22d day of August from a judgment rendered February 21 is not within the six months prescribed by the act governing appeals to this court. In *Brown* v. *Williams*, *supra*, a note executed on the 2d day of January was held within the exception contained in section 44 of the assignment law (Comp. Stat. chap. 6), being a debt created within nine calendar months previous to a general assignment made on the 2d day of October following. In *Sayder* v. *Warren*, 2 Cow. 518, 14 Am. Dec. 519, fifteen calendar months was computed from August 15, 1822, to November 15, 1823. In *McGuire* v. *Ulrich*, 2 Abb. Pr. 28, the statute required one month's notice to quit before suit brought. The notice was given April 18 and it was held that a calendar month had intervened before the commencement of the action, to wit, May 25. In *Guaranty Trust & S. D. Co.* v. *Green Cove Springs & M. R. Co. supra*, the first publication of notice was made August 9, the answer day named being December 1 following. After computing the time at 114 days, the court says the time is "more than four lunar months, but eight days less than four calendar months."

We now come to a class of cases having a more direct bearing upon the question at issue. In *Com.* v. *Maxwell*, 27 Pa. 444, the statute provided that in case of vacancy in the office of judge of the common pleas, a successor should be chosen "at the first general election which shall happen more than three calendar

months after the vacancy shall occur." Act April 27, 1852, p. 465. The presiding judge died July 15, 1856, and the general election for that year occurred October 14. It was held that the statutory period had not intervened, and that the respondent, who was chosen at the election held on the day last mentioned, was not entitled to the office. In *Minard* v. *Burtis*, 83 Wis. 267, we observe this language: "It is also said that the notice was not given one calendar month before the action was commenced; that, having been given April 4, it would not be complete until June 1. We cannot adopt this view. If given the proper number of days before action brought, as contained in the calendar month in which it was given, as in this case, it was sufficient." The leading case of *Lester* v. *Garland*, 15 Ves. Jr. 248, arose under the will of Sir John Lester, providing that the testator's sister, Sarah Pointer, should, within six calendar months after his death, give security that she would not at any time intermarry with A, or that in case she did so intermarry, she would within six calendar months thereafter pay certain bequests therein made. The testator died January 12, and the security given July 12 was held to satisfy the requirement of the will, Grant, M. R., saying: "The question is whether the day of Sir John Lester's death is to be included in the six months or to be excluded. If the day is included she did not, if it is excluded she did, give the required security before the end of the last day of the six months: and therefore did comply sufficiently with the conditions." *Hardy* v. *Ryle*, 9 Barn. & C. 603, was an action against a justice of the peace for illegally detaining the plaintiff after the expiration of his term of imprisonment. The defendant relied upon a statute of limitations which required the action to be brought "within six calendar months after the act committed." The court, after a review of the authorities, says: "The question . . . depends upon this: whether the 14th day of December—the last day of the plaintiff's imprisonment—is to be included or excluded. . . . If it is to be included, the action was not commenced in time; if it is to be excluded, it was." *South Staffordshire Tramways Co.* v. *Sickness & Accl. Assur. Asso.* [1891] 1 Q. B. 402, was an action on a policy of insurance for twelve calendar months from November 24, 1888. It is said that November 25, 1887, was the first, and November 24 1888, the last day covered by the policy. And to the same effect are *Young* v. *Higgon*, 6 Mees. & W. 49; *Watson* v. *Pears*, 2 Campb. 294; *Radcliffe* v. *Bartholomew* [1892] 1 Q. B. 161; *Gross* v. *Fowler*, 21 Cal. 393; *Savings & L. Soc.* v. *Thompson*, 32 Cal. 347. But perhaps the most satisfactory of reported cases is *Migotti* v. *Colvill*, L. R. 4 C. P. Div. 233, which was an action against the governor of the Middlesex house of correction for false imprisonment. It appears that the plaintiff was on the 31st day of October sentenced to imprisonment for the period of one calendar month, and to the further term of fourteen days, to commence on the expiration of the first sentence. The decision turned upon the question when the first sentence terminated, and Lord Denman, after an exhaustive examination of the subject, concludes as follows: "On the whole, I am of opinion that a sentence of imprisonment for one calendar month passed on any given day of any given month is to be held to begin to run from the first moment of that day and to expire upon arriving at the first moment of the corresponding day in the succeeding month. If there be no such corresponding day by reason of the succeeding month not having so many days as in the preceding month, then, by analogy to the law established in the case of bills of exchange, I think the calendar month should be held to expire at the last moment of its last day." The other judges, Cotton, Bramwell, and Brett, concur in separate opinions; the latter using the following language: "I am of opinion that the term a 'calendar month' is a legal and technical term, and that we are bound to interpret its legal and technical meaning. The meaning of the phrase is that, in computing time by calendar months, the time must be reckoned by looking at the calendar, and not by counting days; and that one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month, less one." It is true the precise question was not presented in every case cited, as the same result would, in some instances, have been reached by extending the period to the end of the month. But they are nevertheless instructive, as tending to sustain the assertion of counsel that in no case except in *Minard* v. *Burtis*, *supra*, was the rule applied by the district court contended for. The natural and necessary deduction from the authorities above cited is that the term "calendar month," as used in the Constitution, had, prior to the adoption of that instrument in 1875, received a definite interpretation, and is to be computed, not by counting days, but by looking at the calendar, and terminates with the day numerically corresponding to the day of its commencement, less one, in the following month; and such is evidently the sense in which it is employed in the Constitution.

The authorities are not, as will be observed, harmonious upon the question whether the first day—in this instance, the day of the adjournment of the legislature—is to be included in the prescribed period. That question is, however, not an open one in this state. Indeed, it is clear that section 895 of the Code of Civil Procedure, providing that "the time within which an act is to be done as herein provided shall be computed by excluding the first day and including the last," was intended to establish a uniform rule, applicable to the construction of statutes as well as to matters of practice. *Monell* v. *Terwilliger*, 8 Neb. 360; *McGavock* v. *Pollack*, 13 Neb. 535; *Spencer* v. *Haug*, 45 Minn. 231. It follows that the period of three calendar months after the adjournment of the legislature of 1893 terminated at midnight of the 8th day of July of that year. It follows, too, that the act amendatory of the Criminal Code relating to the penalty for murder in the first degree was the law of the state on the 29th day of July, and should have governed in the trial of this cause. The attorney general, however, relies upon a practical construction of the pro-

vision under consideration adverse to the view above stated. That contention has for its basis the opinion of Hon. George H. Hastings, attorney general, in response to an inquiry addressed to him by the secretary of state on the 29th day of April, 1891. We have examined with care the opinion referred to, but are unable to accept the conclusion of the learned author, for reasons already appearing. A practical exposition of a constitutional provision by the officers charged with its execution is, as said by us in *State* v. *Holcomb*, 46 Neb. 88, entitled to great weight, and will, in case of doubt or ambiguity, especially when long acquiesced in, generally be adopted by the courts. But that rule can have no application to the case at bar. There is not alone an absence of evidence tending to prove that the construction of the attorney general was acquiesced in by the executive officers or the people of the state, but it is a fact, verified by the records of this court, and of which we are required to take notice, that the question has, ever since the date of the opinion mentioned, been the subject of judicial controversy.

Of the many questions presented during the able and instructive arguments with which we have been favored in this case, it is necessary to notice two only, in addition to those already examined, and which are both included in the proposition that it is our duty to discharge the plaintiff in error, instead of remanding the cause for trial *de novo*. It is asserted by counsel that the plaintiff has been once in jeopardy, within the meaning of the bill of rights, and that the trial then had is a bar to further prosecution for the crime charged. If the question were an open one, to be determined by the application of fundamental principles, the argument of counsel could not be lightly disregarded. Indeed, we can conceive of no course of reasoning which does not lead logically to the conclusion contended for. As said by Mr. Bishop (1 Bishop, Crim. L. 1044): "The court is the power that brings the jeopardy upon him [the prisoner]; and, when the Constitution declares that this power shall not put him in jeopardy twice, it is a mockery to say that it may bring him into as many jeopardies as it will, provided it violates the law each time." But the author, at sections 998 and 999 of the same volume, admits the contrary to be the firmly established rule. To attempt an examination of the cases holding that the accused in a criminal prosecution, by procuring a reversal of the judgment of conviction, waives his right to object to a second trial on the ground that he has been once put in jeopardy, would be a work of supererogation. It is sufficient that the question has been definitely determined by this court in *Bohanan* v. *State*, 18 Neb. 57, 53 Am. Rep. 791. See also *United States* v. *Harman*, 68 Fed. Rep. 472. The other contention, that the prisoner should be discharged, is based upon the following facts: On the 29th day of December, 1893, the district court, on overruling the motion for a new trial, pronounced its judgment, by which the prisoner was to be executed on the 6th day of April following, and in the meantime remain in solitary confinement in the jail of Douglas county. On the next day, to wit, December 30th, he was again brought into court, and an order made setting aside the judgment previously entered, and a second sentence pronounced, by which April 13, 1894, was named as the day of execution. The second sentence, like the first, provided that the prisoner should, from the date thereof until the day of his execution, be confined in the jail of Douglas county. It is argued that the second sentence is not irregular merely, but absolutely void, for the reason that the punishment prescribed by the first had been suffered in part by the prisoner, and the power of the court over the subject thereby exhausted. In the brief of counsel for the prisoner his position is thus tersely stated: "The solitary confinement imposed upon the prisoner was as much a part of his sentence as was his execution. The only authority that the sheriff had to imprison him during that day and until called into court the following day was the sentence pronounced on the 29th of December. All previous commitments had expired. Their purpose had been served. The judgment and sentence of the court were the only authority on which the imprisonment could be legally justified from the 29th to the 30th of December, and the imprisonment of plaintiff in error under that sentence from the 29th to the 30th of December was the infliction of a part of the punishment covered by the sentence, and a part, too, that the court had legal authority to impose." That argument, although plausible, is not convincing. The first sentence was, it is conceded, irregular, the time intervening between the date thereof and the day of execution being less than 100 days, as prescribed by law. Crim. Code, § 503. But, having reached the conclusion that the verdict was also irregular, and should have been set aside on the motion of the prisoner, the power of the district court to correct its judgment in prosecutions for felonies will not now be examined. This court in *Re Fuller*, 34 Neb. 581, held that the term of imprisonment of one sentenced to the penitentiary runs from the date of sentence, and not from the date of his delivery to the warden. But that was a construction of section 518 of the Criminal Code, and not involving the question now under consideration. It is by section 547 provided, in substance, that the death penalty shall be inflicted in the immediate vicinity of the jail, in an inclosure to be prepared under the direction of the sheriff. Although the confinement of the prisoner from the time of sentence until the day of his execution is a practice which has prevailed from time immemorial as a necessary incident to the judgment, it is, strictly speaking, no part thereof, and the power of the court in that regard does not rest upon any positive provision of statute. The precise question appears to have been seldom raised, and the cases cited cannot be said to sustain the proposition contended for. In *People* v. *Meservey*, 76 Mich. 223, as well as *People* v. *Kelley*, 79 Mich. 320, the sentence was imprisonment in the penitentiary, and, in accordance with the rule adopted by this court in *Fuller's Case*, *supra*, was held to have commenced on the day it was imposed. In *Re Tyson*, 13 Colo. 482, 6 L. R. A. 472, the statute of 1889 provided that all persons convicted of crimes punishable by death should be delivered to the warden of the penitentiary,

and by him kept in solitary confinement until the day of execution. The statute in force at the time of the homicide, like ours, provided merely that every person convicted of murder in the first degree should suffer death. Tyson, having been convicted of murder in the first degree, was delivered to the warden under the act of 1889, whereupon he sought his discharge by means of a writ of habeas corpus, alleging that the provision for solitary confinement was in the nature of an *ex post facto* law. In disposing of that contention the court says: "Aside from this, the defendant is imprisoned for the purpose only that he may be produced at the time set for his execution, the confinement being no part of the punishment, but simply an incident connected therewith, referable to penal administration as its primary object." The same statute was before the Supreme Court of the United States in *Re Medley*, 134 U. S. 160, 33 L. ed. 835, where it was held, but without controverting the proposition that the imprisonment is not a part of the sentence proper, that the provision therein for solitary confinement was in the nature of an *ex post facto* law as to crimes previously committed. We are satisfied with the reasoning of the Colorado court, and do not hesitate to adopt the conclusion reached by it, so far as applicable to the facts of the case before us.

Although it has been our endeavor to examine the merits of the question presented, we must not be understood as conceding it to be an open one at this time. We have, on the other hand, no reason to doubt the soundness of the practice long prevailing in this state, by which one committed to the penitentiary is, by procuring a reversal of the judgment of conviction, considered to have waived his right to insist that the partial execution of the sentence is a bar to further prosecution. And such, while not expressly decided, logically follows from the rule asserted in *Bohanan* v. *State*.

The judgment is reversed and the cause remanded for further proceedings by the district court.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

ST. LOUIS TRUST COMPANY *et al.*, *Appts.*,
v.
W. H. H. RILEY, by Next Friend.

(70 Fed. Rep. 32.)

Preference over a mortgage debt in respect to the receiver's earnings cannot be given a claim for damages caused by negligence of a street-railway company before the appointment of the receiver, in a suit to foreclose the mortgage on the street-railway property.

(September 30, 1895.)

APPEAL by the representatives of the mortgage bondholders from an order of the Circuit Court of the United States for the Eastern District of Arkansas rendered in the suit by the St. Louis Trust Company *et al.* against the Capital Street-Railway Company *et al.* for the foreclosure of certain mortgages, which order directed the receivers to pay out of the earnings of the property in their possession the amount of a judgment which had been recovered by petitioner against the owners of the mortgaged property. *Reversed.*

The facts are stated in the opinion.

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Messrs. **U. M. Rose, W. E. Hemingway,** and **G. B. Rose** for appellants.

Mr. **William G. Whipple,** for appellee:

Being clearly within the conventional period of six months prior to the appointment of the receiver, this claim was properly directed to be paid out of the earnings of the railroad during the receivership.

Fosdick v. *Schall*, 99 U. S. 235, 25 L. ed. 339; *Hale* v. *Frost*, 99 U. S. 389, 25 L. ed. 419; *Miltenberger* v. *Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Union Trust Co.* v. *Souther*, 107 U. S. 591, 27 L. ed. 488; *Burnham* v. *Bowen*, 111 U. S. 776, 28 L. ed. 596; *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963; *Union Trust Co.* v. *Morrison*, 125 U. S. 591, 31 L. ed. 825; *St. Louis, A. & T. H. R. Co.* v. *Cleveland, C. C. & I. R. Co.* 125 U. S. 658, 31 L. ed. 822; *Kneeland* v. *American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379; *Morgan's L. & T. R. & S. S. Co.* v. *Texas Cent. R. Co.* 137 U. S. 171, 34 L. ed. 625; *Louisville, E. & St. L. R. Co.* v. *Wilson*, 138 U. S. 501, 34 L. ed. 1023; *Kneeland* v. *Bass Foundry & M. Works*, 140 U. S. 592, 35 L. ed. 543; *Quincy, M. & P. R. Co.* v. *Humphreys*, 145 U. S. 82, 36 L. ed. 632; *Thomas* v. *Western Car Co.* 149 U. S. 95, 37 L. ed. 663; *Re Dexterville Mfg. & Boom Co.* 4 Fed. Rep. 873; *Hiles* v. *Case*, 14 Fed. Rep. 141; *Dow* v. *Memphis & L. R. R. Co.* 20 Fed. Rep. 260; *Central Trust Co.* v. *Texas & St. L. R. Co.* 22 Fed. Rep. 135; *Central Trust Co.* v. *East Tennessee, V. & G. R. Co.* 30 Fed. Rep. 898; *Farmers' Loan & T. Co.* v. *Kansas City, W. & N. W. R. Co.* 53 Fed. Rep. 182; *Phinizy* v. *Augusta & K. R. Co.* 63 Fed. Rep. 922; *Central Trust Co.* v. *Charlotte, C. & A. R. Co.* 65 Fed. Rep. 268; *Frazier* v. *East Tennessee, V. & G. R. Co.* 88 Tenn. 138; *Clay* v. *East Tennessee & V. R. Co.* 6 Heisk. 421; *Fosdick* v. *Schall*, 99 U. S. 235, 25 L. ed. 339;

NOTE.—As to receiver's liability for damages caused by his negligent operation of road, see *note* to Turner v. Cross (Tex.) 15 L. R. A. 262.

As to power to prevent receiver of a mere private corporation to create liens on its property, see Farmers' Loan & T. Co. v. Grape Creek Coal Co. (C. C. S. D. Ill.) 16 L. R. A. 603, and *note*, also Hanna v. State Trust Co. (C. C. App. 8th C.) *ante*, 201.

See also 33 L. R. A. 806; 34 L. R. A. 303.

Gilman v. *Illinois & M. Teleg. Co.* 91 U. S. 603, 23 L. ed. 405; *Galveston, H. & H. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 459, 20 L. ed. 199; *Parkhurst* v. *Northern C. R. Co.* 19 Md. 472, 81 Am. Dec. 648; *Ellis* v. *Boston, H. & E. R. Co.* 107 Mass. 1.

Every railroad mortgagee takes subject to an implied understanding that current expenses are to be paid out of current income.

Burnham v. *Bowen*, 111 U. S. 776, 28 L. ed. 596; *Gilman* v. *Illinois & M. Teleg. Co.* and *Fosdick* v. *Schall*, *supra*; *Hale* v. *Frost*, 99 U. S. 389, 25 L. ed. 419; *Williamson* v. *Washington City, V. M. & G. S. R. Co.* 33 Gratt. 624; *Gilbert* v. *Washington City, V. M. & G. S. R. Co.* 33 Gratt. 645.

It cannot be maintained that the same policy and doctrine are not equally applicable to street railways.

1 Wood, Railway Law, p. 2; *Price* v. *State*, 74 Ga. 378; *Katzenberger* v. *Lawo*, 90 Tenn. 238, 13 L. R. A. 185; *Birmingham Mineral R. Co.* v. *Jacobs*, 92 Ala. 187, 12 L. R. A. 830; *Johnson* v. *Louisville City R. Co.* 10 Bush, 231; *St. Louis Bolt & I. Co.* v. *Donohoe*, 3 Mo. App. 559; *Brown* v. *Buck*, 54 Ark. 453; *Chicago* v. *Evans*, 24 Ill. 35; *Hestonville, M. & F. Pass. R. Co.* v. *Philadelphia*, 89 Pa. 219.

Sanborn, Circuit Judge, delivered the opinion of the court:

Is a claim for damages caused by the negligence of a street-railway company, a mortgagor, five months before a receiver was appointed in a suit to foreclose a mortgage upon its property and income, entitled to be preferred to the mortgage debt in payment out of the earnings of the railroad during the receivership? This is the question presented in this case. It arises in this way. The Capital Street-Railway Company, a corporation, which owned and operated a street railway in Little Rock, in the state of Arkansas, mortgaged its property, franchises, and income on April 2, 1890, to secure the payment of certain bonds it issued. On April 1, 1893, it made default in the payment of interest on these bonds, and on April 19, 1893, upon a proper bill for the foreclosure of the mortgage, a receiver of its property and income was appointed by the court below, and that court subsequently appointed a coreceiver. This corporation had, on March 3, 1891, leased its railroad to the City Electric Street-Railway Company, a corporation, which thereafter operated the railway under the lease. On December 1, 1891, the latter company mortgaged its property, franchises, and income to secure the payment of certain bonds which it issued. On June 1, 1893, it made default in the payment of interest on these bonds, and on a bill for the foreclosure of this mortgage the same court directed the receivers of the Capital Street-Railway Company to hold the property and income of the electric company under this bill. In December, 1892, $9,000 was paid by the electric railway company on the interest secured by its mortgage. On October 31, 1892, W. H. H. Riley, the appellee, was injured by the negligence of a motorman of the electric company in operating his car, and on June 19, 1894, he recovered a judgment for $5,000 on account of this negligence against both these corporations. On an intervening petition in the foreclosure suits, and upon the answers of the mortgagees, which disclosed the foregoing facts, the court below held that the claim of the appellee upon the earnings of the property of the railway companies during the receivership was superior to that of the mortgagees, and ordered the receivers to pay it in preference to the mortgage debts. This decision and order are assigned as error.

The proposition that the negligence of a mortgagor may create a claim, and secure that claim by an equitable right to its property and income superior to the lien of a mortgage of the same property and income which it made and recorded years before, is not without interest to those who are accustomed to uphold the obligations of contracts and the validity of contract rights. The counsel for the appellee argues that damages for the negligence of a railroad company are necessary expenses of the operation of its railroad, and rests his proposition chiefly upon the following decisions of the Supreme Court, and particularly upon this quotation from the opinion delivered by Chief Justice Waite in *Fosdick* v. *Schall*, 99 U. S. 235, 252, 253, 25 L. ed. 339, 342, 343: "When [railroad] companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgage is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For, even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control. . . . We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings

which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors, to whom such debts are due, have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights."

It is an interesting fact that these remarks of Chief Justice Waite, upon which courts are constantly urged to base orders for the preference of unsecured to secured creditors in the distribution of the incomes earned during receiverships, and of the proceeds of foreclosure sales, did not lead to the preference of any such claim in that case. The decision in *Fosdick* v. *Schall* was that a claim of the vendor of cars, which had subsequently reclaimed them under its contract, for their rent for six months immediately prior to the receivership, which was by the contract to be paid as a part of the purchase price of the cars, had no equitable claim upon the proceeds of the mortgaged property superior to that of the mortgage bondholders, and the decree of the circuit court which gave it such a preference was reversed. 99 U. S. 235, 25 L. ed. 343.

In *Fosdick* v. *Southwestern Car Co.* 99 U. S. 256, 25 L. ed. 344, the Supreme Court held that the claim of a vendor of cars upon the proceeds of the foreclosure sale was superior to that of a mortgagee, where the cars had been sold under the foreclosure, and the mortgagee had thus received the benefit of their value.

In *Huidekoper* v. *Hinckley Locomotive Works*, 99 U. S. 258, 25 L. ed. 344, an order directing the payment, in preference to the mortgage debt, of an amount found due on account of the purchase of locomotives that had been used by the railway company before the receivership, but had afterwards been reclaimed by the vendor, was reversed by the Supreme Court.

In *Hale* v. *Frost*, 99 U. S. 389, 392, 25 L. ed. 419, 420, that court held that a claim for current supplies, furnished to the machinery department of a railroad company just preceding the receivership, was entitled to a preference over the mortgage debt in payment out of the income earned during the receivership, but that a claim for material for construction purposes was entitled to no such preference.

In *Miltenberger* v. *Logansport, C. & S. W. R. Co.* 106 U. S. 286, 308, 311, 27 L. ed. 117, 126, 127, the Supreme Court sustained a decree which directed the receivers operating the mortgaged property to pay, out of the proceeds of its sale, the arrears due for operating expenses for a period not exceeding ninety days prior to the appointment of a receiver, and an amount not exceeding $10,000, to several connecting lines of railroad in settlement of ticket and freight balances, and for materials and repairs, that had accrued in part more than ninety days before the bill for foreclosure was filed.

In *Union Trust Co.* v. *Souther*, 107 U. S. 591, 593, 595, 27 L. ed. 488, 489, 490, it was held that the court appointing a receiver might properly order him, before paying the mortgage debt, to pay out of the proceeds of the mortgaged property all amounts owing by the railroad company for labor or supplies that accrued in the operation and maintenance of the railroad within six months prior to the appointment of the receiver, in a case in which the receiver had used the income in making permanent repairs and improvements upon the property, instead of discharging these claims.

In *Burnham* v. *Bowen*, 111 U. S. 776, 783, 28 L. ed. 596, 598, the decision was that, in a case in which the income of the receivership had been diverted to pay for the right of way, the court might charge a claim for fuel necessarily furnished to and used by the railroad company in operating its railroad within twelve months prior to the receivership upon the income or proceeds of the mortgaged property in preference to the mortgage debt; but Chief Justice Waite added: "We do not now hold, any more than we did in *Fosdick* v. *Schall* or *Huidekoper* v. *Hinckley Locomotive Works*, 99 U. S. 258, 260, 25 L. ed. 344, 345, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. All we then decided, and all we now decide, is, that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

In *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963, it was held that the wages of employees for a limited time before the receivership might be preferred to the mortgage bondholders in the distribution of the proceeds of the mortgaged property.

In *Porter* v. *Pittsburgh Bessemer Steel Co.* 120 U. S. 649, 671, 30 L. ed. 830, 839, the decision was that claims for the construction of a railroad were entitled to no lien upon the proceeds of the property of the railroad company superior to that of a prior recorded mortgage.

In *Penn* v. *Calhoun*, 121 U. S. 251, 30 L. ed. 915, a claim of a bank for money which was borrowed and used by the mortgagor to pay current expenses and pressing debts, shortly before the foreclosure, was refused a preference in payment over the mortgage debt.

In *Union Trust Co.* v. *Morrison*, 125 U. S. 591, 612, 31 L. ed. 825, 831, a preference in the distribution of the proceeds of the sale of mortgaged property was allowed to a surety, who had executed a bond for an injunction that enabled the railroad company to prevent the sale of its rolling stock on execution, two years and ten months before the receiver was appointed; but Mr. Justice Bradley in the opinion quoted the remark of Chief Justice Waite in *Burnham* v. *Bowen*, which appears above, and declared that it was not the intention of the court to decide anything in conflict with that declaration.

In *St. Louis, A. & T. H. R. Co.* v. *Cleveland*,

C. C. & I. R. Co. 125 U. S. 658, 678, 31 L. ed. 832, 838, the Supreme Court refused to make the amount due for the rental of track used by the mortgagor before the appointment of the receiver a preferred claim to that of the bondholders upon the proceeds of the mortgaged property. In the opinion Mr. Justice Matthews thus enumerates the claims that may be preferred in the distribution of the income: "It is undoubtedly true that operating expenses, debts due to connecting lines growing out of an interchange of business, and debts due for the use and occupation of leased lines, are chargeable upon gross income before that net revenue arises which constitutes the fund applicable to the payment of the interest on the mortgage bonds." Page 673, 125 U. S., and page 837, 31 L. ed.

In *Toledo, D. & B. R. Co.* v. *Hamilton*, 134 U. S. 296, 301, 33 L. ed. 905, 908, it was held that one who had constructed a dock upon the land of the railroad company at its instance, after the execution and recording of its mortgage, had no equitable claim superior to that of the mortgage bondholders on the property or its proceeds.

In *Kneeland* v. *American Loan & T. Co.* 136 U. S. 89, 98, 34 L. ed. 379, 383, the Supreme Court refused to prefer to the mortgage debt a claim for the rental of rolling stock for the three months immediately prior to the filing of the bill for foreclosure, in the distribution of the proceeds of the sale of the property, although the rolling stock was used during that time by a receiver of the railroad company appointed on a creditors' bill.

In *Morgan's L. & T. R. & S. S. Co.* v. *Texas C. R. Co.* 137 U. S. 171, 198, 34 L. ed. 625, 635, that court held that a claim for money loaned and used to pay operating expenses and interest and to keep the company a going concern was entitled to no preference in payment out of the income or proceeds of the mortgaged property over the mortgage debt.

In *Louisville, E. & St. L. R. Co.* v. *Wilson*, 138 U. S. 501, 509, 34 L. ed. 1023, 1026, it was held that the claim of an attorney for services that inured to the benefit of the mortgagee was entitled to a preference over the claim of the latter in payment from the proceeds of the foreclosure sale, but that a claim for services that did not inure to the benefit of the mortgagee was entitled to no such preference.

In *Thomas* v. *Western Car Co.* 149 U. S. 95, 110, 112, 37 L. ed. 663, 668, 669, a preference in the distribution of the proceeds of a mortgaged railroad was denied to a claim for the use of cars for six months immediately prior to the receivership.

From this brief review of the decisions of the Supreme Court bearing upon this question, we think these propositions may properly be deduced:

First. There are certain claims against a mortgaged railroad company, accruing before the appointment of a receiver, which are entitled to a preference over a prior mortgage debt in payment out of the earnings of the railroad during the receivership and out of the proceeds of the sale of its property.

Second. It is an indispensable element of every such claim that it is founded upon property furnished or services rendered to the mortgagor which either preserved or enhanced the value of the security of the mortgage debt, and thereby inured to the benefit of the mortgagee.

Third. Claims of this character have been given a preference over the mortgage debt by these decisions on one of two grounds,—either on the ground that the mortgage is a lien on the net, and not on the gross, income of the railway company, and where that part of the income that is applicable to the payment of current expenses of operation, proper equipment, and necessary improvements has been diverted to pay interest on the mortgage debt or to otherwise benefit the security, and this diversion has left claims for these expenses unpaid, it is the province and duty of the chancellor to restore the diverted fund by taking an equal amount from the earnings of the railway company during the receivership, and applying it to the payment of these claims in preference to the mortgage debt (*Fosdick* v. *Schall*, *Burnham* v. *Bowen*, *St. Louis, A. & T. H. R. Co.* v. *Cleveland, C. C. & I. R. Co.*, *Toledo, D. & B. R. Co.* v. *Hamilton*, and *Morgan's L. & T. R. & S. S. Co.* v. *Texas Cent. R. Co.*, *supra*); or on the ground that the payment of the claims is necessary to preserve the mortgaged railroad, and to keep it a going concern. It is indispensable that the operation of a railroad be uninterrupted in order that the travel and traffic of the public may be accommodated, and in order that the franchises of the railroad company may be preserved from forfeiture. Hence the wages of employees, who might otherwise cease from their work, the amounts due to connecting lines of railroad that might otherwise cease their business relations with the managers of the mortgaged property, and the claims for supplies and materials necessary to keep the mortgaged railroad a going concern, may, in proper cases, be paid out of the earnings during the receivership, or out of the proceeds of the sale of the mortgaged property, in preference to the mortgage debt. *Miltenberger* v. *Logansport, C. & S. W. R. Co.*, *Union Trust Co.* v. *Souther*, and *Union Trust Co.* v. *Illinois Midland R. Co.*, *supra*.

But a claim for damages for the negligence of the mortgagor lacks the indispensable element of a preferential claim. It is not based upon any consideration that inures to the benefit of the mortgage security. Wages, traffic balances, and supplies produce or increase income, and preserve the mortgaged property. Repairs and improvements increase the value of the security of the bondholders. But the negligence of the mortgagor neither produces an income nor enhances the value of the property. The wages, traffic balances, and claims for materials and supplies accrue under and pursuant to the contract between the mortgagor and mortgagee that the former will properly operate the railroad. The damages for negligence accrue in violation of that contract, and for a breach of the duty of the mortgagor to operate the railroad carefully. Many preferential claims are for property or services that were necessary to make or keep the railroad a going concern, necessary to its operation. The negligence that is the foundation of this claim did not tend to keep the railroad in operation, but, if repeated and continued, would inevitably stop it. It was not necessary, but

was deleterious, to its operation. For these reasons this claim for damages cannot, in our opinion, be allowed a preference over the mortgage debt in payment out of the income earned by the receivers appointed under the bills for the foreclosure of these mortgages.

The orders appointing these receivers did not require them to pay claims of the character of that which we have been considering out of the income or proceeds of the mortgaged property in preference to the mortgage debts. The cases cited by counsel for appellee in which such an order was made do not rule this case. *Doe* v. *Memphis & L. R. R. Co.* 20 Fed. Rep. 260; *Central Trust Co.* v. *Texas & St. L. R. Co.* 22 Fed. Rep. 135.

There is a statute in Arkansas which provides in terms that all persons injured by any railroad through actionable negligence shall have a lien on the railroad and appurtenances paramount to that of all other persons interested in it, whether their interest is prior in time to the injury or not. Sand. & H. Dig. (Ark.) § 6251. But we have not considered that statute, or its legal effect, because at the final hearing in the court below counsel for the appellee stated that he did not rely upon it further than to show the policy of the state in that regard, and the circuit court evidently did not consider it.

The order appealed from must be reversed, with costs, and it is so ordered.

CALIFORNIA SUPREME COURT

Re ESTATE of Ozias WALKER, Deceased.

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

An inadvertent mistake by a witness to a will in writing testator's surname with his own initials when attempting to sign his name as a witness makes his signature insufficient under a statute requiring witnesses to the will.

(*McFarland, Garoutte, and Van Fleet, JJ., dissent.*)

(December 10, 1895.)

APPEAL by the legatees under the will of Ozias Walker, deceased, from a judgment of the Superior Court for Butte County granting the petition of Lydia A. Lane to revoke the probate of the will. *Affirmed.*

The facts are stated in the opinion.

Messrs. **C. G. Warren** and **F. C. Lusk** for appellant.

Messrs. **William H. Schooler** and **Reardan & White,** for respondent:

In *Martin's Estate,* 58 Cal. 532, this court said: "We are not at liberty to hold that the legislature intended any one of these requirements to be of greater or less importance than the others. If we may omit one, why not either of the others."

See also *Billing's Estate,* 64 Cal. 427; *Chaffee* v. *Baptist Missionary Convention,* 10 Paige, 85, 40 Am. Dec. 228.

Every one of these four requisites, in contemplation of the statute, is to be regarded as essential as another; there must be a concurrence of all to give validity to the act, and the omission of any is fatal.

Remsen v. *Brinckerhoff,* 26 Wend. 325, 37 Am. Dec. 253.

Each witness must sign his name.

Re O'Neil's Will, 91 N. Y. 520; *Grabill* v. *Barr,* 5 Pa. 441, 47 Am. Dec. 418.

A signature in any method not permitted by the statute would be as fatal to the validity of the paper as a will as would the entire absence of the signature of the testator.

Martin's Estate, 58 Cal. 532; *Re McCabe,* 68 Cal. 520.

"C. G. Walker" was not the name of the witness; it was then something intended by the witness to represent his name, or it was not. If it was intended as something to represent his name, then it was equivalent only to a mark or cross.

Goods of Redding, 2 Rob. Eccl. Rep. 3.

If it is considered as a mark or cross, it is insufficient, because not attested as required by § 17, C. C. P. and § 14, Civil Code.

Olliver's Goods, 2 Spinks' Eccl. & Adm. Rep. 57; *Re O'Neil,* 91 N. Y. 521; *Martin's Estate, supra; Rand's Estate,* 61 Cal. 474; *Billings's Estate,* 64 Cal. 427; *Chaffee* v. *Baptist Missionary Convention,* 10 Paige, 85, 40 Am. Dec. 228.

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

Appeals from the judgment revoking the probate of a will and from the order denying a motion for a new trial. The facts disclosed by the evidence without conflict are as follows: The will of Ozias Walker, deceased, was written by C. G. Warren, the attorney at law of the testator, and was executed in the presence of H. C. White and C. G. Warren, who were requested by the testator to attest, as witnesses, its execution. The requirements of the statute were complied with in all respects saving that the witness C. G. Warren, in signing his name as a witness at the end of the will, inadvertently wrote the name "C. G. Walker," thus employing his own initials but the testator's surname. Upon this showing the court revoked the probate of the instrument, and the propriety of its action in so doing is the sole question presented upon this appeal.

At the outset of this consideration it is proper to say that the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the Constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes. In conferring that right the legislature has seen fit to prescribe certain exactions and requirements looking to the execution and authentication of the instrument, and a compliance with these requirements becomes necessary to its exercise. As has been said (*Re O'Neil's Will,* 91 N. Y.

NOTE.—For signature by mark or cross, see *note* to *Re* Guilfoyle's Will (Cal.) 22 L. R. A. 370.

521): "While the primary rule governing the interpretation of wills, when admitted to probate, recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating their execution. In the latter case courts do not consider the intention of the testator, but of the legislature." As a prerequisite to the exercise of the testamentary right in this state, the legislature has prescribed for the execution and authentication of wills such as this the following requirements: "(1) It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto. (2) The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority. (3) The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will. And (4) there must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request and in his presence." Civ. Code, § 1276. It is not for courts to say that these requirements, or any of them, are mere formalities, which may be waived without impairing the status of the instrument. It is not for courts to say that a mode of execution or authentication, other than that prescribed by law, subserves the same purpose, and it is equally efficient to validate the instrument. The legislative mandates are supreme, and there is no right to make testamentary disposition except upon compliance with those mandates. It may be freely conceded that the question under consideration is of a nature purely technical, but it is to be remembered that the whole subject-matter of the execution and authentication of wills is technical, and nothing else; and it must not be forgotten that the technicalities are those which the lawmaking power has the right to impose, and has imposed, upon the maker of a will.

It will be noted in the section of the Code above quoted that the duty enjoined upon the testator is to subscribe the will, while that imposed upon the attesting witnesses is that each must sign his name as a witness. The difference is neither immaterial nor accidental. A testator may be illiterate, or he may, by reason of paralysis, or other disabling cause, be incapacitated from signing his name, and the law has wisely and liberally provided for the due execution of a will by one so situated. It has required of him that he shall subscribe, and, while the word unquestionably has for one of its significations the signing of a name, it is a verb of comprehensive meaning. Any form or kind of underwriting is a subscription, and generally it has been held that any mark or writing by the testator meant by him to be his name, or to take the place of his signature, or to serve for his identification, will answer the requirements of a statute which calls merely for subscription or signing. The same liberality of construction, and interpretation has been put by the courts upon statutes which require the witnesses merely to subscribe or to sign. There are thus numerous cases under such statutes which hold, in effect, that any signing by which alone, or by which, aided by parol evidence, the identity of the subscriber may be ascertained, substantially complies with the statute. The case of the appellant upon this proposition cannot be more strongly stated than in the following extracts from the learned work of Mr. Jarman, discussing the Victorian wills act: "Examining the requirements common to the statute of frauds and the wills act in their order, the next condition prescribed for the validity of a will is that it should be signed, which suggests the inquiry, What amounts to a 'signing' by the testator? It has been decided that a mark is sufficient, and that notwithstanding the testator is able to write, and though his name does not appear on the face of the will. A mark being sufficient, of course the initials of the testator's name would also suffice. And it would be immaterial that he signed by a wrong or assumed name (since that name would be taken as a mark), or that against the mark was written a wrong name." 1 Jarm. Wills, 6th ed. *79. "The next statutory requisition, which is common to the old and the present law, is, that the will be 'attested and subscribed' by the witnesses. A mark has been decided to be a sufficient subscription. . . . The initials of the witnesses also amount to a sufficient subscription, if placed for their signatures, as attesting the execution. . . . A witness need not sign his own name if the name actually subscribed be intended to represent his name; or a description (without any name) is sufficient if intended to identify him as witness. . . . In fact there seems to be no distinction in these respects between the words 'sign' and 'subscribe;' any act, therefore, which, as before noticed, would be a good signature by a testator, would be a good signature by a witness." Id. *85, *86. An examination of the cases bearing upon the interpretation of the English statute shows that the text of the learned author is fully supported. The reasoning by which the conclusions are reached may be thus summarized: To "subscribe" is to attest or give consent or evidence knowledge by underwriting, usually (but not necessarily) the name of the subscriber. But the place of the writing is immaterial, since a still more general meaning of the word "subscribe" is to attest by writing, in which definition the locality is wholly disregarded. This is the reasoning of the leading English case of *Roberts* v. *Phillips*, 4 El. & Bl. 450. To "sign" in the primary sense of the word is to make any mark. To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation. The signature is the sign thus made. And while, by long usage and custom, "signature" has come generally to mean the name of a person written by himself, and thus to be nearly an exact synonym of "autograph," that signification is derivative, and is not inherent in the word itself, any more than it is in "autograph," which strictly conveys no more than the idea of a specimen of an individual's writing. Any "mark" may be a signature, and that species of mark which we call a "cross" (independent of an accompanying name) was early used as a signature of assent, and indeed was designated "*signum*." While marksmen have become fewer with the spread

of education, the mark of the cross is still recognized by statute law as a method of signing. Therefore, as the wills act required only a signing by the testator, and as this requirement of signing only was also found in the statute of frauds, the courts early decided not to be bound by any narrow definition of "signing" or "signature" as meaning the writing of one's name, but to give to the word its broadest possible scope and significance, and thus held that any mark or signature made with the intent to bind the maker (in the case of the statute) or to be a sign (in the case of wills) should be deemed sufficient. As the English courts had still further obliterated from the word "subscription" the idea of place or locality, there was left no measurable distinction between the requirement upon the testator to sign and that upon the witness to subscribe.

In the decisions this broad rule is repeatedly asserted. In *Goods of Clarke*, 27 L. J. P. 18, the will of an illiterate person was executed by her mark, against which was written her maiden name instead of that properly borne by her in marriage. Says the court: "There is enough to show that the will is really that of the person whose it proposes to be. Her mark at the foot or end of it is a sufficient execution, and what somebody else wrote against the mark cannot vitiate it." In *Goods of Clarke*, 2 Curt. Eccl. Rep. 329, the testator had made his mark, and requested the vicar to sign for him, which he did with his own name, and not that of the deceased. Says the court: "The statute allows a will to be signed for the testator by another person, and does not say that the signature must be in the testator's name. Here this gentleman, at the testator's request, signed the will for him; not in the testator's name, but using his own name. I incline to think this is a sufficient compliance with the act." In *Goods of Bryce*, Id. 325, the testatrix signed her will by a mark, her name nowhere appearing. Says the court: "Although the name of the testatrix does not appear upon the face of the instrument, the affidavit sufficiently accounts for the manner in which the will was signed. The statute does not say that the name of the testator shall appear at the foot of the will. The paper is identified as being the will of the deceased. . . . I am of opinion that the statute is sufficiently complied with." The foregoing cases deal with the "signing" by the testator. Coming to the subscribing by the witness, it is said in *Goods of Eynon*, L. R. 3 Prob. & Div. 92: "No particular form of attestation is necessary, but the act done by the witness must be intended by him to evidence his attestation of the will. I must find that I can draw an inference from what occurred that the witness made a mark of some kind, with the intention to evidence his attestation." In *Goods of Christian*, 2 Rob. Eccl. Rep. 110, it is said: "The attesting witnesses to the so-called 'codicil' have affixed their initials only. However, I have no doubt in the matter, although I believe this is the first instance under the act of the witnesses so signing. I am not aware that the witnesses can be required to sign their names. I am of opinion that there is a sufficient subscription on their parts, and therefore I decree probate as prayed." In *Goods of Olliver*, 2 Spinks, Eccl. & Adm. Rep. 57, it is said: "The statute says the witnesses 'shall attest and subscribe the will.' It does not say 'shall write their own names,' so that a mark is held to be a good subscription." These cases are quoted that there may be no room for misunderstanding of the English decisions or of the text of the book writers. But, as the matter is wholly statutory, they have no value as authority unless there be an identity in the statutory requirements of this state and England. But there is no such identity. Indeed, our statute seems to have been drawn with the express intent to foreclose and shut out the interpretation given to the English law. Thus, the English statute requires subscription. That word had been judicially declared not to have reference to the place of writing. Our statute says that the will shall be subscribed at the end thereof, thus expressly making locality of writing an element of the subscription. The English statute required a signing. As interpreted by the court, this did not necessitate the signing of the name. By express language our statute commands that a witness shall sign his name. In England, therefore, a witness may sign in any one of a multitude of ways; by our law his signing is limited to the expression of his name. The case of *Meehan* v. *Rourke*, 2 Bradf. 385, is in no way opposed to, but rather is in full accord with, this view. The statute of New York, from which ours was taken, likewise requires that the witnesses should sign their names. Eliza Green, one of the witnesses to the will under consideration, was unable to write. Her name was correctly written by the doctor, and she then made her mark across it, and acknowledged it to be her mark and signature. The court said that before the Revised Statutes a witness might attest a will by a mark; as in this state it may be done under section 14 of the Civil Code. The opinion declares: "Our statute requires the witness to 'sign his name.' . . . Where another person writes the name of the witness, and then the witness acknowledges the signature,—puts his mark to it, his *signum*,—he literally signs; and what he signs is his name,—*i. e.*, he signs his name,—while a mark alone [the learned judge significantly adds] would not be sufficient." Yet a mark alone is held sufficient under the English statute.

I conclude, therefore, that as our law has seen fit to prescribe that the testator shall subscribe his will at the end thereof, so it has seen fit to require that attesting witnesses shall sign and shall sign only in one way,—that is to say, by affixing their names. It cannot be said that some other mode of subscription will answer the purpose, or subserve the statutory requirement, when in truth it does not. As well could it be said that the requirement of two attesting witnesses is not mandatory, and that this will, having been duly attested by one witness, should be admitted to probate. That the overthrowing of any will works a hardship upon the devisees and legatees is obvious; but the law is no more tender of their claims than it is of the rights of the natural heirs. In the absence of any will, the law makes a wise, liberal, and beneficent distribution of the dead man's estate; so wise, indeed, that the policy of permitting wills at all, is often gravely questioned.

When a will is proved, every exertion of the court is directed to giving effect to the wishes of the testator therein expressed, but in the proving of the instrument the sole consideration before the court is whether or not the legislative mandates have been complied with. If not, then the law makes the will, and it is often a better one, embracing a more equitable disposition of his property, than that which the deceased attempted but failed to execute.

The judgment and order appealed from are affirmed.

We concur: **Beatty**, Ch. J.; **Harrison**, J.; **Temple**, J.

McFarland, J., dissenting:

I dissent. In my opinion there was in this case a sufficient compliance with the formalities prescribed by the Code for the attestation of a will. It is true that the right to make testamentary disposition of property—like most other rights—rests upon the legislative will; but that legislative will has been uniformly exercised in favor of the right in all English-speaking countries, and in nearly all others, from time immemorial, so that the right has come to be a usual, well-established, and most important attribute of ownership. Therefore, in dealing with an attempt to exercise that right, the general rules of construction should be applied; that is, the provisions of the Code "are to be liberally construed with a view to effect its objects." The signature of the witness Warren, in this case, as shown beyond question, would be held good if any written instrument or paper known to the law were involved other than a will, and I see no good reason why the same rule should not apply here. To allow a will to be defeated by the careless (or intentional) misspelling of his name by a subscribing witness would lead, I fear, to great abuses. If a man should not have the right to make a will, let the legislature take it away; but, as long as he has it, let it be protected as other rights. I think that the judgment should be reversed.

Garoutte, J., dissenting:

I dissent. I do not think a man's testamentary disposition of his property should be defeated for the reasons here given. The argument requires a too technical analysis of terms and statutes in order to arrive at such a result. While the right to dispose of property by will is purely statutory, still it can hardly be said to be a mere matter of legislative grace, for it has become almost an inalienable right, made so by reason of its long practice and approval in all civilized nations. It is conceded that, if the testator, Walker, had made a like mistake, and signed his name "Warren," it would not have defeated the will; but it is now held that, the witness Warren having made the mistake in signing his name "Walker," the will is avoided. I have no idea that the legislature, in formulating the statute as to the character of the signatures, ever intended such results to follow; and I am satisfied it never intended to attach any different meaning to the two phrases, namely, "sign his name as a witness," and "subscribed by the testator," or that the legislature ever intended to bar a man from being a witness to a will who was unable to sign his name, any more than it intended to bar a man from making his will who was likewise so unfortunate. I believe that for the purposes of this statute the person's mark, properly witnessed, is his name; and further, I believe any name that the party should attach to the will as a witness is his name. I do not think it is for a contestant of the will to say to a witness, "That is not your name;" and neither is it for the witness to appear upon the stand and say, "That is not my name." If we are to be so technical in this matter, the statute should have said "true name." The true names of witnesses are often unknown to the testator, and to say that a person could intentionally and corruptly sign a false name to a will as a witness, and thereby defeat it, is to go to great lengths. No case in the books has ever gone that far, to my knowledge. Still that doctrine would seem to be declared by the main opinion of the court in the present case. A name signed by mistake of the witness is no different from one signed in fraud. The knave wrote the name as his name, and for the purposes intended by the testator it was his name. In the present case the attorney, as a witness, unintentionally wrote a name which was not his true name, but he intended the writing to be his name, and he made the writing for his name, and for the purposes intended by the testator; and as to those purposes it should be held to be his name. If, one hour previous to the signing of the will, he had concluded to change his name to C. G. Walker, and had so signed it, or, for the very purpose of concealing his true name, had signed the will "John Brown," to my mind the will would be legally witnessed; and in the present case the same conclusion should be declared.

Van Fleet, J., dissenting:

I dissent from the conclusion reached by the majority of the court, and agree with what is said by Justices McFarland and Garoutte. I think by a too close adherence to the mere letter of the statute the court, in the main opinion, loses sight of the evident purpose intended to be subserved by the provision in question. When the witness Warren, intending in perfect good faith, as is conceded, to write his own name, wrote his own initials, but inadvertently added the name of the testator instead of his own, it was, to all essential intents and purposes, a signing of his name within the spirit and intent of the statute, since it met every purpose designed to be subserved thereby. And this view, in my judgment, is sustained by the case of *Meehan* v. *Rourke*, 2 Bradf. 385, cited in the main opinion. There the name of the witness was written by another, and merely viséd by the mark of the witness himself, although the requirement of the statute, like our own, was that the witness should sign his name. But it is said by the surrogate, in addition to the language quoted in the majority opinion: "I think the requisition of the statute sufficiently complied with by the name of the witness being written at the end of the will, and the witness putting his mark thereto. This construction meets the design of the legislature in having the name of the witness, and excluding wills attested only

by marks, and does not shut out the attestation of wills by illiterate persons, when a penman can be found to record the transaction. I should come to any other conclusion with regret, as otherwise I should be compelled very frequently to reject wills attested by marksmen, the experience of this office showing this mode of execution to be very common. But, aside from the consequences, I do not think the rule contended for justified by the language of the statute, or consistent with the distinction made between a witness writing his name when he has subscribed the testator's name, and being required in all other cases only to 'sign his name.'" I think the record shows a sufficient compliance with the requirements of the statute, and that the deceased should not, by any such slight lapse as is here disclosed, be deprived of the right of testamentary disposition of his property.

Whatever may be our personal views as to the provisions of the law for the distribution of the property of intestates, whether they meet with our approval or otherwise, cannot affect our consideration here. The sole question is whether the testator, in endeavoring to avail himself of the privilege of the law to so dispose of his estate as to meet his own cherished desires, has so far complied with the statute as to make his purpose effectual; and this, I think, he has done, and that the judgment of the lower court should be reversed.

A petition for rehearing was subsequently filed, in response to which, on January 9, 1896, the following opinion was handed down:

Per Curiam:

The opinion heretofore rendered herein is modified by eliminating from the paragraph preceding the judgment the first and last sentences, so that the same will read: "When a will is proved, every exertion of the court is directed to giving effect to the wishes of the testator therein expressed, but in the proving of the instrument the sole consideration before the court is whether or not the legislative mandates have been complied with." As so amended, the petition for a rehearing is denied.

McFarland, Garoutte, and Van Fleet, JJ., dissent from the order denying the petition for rehearing.

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan
v.
Edward C. GAY.

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

There is no unwarranted discrimination against citizens of other states in a statute declaring it to be unlawful for any person to solicit insurance within the state on property within the state for any nonresident; persons without procuring from the commissioner of insurance the certificate of authority provided for by the statute.

(December 17, 1895.)

EXCEPTIONS by defendant to rulings of the Circuit Court for Kalamazoo County made during the trial of a proceeding against him for the violation of the statute against soliciting insurance for a nonresident without a certificate of authority from the insurance commissioner, which resulted in conviction. *Affirmed.*

Defendant was soliciting insurance for an association of individuals doing an insurance business under the name of Lloyds, and claimed that the statute under which the conviction was had could not be made applicable to individuals.

Further facts appear in the opinion.

Messrs. **Frank E. Knappen** and **Myron H. Beach** for appellant.

Mr. **E. M. Irish,** with *Mr.* **Alfred S. Frost,** for appellee:

The statute is valid.

Clay F. & M. Ins. Co. v. *Huron Salt & L. Mfg. Co.* 31 Mich. 354; *People* v. *Howard*, 50 Mich. 239; *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Ducat* v. *Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972.

A state may extend such restrictions to individuals doing business as individuals.

Greene v. *People* (Ill.) 21 N. E. Rep. 605; *State* v. *Ackerman*, 51 Ohio St. 163, 24 L. R. A. 298; *State* v. *Stone*, 118 Mo. 388, 25 L. R. A. 243.

It was not necessary for the people to prove the incorporation or association of the Lloyds.

The subject matter of the averment lies peculiarly within the knowledge of the defendant, and even in criminal cases the people need not prove such an averment.

1 Greenl. Ev. § 79, and cases cited.

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

By Act No. 74 of the Session Laws of 1893, it was enacted that it shall be unlawful for any person or persons, as agent, solicitor, surveyor, broker, or in any other capacity, to transact, or to aid in any manner, directly or indirectly, in the transacting or soliciting within this state any insurance business for any person, persons, firm, or copartnership who are nonresidents of this state, or for any fire or inland navigation insurance company or association not incorporated by the laws of this state, or acting for or in behalf of any person or persons, firm or copartnership, as agent or broker, or in any other capacity, or procure or assist to procure a fire or inland marine policy or policies of insurance on property situated in this state, for

NOTE.—For restrictions on business of foreign insurance companies, see *note* to State v. Ackerman (Ohio) 24 L. R. A. 298. See also Seamans v. Temple Co. (Mich.) 28 L. R. A. 430, and *note* thereto.

any nonresident person, persons, firm, or copartnership, or for any company or association, without this state, whether incorporated or not, without the procuring or receiving from the commissioner of insurance the certificate of authority provided for in section 23 of an act entitled "An Act Relative to the Organization of Fire and Marine Insurance Companies Transacting Business within This State," approved April 3, 1869, as amended. Such certificate of authority shall state the name or names of the person, persons, firm, or copartnership, or the location of the company or association, as the case may be, showing the party named in the certificate has complied with the laws of this state regulating fire and inland navigation insurance, and the name of the duly appointed attorney in this state on whom process may be served. By section 5 of the act of which the above is amendatory, it is provided: "In any suit brought under this act it shall not be necessary to prove the legal incorporation or association of any corporation or association of individuals, the policies of which have been solicited or issued contrary to this act. It shall be sufficient to show that the policy of insurance has been solicited or issued, directly or indirectly, by or through the defendant company or association, not authorized to do business in this state."

Respondent was charged and convicted in the Kalamazoo circuit court of a violation of this act. He has brought the record here for review on exceptions before sentence. While the record contains numerous assignments of error, we have not been favored with any brief on behalf of the respondent. We have, however, looked through the record, and discovered no error. The only question meriting discussion is whether the law in question is unconstitutional. It appears from the defendant's requests that it was contended below that the statute contained an unwarranted discrimination against the citizens of other states. It has been repeatedly held that it is within the power of the state to exclude corporations or other states from doing business in this state, except on such terms as the legislature may see fit to prescribe for the protection of its citizens. *Hartford F. Ins. Co.* v. *Raymond*, 70 Mich. 485; *Doyle* v. *Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148. This naturally carries with it the right to prohibit individuals within this state from acting for such inhibited corporations. *People* v. *Howard*, 50 Mich. 239; *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357. But it appears to have been insisted below that, while it may be competent to prohibit corporations from doing business within this state, the legislature cannot deny the right to individuals. But an answer to this is that there is no discrimination against individuals of other states under the insurance laws of this state. See *State* v. *Ackerman*, 51 Ohio St. 163, 24 L. R. A. 298; *State* v. *Stone*, 118 Mo. 388, 25 L. R. A. 243.

Conviction affirmed, and the court is instructed to proceed to sentence.

The other Justices concur.

ILLINOIS SUPREME COURT.

WEARE COMMISSION CO., *Appt.*,
v.
Mary A. DRULEY, Admrx., etc., of William M. Druley, Deceased, *et al.*

(156 Ill. 25.)

1. A conveyance by a debtor, legally or constructively fraudulent as to creditors, as contradistinguished from fraudulent in fact, is not ground for attachment by them under the Illinois attachment law.

2. A judgment against an insolvent estate will not be reversed at the instance of the administratrix where the reversal would result in no benefit to her or the estate from the fact that the claim has been allowed by the probate court.

NOTE.—*What intent to defraud will sustain an attachment.*

I. *Generally.*
II. *Actual as distinguished from constructive fraud.*
III. *Fraudulent contraction of debts.*
IV. *Against absconding debtors.*
V. *For removal of property.*
VI. *For assignment, disposal, or secretion of property.*
- a. *The intent to defraud.*
- b. *Participation in fraudulent intent by transferee.*
- c. *Gifts.*
- d. *Sales of property.*
- e. *Mortgaging or pledging property.*
- f. *Assignments for the benefit of creditors.*
- g. *Threats to assign or dispose of property.*
- h. *Making preferences.*
- i. *Transfers in payment of debts.*
- j. *Confession of judgment.*
- k. *Transfers and withdrawals by partners.*
- l. *Formation of and transfer to corporation or partnership.*

VI.—(Continued.)
- m. *Overbuying.*
- n. *Refusal to pay.*
- o. *Statements and misrepresentations by debtor.*
- p. *Conversion of property.*
- q. *Miscellaneous cases.*

I. *Generally.*

The right to attach as it exists in most of the United States is a statutory one, and the question as to what intent to defraud will sustain it is one of the construction of the particular statute conferring the right and the determination as to whether the facts of the case bring it within the statute, and is confined to questions as to the fraudulent contraction of debts, the absconding of the debtor, his removal of his property, and his assignment, disposition, or secretion of property, the question of intent not entering into the right of attachment against nonresidents.

II. *Actual as distinguished from constructive fraud.*

A decided preponderance of authority supports the rule that a mere constructive fraud,—that is an

See also 31 L. R. A. 222; 34 L. R. A. 248.

(January 15, 1896.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County dissolving an attachment which plaintiff had levied upon property of its debtor on the ground that he had attempted to transfer his property in fraud of creditors. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Osborne Bros.** and **J. M. H. Burgett**, for appellant:

The burden of proof was on defendant to show that the deed was executed in good faith. See *Hollenback* v. *Todd*, 119 Ill. 543; *Hubbard* v. *Allen*, 59 Ala. 283; *Harrell* v. *Mitchell*, 61 Ala. 271; *Clements* v. *Nicholson*, 73 U. S. 6 Wall. 299, 18 L. ed. 786; *Callan* v. *Statham*, 64 U. S. 23 How. 477, 16 L. ed. 532; *Alexander* v. *Todd*, 1 Bond, C. C. 175; *Knight* v. *Capito*, 23 W. Va. 639; *Goshorn* v. *Snodgrass*, 17 W. Va. 717; *Smith* v. *Brown*, 34 Mich. 455; *Henderson* v. *Henderson*, 55 Mo. 534; *Great Western R. Co.* v. *Bacon*, 30 Ill. 347, 83 Am. Dec. 199; *King* v. *Atkins*, 33 La. Ann. 1057; *Ford* v. *Simmons*, 13 La. Ann. 397; *Lovell* v. *Payne*, 30 La. Ann. 511; *Apothecaries Co.* v. *Bentley*, Ryan & M. 159; *Huggins* v. *Ward*, 21 Week. Rep. 914.

If the deed was intended as a mortgage, the

---

act involving no positive wrong, the invalidity of which arises entirely from the provisions of the law, — will not warrant an attachment upon the ground of a disposition of property with intent to defraud.

This is the rule adopted by the principal case, and it was also expressly held in Standard Oil Co. v. Morrison, A. & A. Co. 54 Ill. App. 531 (1894); First Nat. Bank v. Kurtz, 22 Ill. App. 213 (1886); Shove v. Farwell, 9 Ill. App. 256 (1881); Market Nat. Bank v. Bethel, 32 Ohio L. J. 135 (1894); Heidenheimer v. Ogborn, 1 Disney (Ohio) 351 (1857); Chamberlain v. Strong, 3 W. L. G. 281 (1859), as given in Walker & Bates' (Ohio) Dig. 101; National Bank v. Purcell, 8 Rec. 74 (1880), as given in 3 Bates' (Ohio) Dig. 62; Union Rolling Mill Co. v. Packard, 13 Bull. 591, 1 C. C. 76, as given in 4 Bates' (Ohio) Dig. 34.

It is not sufficient, though the actual or even necessary consequence of the act would be to hinder and delay creditors. Heidenheimer v. Ogborn, *supra*.

The right to attachment is based upon the supposed existence of fraud in fact, and not upon what is merely voidable because against equity and good conscience, sometimes denominated fraud in law. Holbrook v. Peters & M. Co. 8 Wash. 344 (1894) (*dictum*).

And an actual personal intent to defraud, hinder, and delay creditors is necessary to uphold an attachment. McPike v. Atwell, 34 Kan. 142 (1885); Union Rolling Mill Co. v. Packard, and Shove v. Farwell, *supra*; Seidentopf v. Annabil, 6 Neb. 524 (1877).

The right to issue an attachment depends entirely upon the fraudulent intent, which must be made to appear, and not upon something inferred from the consequence of the acts stated. Seidentopf v. Annabil, *supra*.

Thus a conveyance of property in violation of the bankrupt law furnishes no ground for an attachment. Stanley v. Sutherland, 54 Ind. 339 (1876).

And a conveyance without consideration to his wife by a person whose solvency is doubtful, made without intent to defraud creditors, will not sustain an attachment, though it might justify a bill to set aside the conveyance. McFarlan v. Mills, 4 Bull. 1064, as given in 3 Bates' (Ohio) Dig. 62.

And a sale to one creditor without actual fraud, to prevent another creditor from gaining any advantage, does not show a fraudulent intent which will support an attachment. Chamberlain v. Strong, 3 W. L. G. 281 (1859), as given in Walker & Bates' (Ohio) Dig. 101.

So, a transfer of property by an insolvent corporation, by which a preference is given to one creditor over others, is not such a fraud in fact as to afford ground for an attachment at the instance of an unpreferred creditor. Holbrook v. Peters & M. Co. 8 Wash. 344 (1894).

And the mere fact that the debtor converted his business house into a corporation, and transferred to the corporation the assets of his business, will not sustain such an attachment without evidence of fraudulent intent. Union Rolling Mill Co. v. Packard, 13 Bull. 591, 1 C. C. 76, as given in Bates' (Ohio) Dig. 215.

Nor will a transfer by a limited partnership of the effects of the firm in payment of a valid debt with intent to give preference to a creditor, in violation of Maryland Pub. Gen. Laws, art. 73, § 15, making such transfer void as to creditors, warrant an attachment under the New York Code, on the ground that they have assigned, disposed of, or secreted, their property with intent to defraud their creditors. Casola v. Vasquez, 147 N. Y. 258 (1895).

And a surviving partner who in good faith and with the acquiescence of the representative of the deceased partner uses the firm property to continue the business on his own account and in his own name, and raises money upon the credit given him by the possession of such property, and finally disposes of it, is not subject to attachment upon the ground of a disposal with intent to defraud, in the absence of circumstances showing such an actual intention, though a part may have been applied to the payment of his individual obligations. Fitzpatrick v. Flannagan, 106 U. S. 648, 27 L. ed. 311 (1882).

So, selling by a mortgagor from the stock of goods mortgaged, in the ordinary course of business, with the knowledge and implied consent of the mortgagee, is a constructive fraud only, where there is no fraudulent intent in fact on the part of the mortgagor, and is not ground for an attachment against him. Rhode v. Matthai, 35 Ill. App. 147 (1889).

And a chattel mortgage containing a stipulation for the retention of possession by the mortgagor of the mortgaged property and possession so retained pursuant to the terms thereof, is not *per se* fraudulent or prima facie evidence of a fraudulent intent which will support an attachment, where the mortgage was duly filed and there is nothing to indicate an actual intent to defraud. Frankhouser v. Ellett, 22 Kan. 127, 31 Am. Rep. 171 (1879).

And a sale under a chattel mortgage which in fact hinders and delays creditors does not warrant an attachment under the Illinois statute on the ground that such sale is fraudulent in law, in the absence of a corrupt intent in making the mortgage. Laflin v. Central Pub. House, 52 Ill. 432 (1869).

So, an assignment for the benefit of creditors, which is fraudulent at law and void on its face as hindering or delaying creditors, will not justify an attachment in the absence of a showing of actual intent to defraud. Belmont v. Lane, 22 How. Pr. 365 (1862) (*dictum*).

And an assignment for the benefit of creditors, which is invalid by reason of noncompliance with the statute, does not constitute an assignment or disposition of the debtor's property with intent to defraud creditors, which will support an attachment. First Nat. Bank v. Rosenfeld, 66 Wis. 292 (1886).

So, an assignment for the benefit of creditors, ex-

fact that Jane Druley came into court and claimed absolute title under the deed from William is conclusive of her intent to defraud plaintiff, and will disentitle her to any rights under the deed.

Barker v. *French*, 18 Vt. 460; *Foster* v. *Grigsby*, 1 Bush, 86; *Thompson* v. *Pennell*, 67 Me. 159; *Metropolitan Bank* v. *Godfrey*, 23 Ill. 579; *Larmon* v. *Knight*, 140 Ill. 232; *Jones* v. *Neely*, 72 Ill. 449; *Mackie* v. *Cairns*, Hopk. Ch. 373.

The instruction to find for the defendant on the attachment issue was error.

It is only when the evidence, with all the inferences that can justifiably be drawn from it, is so sufficient to support a verdict for plaintiff that it would be the duty of the court to set such a verdict aside, that the court can direct a verdict for defendant.

Purdy v. *Hall*, 134 Ill. 298; *Pennsylvania Co.* v. *Conlan*, 101 Ill. 93; *Bartelott* v. *International Bank*, 119 Ill. 259; *Pratt* v. *Stone*, 10 Ill. App. 633; *Johnson* v. *Moulton*, 2 Ill. 532; *Chicago & A. R. Co.* v. *Shannon*, 43 Ill. 338; *Bishop* v. *Busse*, 69 Ill. 403; *Morgan* v. *Ryerson*, 20 Ill. 343; *Kincaid* v. *Turner*, 7 Ill. 618; *Kitzinger* v. *Sandborn*, 70 Ill. 146; *Lloyd* v. *McClure*, 2 G. Greene, 139; *Wight Fire Proofing Co.* v. *Roczkai*, 30 Ill. App. 266; *Lind* v. *Beck*, 37 Ill. App. 430.

---

ecuted in good faith and without any wrongful intent, but which is so defectively executed as to render it void, does not authorize an attachment as a disposal of property with intent to defraud creditors. Cooper v. Clark, 44 Kan. 358 (1890); McPike v. Atwell, 34 Kan. 142 (1885); Harris v. Capell, 28 Kan. 117 (1882).

And an assignment for the benefit of creditors, regular on its face, made in an attempt under the advice of counsel to divide equitably all of the debtor's property among his creditors, cannot be held to be a disposition of property with intent to defraud creditors, though the assignment is void. Wearne v. France, 3 Wyo. 273 (1889).

But the act which constitutes the constructive fraud may be such as to justify an inference of a fraudulent intent which will support an attachment.

An actual fraud, as distinguished from a constructive one, is necessary to sustain an attachment, but this arises when the acts done create as a logical sequence results that are not fairly or reasonably consistent with an honest purpose. Seckendorf v. Ketcham, 67 How. Pr. 526 (1884).

Acts conceded to be fraudulent should not be declared by the court insufficient to establish a fraudulent intent which will sustain an attachment as a matter of law, if they were acts which the jury should consider and act upon. Main v. Lynch, 54 Md. 658 (1880). See also Kipling v. Corbin, 66 How. Pr. 12 (1884), *infra*, VI. a, *The intent to defraud*.

Thus, an assignment by a debtor to a creditor for the sale of the property, and a return of the balance after satisfaction of the creditor's claim to the debtor, is fraudulent and void, and contains in itself evidence of a fraudulent intent upon which an attachment may be issued. Selz v. Evans, 6 Ill. App. 466 (1880).

And an assignment for the benefit of creditors, containing provisions preferring members of the debtor's firm and giving the assignee power to sell upon credit, though a fraud in law as distinguished from an actual fraud, warrants the inference of the existence of such a fraudulent intent as will support an attachment. Ryhiner v. Ruegger, 19 Ill. App. 157 (1886).

So, the constructive fraud evidenced by an assignment by a partner of partnership property for the payment of firm and individual debts without providing that the firm debts shall be first paid, is sufficient to justify an inference of fraudulent intent which will support an attachment. Friend v. Michaelis, 15 Abb. N. C. 354 (1885).

In Friend v. Michaelis, *supra*, Milliken v. Dart, 26 Hun, 24 (1881), *infra*, VI. f, *Assignments for the benefit of creditors*, was limited and distinguished as belonging to a class of cases in which no positive wrongdoing was involved, the invalidity arising wholly from the provision of the law; and the court said that the ruling should be restricted to such cases.

And an assignment by an insolvent firm by which partnership property is appropriated to the payment of individual debts of a partner, will support an attachment upon the ground of a disposal of property so as to hinder and delay creditors, though the fraud charged is one in law, and not in fact. Keith v. Fink, 47 Ill. 272 (1868).

The courts of several of the states, however, among which are Maryland, Florida, and the District of Columbia, have adopted the opposite doctrine,—that mere constructive fraud is sufficient to justify an attachment.

Thus, a conveyance which by its terms operates to hinder, delay, or defraud creditors, will be presumed to have been intended to so operate, and will sustain an attachment. Whedbee v. Stewart, 40 Md. 414 (1874); Farrow v. Hayes, 51 Md. 498 (1879).

And an assignment in trust to sell the assigned property and pay releasing creditors out of the proceeds, and return the surplus, if any, to the grantor, operates to hinder, delay, or defraud creditors, and is fraudulent, and the intent to defraud, upon which an attachment may be issued, will be imputed to the assignor, and parol evidence is not admissible to show a different intent. Farrow v. Hayes, *supra*.

So, in Cissell v. Johnston, 22 Wash. L. Rep. 730 (1894), it was held that an attachment upon the ground that the debtor has assigned, disposed of, and secreted his property with intent to delay and defraud his creditors will lie for fraud in law in case of an assignment by insolvent debtors, though there was no fraud in fact or actual fraud.

And the fact that a mortgagor of a stock of goods is permitted to remain in possession and continue to sell and dispose of them in the ordinary course of business amounts to a conveyance to the use of the grantor, and is fraudulent *per se* and a ground for attachment, even when the act is entirely unconnected with any intentional fraud. Eckman v. Munnerlyn, 32 Fla. 367 (1893).

So, under statutes like those of Missouri and New Mexico, providing for an attachment for a disposition of property so as to defraud creditors, constructive fraud is sufficient to warrant its issuance, no intent to defraud being necessary.

Thus, the element of intention is not embraced in the ground of attachment that the debtor has fraudulently sold or removed or disposed of his property so as to hinder or delay creditors. Noyes v. Cunningham, 51 Mo. App. 194 (1892); Potter v. McDowell, 31 Mo. 62 (1860); Douglass v. Cissna, 17 Mo. App. 44 (1885).

A conveyance which is fraudulent at law and void as to existing creditors warrants an attachment under the Missouri statute, regardless of the motives or intention of the debtor. Farmers' & M. Bank v. Price, 41 Mo. App. 291 (1890); Kritzer v. Smith, 21 Mo. 296 (1855).

And an act done by a debtor, which is fraudulent in law because it hinders and delays creditors, will support an attachment under the Missouri statute

The deed was fraudulent as to William's creditors.

If the deed, which was absolute on its face, was intended by the parties to be a mere mortgage, it will be conclusively presumed to have been made with intent to defraud, hinder, and delay the grantor's creditors.

Harris v. *Sumner*, 2 Pick. 129; *Metropolitan Bank* v. *Godfrey*, 23 Ill. 579; *Bullock* v. *Battenhousen*, 108 Ill. 28; *Battenhousen* v. *Bullock*, 11 Ill. App. 665; *Sims* v. *Gaines*, 64 Ala. 392; *Bryant* v. *Young*, 21 Ala. 264; *Gregory* v. *Perkins*, 4 Dev. L. 50; *Halcombe* v. *Ray*, 1 Ired. L. 340; *Gaither* v. *Mumford*, 1 N. C. Term. Rep. 167; *Benton* v. *Saunders*, Busbee's L. 360; *North* v. *Belden*, 13 Conn. 376, 35 Am. Dec. 83; *Hough* v. *Ives*, 1 Root, 492; *Friedley* v. *Hamilton*, 17 Serg. & R. 70, 17 Am. Dec. 638; *Jaques* v. *Weeks* 7 Watts, 261; *Dey* v. *Dunham*, 2 Johns. Ch. 182; *Odell* v. *Montross*, 68 N. Y. 499; *Coolidge* v. *Melvin*, 42 N. H. 510; *Winkley* v. *Hill*, 9 N. H. 31, 31 Am. Dec. 215; *Tifft* v. *Walker*, 10 N. H. 150; *Smith* v. *Lovell*, 6 N. H. 67; *Rice* v. *Cunningham*, 116 Mass. 469; *Shield* v. *Anderson*, 3 Leigh, 729; *Watkins* v. *Arms*, 64 N. H. 99; *Bentz* v. *Rockey*, 69 Pa. 71; *McCulloch* v. *Hutchinson*, 7 Watts, 434, 33 Am. Dec. 776; *Shaffer* v. *Watkins*, 7 Watts & S. 219; *Connelly* v. *Walker*, 45 Pa. 449.

When a conveyance by its terms operates to

---

though it may not defraud the creditor in fact. Kellog v. Richardson, 19 Fed. Rep. 70 (1883).

The term "fraud," as understood in the Missouri statute concerning fraudulent conveyances, has the same meaning in the attachment law, and it is not necessary to show that the act originated in any meditated design to commit a positive fraud to injure others. Reed v. Pelletier, 28 Mo. 173 (1859) (*dictum*).

Whatever is denounced as fraud by the judgment of the law must be regarded in the same light with reference to an act or transaction which is made the ground of an attachment, and if the act charged to have been committed is fraudulent, actual or constructive, it will be inferred that the party intended its natural and ordinary results. *Ibid.*

Thus, an assignment for the benefit of creditors which is fraudulent in and of itself as matter of law is a fraudulent conveyance within the meaning of the provision of such an act. Douglass v. Cisena, 17 Mo. App. 44 (1885); Leitensdorfer v. Webb, 1 N. M. 34 (1853).

And an assignment for the benefit of certain preferred creditors, made without presenting a petition to any court or judge and without any schedule of debts or creditors, and without the sanction of any court of sessions or service of any citation of creditors, as required by law in New Mexico, is fraudulent in law, and will support an attachment as a disposal of property so as to defraud creditors. Leitensdorfer v. Webb, *supra*.

And a mortgage by a tradesman of his entire stock of goods, of which he is permitted to continue in possession and to sell and dispose of in the usual course of his business, is fraudulent in law and furnishes ground for an attachment under the Missouri statute, though it was made to secure a bona fide debt. Sauer v. Behr, 49 Mo. App. 86 (1892); Reed v. Pelletier, *supra*.

III. *Fraudulent contraction of debts.*

The statutes of some of the states provide for an attachment upon the ground that the debt thereby sought to be collected was fraudulently contracted.

Under such statutes false representations made by a debtor as to his solvency, by which he obtains credit, are sufficient to sustain an attachment in an action brought by a creditor by whom the credit is given. First Nat. Bank v. Rosenfeld, 66 Wis. 222 (1886).

So the contraction of a debt with the preconceived intention not to pay it is fraudulent within the meaning of the Missouri statute, defining the ground of attachment. Blackwell v. Fry, 49 Mo. App. 638 (1892).

And the purchase of property by one who is practically insolvent, who for the purpose of obtaining credit makes exaggerated statements as to his solvency, stating the purpose for which he wanted the property, but disposes of it in payment of debts made after its receipt, together with other suspicious circumstances, authorizes the assertion that he did not intend to pay for it, and is sufficient to support an attachment. Cole Mfg. Co. v. Jenkins, 47 Mo. App. 664 (1890).

But to sustain an attachment on the ground that the debt was fraudulently contracted, it must be shown that the debtor intended to defraud the creditor. Hughes v. Lake, 63 Miss. 552 (1886).

And to support an attachment upon the ground that a debt was contracted for property obtained under false pretenses, it must be shown that there was an intent on the part of the debtor to cheat or defraud at the time the debt was contracted or property obtained, and some false pretense must have been designedly used for that purpose and the fraud accomplished by means thereof, or it must have had such an effect that without it the defrauded party would not have parted with his money or property. Wyman v. Wilwarth, 1 S. D. 172 (1890).

So, statements made by a debtor through an agent, on which credit was given him, though false, will not support an attachment where they were not communicated to the creditor by the authority or with the knowledge of the debtor, and were not made with the intention of influencing and inducing the creditor to part with his property. Lodge v. Rose Valley Mills, 11 Pa. Co. Ct. 667, 1 Pa. Dist. R. 811 (1892).

And an attachment will not lie under Mo. Rev. Stat. § 336, providing therefor, when the debt was fraudulently contracted, for the wrongful conversion of personal property, though possession was obtained with intent to convert it. Finlay v. Bryson, 84 Mo. 664 (1884).

Proof that a debt was fraudulently contracted, however, will not support an attachment upon the ground that the debtor had assigned, disposed of, or concealed his property with intent to defraud creditors. Dellone v. Hull, 47 Md. 112 (1877); Johnson v. Buckel, 65 Hun, 601 (1892); Wittner v. Von Minden, 27 Hun, 234 (1882).

In the absence of evidence of a fraudulent appropriation of his property by the debtor with such intent. Johnson v. Buckel, *supra*.

Thus, procuring a loan by fraudulent representations is not a ground for an attachment under the Ohio statute providing therefor, where the debtor has sold, conveyed, or otherwise disposed of his property with the fraudulent intent to cheat and defraud creditors, or is about to make such sale with like intent. Stone v. Bank, 1 Ohio Dec. 369 (1894).

And an attachment will not be granted upon the ground that the debtor has disposed of his property with intent to defraud his creditors on proof of misrepresentations as to his solvency and ownership of property, where there was a failure of proof of fraudulent appropriation and that the debtor had property as represented. Kibbe v. Herman, 51 Hun, 438 (1889).

hinder, delay, or defraud creditors, the law presumes the intent to do so.

Sims v. *Gaines*, 64 Ala. 392; *McKibbin* v. *Martin*, 64 Pa. 352, 3 Am. Rep. 588; *Harris* v. *Sumner*, 2 Pick. 129; *Holmes* v. *Marshall*, 78 N. C. 262; *Chenery* v. *Palmer*, 6 Cal. 119, 65 Am. Dec. 493; *Briggs* v. *Mitchell*, 60 Barb. 288; *Lukins* v. *Aird*, 73 U. S. 6 Wall. 78, 18 L. ed. 750; *Emerson* v. *Bemis*, 69 Ill. 537; *Ryhiner* v. *Ruegger*, 19 Ill. App. 156; Wait, Fraud. Conv. § 9; Bump, Fraud. Conv. 3d ed. 362, 579, 603, 604; *Metropolitan Bank* v. *Godfrey*, 23 Ill. 579.

The fraudulent conveyance will be wholly set aside, and will not stand as security even.

Harris v. *Sumner*, 2 Pick. 129; *Metropolitan Bank* v. *Godfrey*, *supra*; *Smith* v. *Smith*, 11 N. H. 459; *Sidensparker* v. *Sidensparker*, 52 Me. 486, 83 Am. Dec. 527; *Mackie* v. *Cairns*, Hopk. Ch. 373; *Graves* v. *Blondell*, 70 Me. 190; *Egery* v. *Johnson*, 70 Me. 258; *Graham* v. *Rooney*, 42 Iowa, 567; *Moore* v. *Wood*, 100 Ill. 451.

An absolute conveyance or transfer of property, with a secret understanding between the parties reserving an interest to the grantor, is fraudulent and void as to his creditors.

Whenever the effect of a particular transaction is to hinder, delay, or defraud creditors, the law conclusively presumes the intent.

Lukins v. *Aird*, 73 U. S. 6 Wall. 78, 18 L. ed. 750; *Sims* v. *Gaines*, 64 Ala. 392; *Dean* v.

Nor will an assignment for creditors be deemed to have been made with intent to defraud creditors so as to support an attachment because the debtor had previously fraudulently contracted debts, unless some connection between such debts and the assignment appears. Strauss v. Rose, 59 Md. 525 (1882).

And a preferential assignment will not be deemed a disposition of property with intent to defraud which will support an attachment merely because shortly before its execution the debtor purchased goods upon credit which had not expired at the time of the assignment, for which he had no reason to suppose he would be able to pay. Talcott v. Rosenthal, 22 Hun, 573 (1880).

So, false pretenses by a debtor as to his solvency, by which he obtained goods on credit, followed by a general assignment with preferences made a few days later, do not establish a disposition of his property with intent to defraud which will sustain an attachment in a suit by the vendor of the goods. Tim v. Smith, 13 Abb. N. C. 31 (1883); Achelis v. Kalman, 60 How. Pr. 491 (1881).

Though they would justify an arrest. Achelis v. Kalman, *supra*.

And false representations made by a debtor for the purpose of obtaining a large amount of goods on credit, followed by an assignment made six months afterwards, will not justify an attachment upon the ground of a disposition of property with intent to defraud, where all the property in the debtor's possession was assigned and there was nothing to show that he had previously made a dishonest use of it. Place v. Miller, 6 Abb. Pr. N. S. 178 (1869).

So, false statements as to a debtor's financial condition, made for the purpose of obtaining goods on credit, and the confession of judgments within three months thereafter to an amount largely in excess of what he represented to be his indebtedness, will not sustain an attachment upon that ground. Strasburger v. Bachrach, 38 N. Y. S. R. 1006 (1891).

And false representations by a debtor that he was perfectly solvent and owed only to the amount of $2,000, followed by an offer of judgment for $6,000 to his son, which was accepted and an execution issued under which his whole stock in trade was levied upon, does not warrant an attachment where the indebtedness to the son was not impeached and nothing more was done than the law allows in securing the payment of a just debt. Stein v. Levy, 55 Hun, 281 (1890).

But the fraudulent contraction of a debt, when considered in connection with other facts, may constitute one of the elements of a case of fraudulent intent upon which an attachment may be granted.

The manner in which a debtor recently obtained goods from his creditors, as well as the manner in which he disposed of them, is admissible in evidence to prove his intent in making such disposal to sustain an attachment. Gray v. St. John, 35 Ill. 222 (1864).

Thus, proof that a debt was fraudulently contracted, and that the debtor was engaged in putting all of his property out of his hands and proposed to refuse payment of his obligations pursuant to a plan determined upon before the debt was contracted, and his failure to deny such facts when charged therewith, make out a prima facie case of fraudulent design which will sustain an attachment. Blake v. Bernhard, 3 Hun, 397 (1875).

And positive testimony that possession of the creditor's goods was obtained by the debtor by false statements, and that their whereabouts were concealed, and of the debtor's refusal to consummate an agreement with the creditor which would have been to his interest to fulfil had he intended to continue his business and pay his debts, will support an attachment upon the ground that he had disposed of or secreted property with intent to defraud his creditors. Weiller v. Schreiber, 63 How. Pr. 491, 11 Abb. N. C. 175 (1882).

And proof that a large amount of goods were purchased shortly before the failure of the debtor and not paid for, and that judgments were confessed to preferred creditors and preferences made in favor of the debtor's wife and near relatives, exceeding the value of the assets transferred in the assignment in amount, sufficiently indicates a fraudulent intention in making the assignment to uphold an attachment. Hamburger v. Moeller, 4 N. Y. S. R. 447 (1886).

So, purchases to a large amount for which the purchaser gives his check, which is dishonored, and the disposal by him of a large amount of money in a clandestine manner, and the transfer of a large sum to his lawyer and friend, are sufficient to uphold an attachment upon the ground of a disposal of property to defraud creditors, in the absence of any excuse for not making his bank account good. Greenleaf v. Mumford, 19 Abb. Pr. 469, 30 How. Pr. 30 (1869).

And an attachment on the ground that the debtor has disposed of property with intent to defraud his creditors is justified on proof of an agreement of a stockholder of a corporation to pay an assessment upon his stock, provided the corporation would give him its check for an equal amount in payment of an indebtedness due him, the proceeds of which he agreed to apply in payment of his own and the delivery of such check to the stockholder, who collected it and used the proceeds for other purposes, and stopped payment of his own check. Wildman v. Van Gelder, 60 Hun, 443, 21 N. Y. Civ. Proc. Rep. 143 (1891).

So, the purchase of goods on credit by a debtor, who conveys the false impression that a wealthy brother is a member of the firm, and immediately thereafter giving a chattel mortgage to a bank and confessing judgment to it, and riding a long

Skinner, 42 Iowa, 418; *Macomber* v. *Peck*, 39 Iowa, 351; *Scott* v. *Hartman*, 26 N. J. Eq. 89; *Coolidge* v. *Melvin*, 42 N. H. 510; *Winkley* v. *Hill*, 9 N. H. 31, 31 Am. Dec. 215; *Shield* v. *Anderson*, 3 Leigh, 729; *Rice* v. *Cunningham*, 116 Mass. 466; *Chenery* v. *Palmer*, 6 Cal. 119, 65 Am. Dec. 493; *Hilliard* v. *Cagle*, 46 Miss. 309; *Potter* v. *McDowell*, 31 Mo. 62; *Bigelow* v. *Stringer*, 40 Mo. 195; *Binford* v. *Johnston*, 82 Ind. 427, 42 Am. Rep. 508; *Emerson* v. *Bemis*, 69 Ill. 537; *Moore* v. *Wood*, *supra*; *Lawson* v. *Funk*, 108 Ill. 502; *Gordon* v. *Reynolds*, 114 Ill. 118; Bump, Fraud. Conv. 3d ed. 22, 23, 362.

If the deed was fraudulent *per se* as to the creditors of William Druley, the attachment should have been sustained.

If, by reason of the facts and circumstances attendant on the execution of the deed, the law would hold the deed void as to the grantor's creditors and raise a conclusive presumption of intention on the grantor's part to defraud his creditors by its execution, then there was ground for the attachment.

Ryhiner v. *Ruegger*, 19 Ill. App. 156; *Selz* v. *Evans*, 6 Ill. App. 466; *Bigor* v. *Simmons*, 47 Ill. App. 428; *Douglass* v. *Cissna*, 17 Mo. App. 44; *Reed* v. *Pelletier*, 28 Mo. 173; *Potter* v. *McDowell*, 31 Mo. 62; *Adams* v. *Paige*, 7 Pick. 542; *Bernard* v. *Barney Myroleum Co.*

---

distance and confessing judgments to a brother, and causing executions to be issued thereon and immediately levied, in connection with requests for time and statements that all judgments would be paid as they matured, and a subsequent sending away of large quantities of goods,—are sufficient prima facie to sustain an attachment. Jaffray v. Nast, 32 N. Y. S. R. 250 (1890).

IV. *Against absconding debtors.*

The New York Code, and the Codes and statutes of some of the other states, provide for an attachment where the debtor has departed from the state with intent to defraud his creditors or to avoid the service of a summons, or keeps himself secreted therein with a like intent.

The general rule is that an intent to defraud creditors is not necessary to sustain an attachment upon the ground that the debtor has concealed himself to avoid service of process. Young v. Nelson, 25 Ill. 565 (1861); Morgan v. Avery, 7 Barb. 656 (1850).

Proof that a debtor has absconded, however, will not justify an attachment where it does not show that he had left the state and the intent with which he left. Decker v. Bryant, 7 Barb. 182 (1849).

And that a debtor is absent so that the ordinary process of law cannot be served on him is held to be insufficient in North Carolina to support an attachment, where there is nothing to show that such absence was with intent to defraud creditors. Love v. Young, 69 N. C. 65 (1873).

But proof of intent is necessary when the attachment is sought on the charge that the debtor has absconded with intent to defraud his creditors.

Thus, an attachment will not lie because the debtor is about to dispose of his property and leave the state, in the absence of anything to show that he intended to do so for the purpose of defrauding his creditors. Hertz v. Stuart, 3 N. Y. Week. Dig. 332 (1876).

And proof of inquiry at the late residence of the debtor, and that the inquirer was informed that the debtor had left the state and was not in the county, will not support an attachment in the absence of evidence of facts showing an intent to defraud creditors. *Ex parte* Robinson, 21 Wend. 672 (1840).

Whether a debtor has withdrawn himself from his creditors with intent to elude process and evade their demands, is a question of fact to be submitted to the jury. Fitch v. Waite, 5 Conn. 117 (1823).

And the proof which will warrant an attachment should be such as would warrant no other conclusion than that of a dishonest purpose.

Thus, one who departs from his usual residence, or remains absent therefrom, or conceals himself so that he cannot be served with process, with intent to delay or defraud his creditors, is an absconding debtor within the attachment law; but if he departs from the state or from his usual abode with intention of returning, and without a fraudulent design, an attachment will not lie. Fitch v. Waite, *supra*.

And a departure by a debtor openly to another place within the state, where he works openly at his trade, is not a withdrawing himself from his creditors with intent to evade their demands which will support an attachment. *Ibid.*

And an attachment will not issue upon the ground that the debtor had departed from the state with intent to defraud his creditors or to avoid arrest, where his departure and its object were notoriously known. *Re* Chipman, 1 Wend. 66 (1828).

So, proof that a debtor had left with the intent not to return, and secretly and without the knowledge of his family, is not alone sufficient to warrant an attachment upon the ground that he had left with intent to defraud his creditors. Kelly v. Archer, 48 Barb. 68 (1866).

And a departure from the state with intent to defraud, which will sustain an attachment, is not established by proof that the debtor had transferred his farm to his wife and gone west, and that he intended to leave the place at which he resided and settle in Dakota. Taylor v. Hull, 56 Hun, 90 (1890).

And refusal by a debtor to recognize a creditor's demand as a binding obligation, and a proposal that if he could sell his real estate for a specified price he would remove from the state and go into the cattle business, does not show an intent to defraud which will support an attachment. Hunter v. Soward, 15 Neb. 215 (1883).

So, proof that a debtor residing in the city of New York is absent therefrom or concealed therein, and is an absconding or concealed debtor and cannot be found, will not sustain an attachment under the provision of the New York Code which authorizes it where the debtor has departed from the state with intent to defraud his creditors or avoid the service of civil process. Castellanos v. Jones, 5 N. Y. 164 (1851).

It is not necessary, however, that a debtor should actually leave the state to entitle a creditor to an attachment under the Maryland statute, where he absconds or flees from justice or removes from his usual place of residence with intent to avoid the payment of his debts or to defraud his creditors. Stouffer v. Niple, 40 Md. 477 (1874).

And very strong circumstantial evidence, with some positive testimony, as to a debtor's fraudulent intent, is sufficient to sustain an attachment on motion to dissolve, as against evidence that the debtor had declared the object of his departure to be to collect debts, and had left his family at home, and that his return was expected. Gibson v. McLaughlin, 1 Browne (Pa.) 292 (1871).

So, in Fulton v. Heaton, 1 Barb. 552 (1847), an attachment upon the ground that the debtor was about to depart from the county with intent to defraud his creditors was upheld on proof that he refused to pay the attaching creditor and told a third party that he was going to Canada, and the

147 Mass. 356; *Washburn* v. *Hammond*, 151 Mass. 132; *Wheelbee* v. *Stewart*, 40 Md. 414; *Bentz* v. *Bockey*, 69 Pa. 71; *Shaffer* v. *Watkins*, 7 Watts & S. 219; *Eckman* v. *Munnerlyn*, 32 Fla. 367; *Rice* v. *Morner*, 64 Wis. 599; *Leitensdorfer* v. *Webb*, 1 N. M. 34; *Sauer* v. *Behr*, 49 Mo. App. 88; *First Nat. Bank* v. *Gerson*, 50 Kan. 589; *Bickham* v. *Lake*, 51 Fed. Rep. 892; *Gallagher* v. *Goldfrank*, 75 Tex. 562; *Blass* v. *Lee*, 55 Ark. 329; *Putnam* v. *Osgood*, 52 N. H. 148; *City Bank* v. *Westbury*, 16 Hun, 458; *Anderson* v. *Patterson*, 64 Wis. 557; *Place* v. *Langworthy*, 13 Wis. 629, 80 Am. Dec. 758; *Orton* v. *Orton*, 7 Or. 478, 33 Am. Rep. 717; *Kellogg* v. *Richardson*, 19 Fed. Rep. 70; *Burgert* v. *Borchert*, 59 Mo. 80; *Bigelow* v. *Stringer*, 40 Mo. 195.

The giving of a mortgage purporting to be given for a greater sum than was really due is fraudulent as to creditors, and will sustain an attachment.

Rice v. *Morner*, 64 Wis. 599; *Butts* v. *Peacock*, 23 Wis. 359; *Sims* v. *Gaines*, 64 Ala. 392; *Coolidge* v. *Melvin*, 42 N. H. 510; *Ryhiner* v. *Ruegger*, 19 Ill. App. 156; *Metropolitan Bank* v. *Godfrey*, 23 Ill. 579; *Wheelbee* v. *Stewart*, 40 Md. 424.

From the use of the word "intent" it does

---

he was about to take all of his property with him.

And that a debtor had left his home and place of business to go to an adjacent county for a legitimate purpose which would have required but two or three days, and had been absent about six weeks, and that after diligent search it was learned that he had gone west, but where or for what purpose could not be ascertained, and that he was considerably indebted, are sufficient to confer jurisdiction to issue an attachment upon that ground. Van Alstyne v. Erwine, 11 N. Y. 331 (1854).

And that a debtor had failed to pay the rent and water tax due under a lease executed by him, and failed to pay a promissory note, and disposed of his interest in the lease and fixtures of the demised premises, and met requests for payments with evasive answers, and stated that within three days he was to leave the state and take his property to another state, refusing to settle or state when he would pay,—justify an inference that he intended to depart from the state with intent to hinder, delay, and defraud his creditors, for which an attachment will be allowed. Stevens v. Middleton, 26 Hun, 470 (1882).

So, proof that the debtor had left the city and his business without leaving any one to take charge of it, and that his bookkeeper stated upon inquiry as to his whereabouts that he had left the state taking what amount of money he could raise, and did not intend to return, warrant an attachment upon the ground that he had left the state with intent to defraud creditors. Deimel v. Scheveland, 16 Daly, 38 (1890).

And proof that a debtor had left the county suddenly and clandestinely, and had subsequently sent back and employed help to assist him in the removal of his household goods to a railroad station in order to have them shipped to Boston, warrant the issue of an attachment upon that ground, in the absence of counter affidavits. Patterson v. Delaney, 37 N. Y. S. R. 585 (1891).

And an attachment on the ground that the debtor had gone away with intent to avoid the service of a summons is justified by proof that he had gone away and was in an embarrassed position, and attempted to borrow money immediately before his departure, and confessed his inability to meet his payments, and had taken pains not to disclose his intention to go away to any of his creditors, and that his confidential clerk called a meeting of his creditors within twenty-four hours after his departure. Morgan v. Avery, 7 Barb. 656 (1850).

So, evidence that a debtor, who was the proprietor of a line of stages, had sold his stages and horses and broke up his business and departed from or kept concealed in the city, and that his goods were sold for nonpayment of rent, and that it was generally understood and believed that he was keeping out of the way to avoid creditors,—is sufficient to confer jurisdiction to issue an attachment upon the ground that he had departed from the state or kept concealed in it with intent to defraud creditors. *Re* Fulkner, 4 Hill, 598 (1843).

And evidence that an insolvent debtor had sold his stock of goods to his clerk wholly on credit, and that he settled nearly all of his accounts and received payment therefor, and had gone away stating that he was going to Kansas, and had not been seen since, and that the clerk stated that he did not know where he had gone or when he would return, if at all,—is sufficient to support an attachment upon the ground of a departure from the state with intent to defraud creditors. Furman v. Walter, 13 How. Pr. 348 (1856).

And proof that one largely indebted absconded, and that he was in possession of personal property worth $8,000 or $10,000 immediately before, and that he had transferred property, and that his wife had since been trying to sell the same property,—establishes prima facie the fraudulent intent necessary to sustain an attachment. Sickles v. Sullivan, 5 Hun, 569 (1875).

And proof of the purchase of goods to be paid for a few weeks later upon the fraudulent representation that the purchaser was in the habit of purchasing for cash and that his stock was fully paid for, when at the time he was indebted for more than the value of his property, and that, a short time after, he left the county on pretense of a few days' absence and had not returned, and that a clerk in the meantime was disposing of his stock in trade and refusing to apply anything upon his indebtedness,—authorizes the issue of an attachment upon the ground that he had departed from the county and state with intent to defraud his creditors. Schoonmaker v. Spencer, 54 N. Y. 366 (1872).

So, an attachment upon the ground that the debtor had left the state with intent to avoid the service of process, or to defraud his creditors, is sustained by proof that he had gone away without the knowledge of his neighbors, and that he had been called upon to account as executor but had absconded and been removed from his trust, and that his wife, after receiving a letter from him, refused to tell his whereabouts to creditors, but told her sister that he was in Canada. Buell v. VanCamp, 28 N. Y. S. R. 907 (1889), affirmed on the question of the sufficiency of the affidavit, in 112 N. Y. 169 (1890).

Where one of two partners has left the state with intent to defraud his creditors or avoid the service of a summons, an attachment can issue on that ground against him only, and not against the other partner, where he remains in the state and continues to carry on his business. Bogart v. Dart, 25 Hun, 395 (1881).

But a departure of one or more of several defendants from the state with intent to defraud creditors will sustain an attachment, under Ky. Civ. Code, § 221, against the property of all of them. Mills v. Brown, 2 Met. (Ky.) 495 (1859).

V. *For removal of property.*

There are two classes of statutes providing for attachment upon the ground of the removal of property, the one class gives the right for a mere

not necessarily follow that this can only be ascertained by extrinsic evidence.

State v. *Benoist*, 37 Mo. 500; *Bigelow* v. *Stringer*, 40 Mo. 195; *Potter* v. *McDowell*, 31 Mo. 62; *Leitensdorfer* v. *Webb*, 1 N. M. 34.

Every man must be taken to contemplate the probable consequences of the act he does.

Townsend v. *Wathen*, 9 East, 278; *Holmes, B. & H.* v. *Holmes B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324; *Binford* v. *Johnston*, 83 Ind. 427, 42 Am. Rep. 508; Wait, Fraud. Conv. § 9; *Edgell* v. *Hart*, 9 N. Y. 213, 59 Am. Dec. 532; *Schuman* v. *Peddicord*, 50 Md. 560; *Enders* v. *Swayne*, 8 Dana, 103; *Coleman* v. *Burr*, 93 N. Y. 17, 45 Am. Rep. 160; *Smith* v. *Cherrill*, L. R. 4 Eq. 390; *Worseley* v. *Demattos*, 1 Burr. 474; *Gregory* v. *Perkins*, 4 Dev. L. 50; *Seward* v. *Jackson*, 8 Cow. 406; *Cunningham* v. *Freeborn*, 11 Wend. 241; *Hunters* v. *Waite*, 3 Gratt. 26; *Oliver Lee & Co.'s Bank* v. *Talcott*, 19 N. Y. 146; *McBroom* v. *Rives*, 1 Stew. (Ala.) 72.

There is no difference between fraud in fact and fraud in law; between fraud proved by direct evidence and fraud inferred by law.

Sims v. *Gaines*, 64 Ala. 396; *Wilt* v. *Franklin*, 1 Binn. 502, 2 Am. Dec. 474; *Furrow* v. *Hayes*, 51 Md. 498; *Babcock* v. *Eckler*, 24 N. Y. 632; *Hunters* v. *Waite*, 3 Gratt. 26; *Gregory* v. *Perkins*, 4 Dev. L. 50; *Re Moroney*, L.

---

removal of property from the state or a removal from the state without leaving sufficient to pay debts, while the other gives it when the debtor has removed or is about to remove his property from the state with intent to defraud creditors.

The rule supported by a preponderance of authority is that it is not necessary that fraud or a purpose to defraud or injure the creditor should enter into a removal of or purpose to remove property upon which an attachment is sought under a statute providing therefor, where the debtor has removed or is about to remove his property out of the state. Freidlander v. Pollock, 5 Coldw. 490 (1868).

And that no intent to cheat, hinder, or defraud creditors is necessary to sustain an attachment on the ground that the debtor is removing or proposes to remove his property beyond the state without leaving sufficient to pay his debts. Durr v. Hervey, 44 Ark. 301, 51 Am. Rep. 594 (1884); Goodbar v. Bailey, 57 Ark. 611 (1893); Sherrill v. Fay, 14 Iowa, 286 (1862); Branch of State Bank of Iowa v. White, 12 Iowa, 141 (1861); Stephenson v. Sloan, 65 Miss. 407 (1888); Mack v. McDaniel, 2 McCrary, 198 (1880).

In Durr v. Hervey, *supra*, Rice v. Pertuis, 40 Ark. 157 (1882), *infra*, this section, was distinguished upon the ground that in that case the attachment was for a debt not yet due, which was issued under Gantt's (Ark.) Dig. § 437, requiring in terms the averment of fraud.

Thus an attachment will lie against one who is removing or about to remove his property out of the state, not leaving sufficient remaining to satisfy all of his debts, under Mansf. (Ark.) Dig. § 309, subdiv. 6, authorizing an attachment therefor, though such removal is made with the intent to sell the property and apply the proceeds to the payment of a bona fide debt. Goodbar v. Bailey, *supra*.

But an attachment will not lie under the Mississippi statute on the ground that a debtor has taken property from the state with intent to defraud or to remove it from the reach of creditors, where he has in his possession property of a permanent character subject to execution, of sufficient value to pay all his liabilities, which he does not intend to remove. Montague v. Gaddis, 57 Miss. 453 (1879).

But some of the cases have insisted upon the necessity of an intent to defraud, though the statute does not expressly require it.

Thus, the removal of property by a debtor from the state, where there is no bad intent and the amount of property removed is small as compared with what is left, and the debtor is solvent, and the collection of the debt is not endangered, though within the letter of the Florida statute authorizing an attachment whenever the debtor is actually removing his property out of the state, is not within its spirit, and will not sustain an attachment. Haber v. Nassitts, 12 Fla. 589 (1868).

And an attachment issued upon the ground that the debtor is about to remove his property out of the jurisdiction without paying his debts cannot be sustained if the evidence fails to show that he was not acting in good faith but with the intention of defrauding his creditors. Hoes v. Williams, 24 La. Ann. 568 (1872).

So, in Vandevoort v. Fanning, 10 Iowa, 589 (1859), it was held that the fact that a debtor is about to dispose of his property or carry the same out of the state without leaving sufficient remaining for the payment of his debts will not warrant an attachment, where there is nothing to show that such removal or disposal will be made with intent to defraud his creditors.

But see subsequent Iowa cases cited *supra*.

Under the other class of statutes the intent to defraud is essential. This was held of the Nebraska statute in Steele v. Dodd, 14 Neb. 496 (1883).

And in Montgomery v. Tilley, 1 B. Mon. 155 (1840), it was held that a removal of property from the state which will support an attachment under Ky. act 1838, § 3, must have been with fraudulent intent, or its effect must be to cheat, hinder, delay, or defraud creditors in the collection of their debts.

A fraudulent intention on the part of a debtor to remove his property out of the commonwealth alone gives jurisdiction to the court of equity under the Kentucky statute empowering it to attach property and to arrest its removal on the establishment of the intent to remove it, where the demand is purely legal. Farmer v. Bascom, 9 B. Mon. 23 (1848).

So, the shipping of cotton by a debtor out of the state to a creditor in another state in payment of a bona fide debt will not sustain an attachment under the provision of the Arkansas statute, authorizing an attachment where the debtor is about to remove his property from the state with intent to defraud his creditors, where no fraudulent intent is shown. Rice v. Pertuis, 40 Ark. 157 (1882).

And the temporary removal by a debtor of part of his property from the state will not support an attachment upon the ground of the removal of property with intent to defraud creditors, where no actual intent to defraud existed, though such removal had the actual effect of hindering or delaying them. Montgomery v. Tilley, *supra*.

So, the evidence of intention necessary to sustain an attachment on this ground, like that in case of an absconding debtor, must be of such a character as to justify no other conclusion than that of a dishonest purpose.

Thus, the removal by a debtor of a part of his stock of goods to another town in the same county to be sold or traded there does not of itself show a fraudulent intent which will support an attachment. Mack v. Jones, 31 Fed. Rep. 189 (1887).

And that a debtor is about to remove his stock of goods from the state will not support an attachment upon the ground that he is about to remove his property with intent to defraud his creditors, where he has $10,000 worth of unencumbered real estate within the state. Wrompelmeir v. Moses, 3 Bart. 467 (1874).

R. 21 Ir. Rep. 27; *Harman* v. *Hoskins*, 56 Miss. 142; *Lukins* v. *Aird*, 73 U. S. 6 Wall. 78, 18 L. ed. 750; *Rencher* v. *Wynne*, 86 N. C. 268; *Cheatham* v. *Hawkins*, 80 N. C. 161; *Tennessee Nat. Bank* v. *Ebbert*, 9 Heisk. 154; *Blum* v. *McBride*, 69 Tex. 60; *Sanger* v. *Guenther*, 73 Wis. 354; *Freeman* v. *Pope*, L. R. 5 Ch. 538; *Cunningham* v. *Freeborn*, 11 Wend. 240; *Edgell* v. *Hart*, 9 N. Y. 213, 59 Am. Dec. 532; *Dunham* v. *Waterman*, 17 N. Y. 9, 72 Am. Dec. 406; *Bernard* v. *Barney Myroleum Co.* 147 Mass. 356; *Cook* v. *Johnson*, 12 N. J. Eq. 51, 72 Am. Dec. 381; *Burr* v. *Clement*, 9 Colo. 1; *Leadman* v. *Harris*, 3 Dev. L. 144; *Hardy* v. *Simpson*, 13 Ired. L. 132.

Petition for rehearing.

As a matter of evidence every man is to be presumed, prima facie at least, to intend the probable consequences of his acts.

Re Bininger, 7 Blatchf. 262; *Knapp* v. *White*, 23 Conn. 529; *Quinebaug Bank* v. *Brewster*, 30 Conn. 559; *Jones* v. *Ricketts*, 7 Md. 108; *Reynolds* v. *United States*, 98 U. S. 167, 25 L. ed. 250; *First Nat. Bank* v. *Jones*, 88 U. S. 21 Wall. 325, 22 L. ed. 542; *Sackett* v. *Mansfield*, 26 Ill. 21; *Seacord* v. *People*, 22 Ill. App. 279; 8 Am. & Eng. Enc. Law, p. 773.

Acts often speak louder than words.

Griffin v. *Marquardt*, 21 N. Y. 121; *Thurs-*

And the payment to a debtor of moneys held by a third person for him after the dissolution of an attachment against him and before the issue of a second attachment, is wholly insufficient as evidence of an intention of the debtor to remove his property for fraudulent purposes to support the second attachment. Stow v. Stacy, 30 N. Y. S. R. 308 (1890).

So, that a debtor was on his way down the Wisconsin river to a southern market with a raft of lumber which he was removing out of the territory and which was all the property that he owned, does not authorize an attachment upon the ground that he is about fraudulently to remove his property to hinder and delay his creditors, where that use of his property was the only one by which it could be of any value, and was in strict conformity to usages and customs of the business. Hurd v. Jarvis, 1 Pinney, 475 (1844).

And proof that a debtor closed up his place of business and commenced packing up his goods and continued to do so until midnight, and that his store was closed on the next morning, and that on the preceding day he removed his family without informing any one, will not support an attachment upon the ground that he was about to remove his property with intent to defraud creditors. Mott v. Lawrence, 9 Abb. Pr. 196, 17 How. Pr. 559 (1859).

And proof of a statement by a member of a firm that he intended to leave the state and would dispose of the property of the partnership if he could find any one to take it, and any creditor who did not know enough to take care of himself must get what he could, will not support an attachment upon that ground, where neither the time, the place, nor the individual who made the statement, is shown. Skiff v. Stewart, 39 How. Pr. 385 (1868).

But an admission by a partner that his copartner in the debtor firm had absconded to another state and taken most of the means of the firm with him is sufficient to warrant an attachment against the firm upon the ground of its removal of its goods beyond the state to defraud creditors, where no effort was made by the one partner to prevent the other from taking the partnership assets. Bryant v. Simoneau, 51 Ill. 324 (1869).

So, the failure of a debtor to pay debts, and the giving of conveyances, putting off of payments indefinitely, and the sale of his property with the statement that he is about to leave the state and take his property with him, justify an inference of fraudulent intent which will support an attachment. Stevens v. Middleton, 14 N. Y. Week. Dig. 126 (1882).

And the taking of his stock of goods from the rear of his store by a debtor at night, and sending them from a point where there was a station on the railroad beyond another station nearer by to be shipped, are sufficient to support an attachment upon the ground of the fraudulent concealment of property for the purpose of delaying and defrauding creditors. Bryant v. Simoneau, *supra*.

And stoppage of business, and insolvency, though not necessarily evidence of an intent to defraud, will justify an attachment when taken in connection with the removal of the property, consisting of machinery, from the factory, in which it could only be used to advantage and be of much value. McTaggart v. Putnam Corset Co. 29 N. Y. S. R. 552 (1890).

The term "about," as used in the Mississippi statute providing for attachment where the debtor is about to remove himself or property from the state or to dispose of property with intent to defraud, means that such act will soon occur, but does not mean that it must be done within any definite space of time, as an hour, a day, a week, a month, etc. Myers v. Farrell, 47 Miss. 281 (1872).

VI. *For assignment, disposal, or secretion of property.*

a. *The intent to defraud.*

The provision on this subject found in the Codes and statutes of most of the states authorizes an attachment when the debtor has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property with intent to defraud his creditors.

Under such statutes the existence of the intent to defraud would appear to be essential. See *supra*, II., *Actual as distinguished from constructive fraud.*

Neither indebtedness nor insolvency, alone, will justify the issue of an attachment. Marx Bros. v. Leinkauff, 93 Ala. 453 (1890); Clarke v. Seaton, 18 B. Mon. 230 (1857).

And while a belief upon the part of the creditor in the existence of a fraudulent intent, based upon proper grounds, would authorize the issuance of an attachment, it is not usually regarded as sufficient to sustain it unless such intent actually existed.

Thus, in Farwell v. Brown, 1 Fed. Rep. 128 (1880), it was said that the creditor's reason for believing in the existence of an intent to defraud is a material fact for the purpose of issuing a writ of attachment, but counts for nothing where the facts constituting the ground for sustaining the attachment are denied. Here the parties come to closer quarters and use facts instead of reasons for belief, for their weapons.

The intent to defraud must exist to justify an attachment; it does not suffice that appearances indicate it, and the advertisement by a debtor of the sale of his property will not sustain an attachment though calculated to induce suspicion, where the evidence shows that it was not well founded. Ferguson v. Chastant, 35 La. Ann. 339 (1883).

It must be a fair and logical sequence from facts proved, and it is immaterial what the applicant believes or disbelieves. Ellison v. Bernstein, 60 How. Pr. 145 (1880).

And letters and threats giving a creditor reasonable ground to believe that his debtor intended to defraud him do not furnish a sufficient ground

ton v. *Cornell*, 38 N. Y. 281; 8 Am. & Eng. Enc. Law, p. 753.

Fraud that will uphold attachment may be inferred from circumstances.

Waples, Attachm. 2d ed. § 58; *Bryant* v. *Simoneau*, 51 Ill. 324; *Carter* v. *Gunnels*, 67 Ill. 270; *Strauss* v. *Kranert*, 56 Ill. 254; *Cowling* v. *Estes*, 15 Ill. App. 255; *Hanchett* v. *Goetz*, 25 Ill. App. 445.

A person would not be likely to accomplish an act, and afterward say that it was prompted by corrupt motives.

Wait, Fraud. Conv. 2d ed. § 8.

Defendant's motive in making the representation does not, in the eye of the law, make the representation less a fraud.

8 Am. & Eng. Enc. Law, p. 753; *Case* v. *Ayers*, 65 Ill. 142; *Keith* v. *Goldston*, 22 Ill. App. 457; *McBean* v. *Fox*, 1 Ill. App. 177; *Gough* v. *St. John*, 16 Wend. 646; *Drabek* v. *Grand Lodge of B. S. Benev. Soc.* 24 Ill. App. 83; *Ryhiner* v. *Ruegger*, 19 Ill. App. 156; *Moore* v. *Wood*, 100 Ill. 451; *Flower* v. *Brumbach*, 30 Ill. App. 294.

It is a fraud which will avoid an obligation of a bond, for the obligee to induce the sureties to become such on representations known to be false, although the motive from which the representation proceeded was not bad.

Drabek v. *Grand Lodge of B. S. Benev. Soc. supra;* 8 Am. & Eng. Enc. Law, p. 753.

A vendee of goods inducing a sale thereof

---

for an attachment, without reference to the actual intention, the question being, not what was believed, but what was the fact. Rheinhart v. Grant, 24 Mo. App. 154 (1887).

Where, however, an attaching creditor had good reason to believe that his debtor is about to dispose of his property with intent to defraud his creditors, and attaches on that ground, the fact that the debtor afterwards changes his mind and absconds does not invalidate the attachment or give priority to another creditor, subsequently attaching on the ground that the debtor had left the state. Boyd v. Labranche, 35 La. Ann. 235 (1883).

And where the acts of a debtor are such as to justify the belief on the part of the creditor of an intent to defraud, it is sufficient to justify an attachment, though the creditor may have been mistaken in his belief, as the intent can only be shown by the acts of the debtor. Steinhardt v. Leman, 41 La. Ann. 835 (1889).

An intent to defraud or give an unfair preference must exist to sustain an attachment under the Louisiana statute, but as such intent lies in the bosom of the debtor, it can only be shown by his acts and declarations. Chaffe v. Mackenzie, 43 La. Ann. 1062 (1891).

So, the burden of proof to show that an assignment which is valid upon its face is fraudulent in fact, and will support an attachment as having been made with intent to defaud, rests with the attaching creditor. Strauss v. Rose, 59 Md. 525 (1882).

And evidence necessary to establish a fraudulent intent, which will sustain an attachment, must tend to establish a probability of guilt, and be inconsistent with innocence. West Side Bank v. Meehan, 49 N. Y. S. R. 606 (1892).

It should be of such character as to fairly justify no other conclusion than that of a dishonest purpose. Mere conjectures are not sufficient. Goldschmidt v. Herschorn, 13 N. Y. S. R. 560 (1888), Herman v. Doughty, 15 N. Y. Week. Dig. 94 (1882).

Fraud is not to be presumed when under the evidence the transaction may be fairly reconciled with honesty of purpose. Dempsey v. Bowen, 25 Ill. App. 132 (1887); Pierce v. Johnson, 93 Mich. 125, 18 L. R. A. 486 (1892); Ripon Knitting Works v. Johnson, 98 Mich. 129 (1892).

Though a fraudulent intent which will support an attachment may be reasonably inferred from the acts and conduct of the party. Scott v. Simmons, 34 How. Pr. 66 (1867).

And whatever facts tend to show the good or bad faith of a party against whom an attachment is issued upon the ground of fraud are properly admissible in evidence. Marx Bros. v. Leinkauff, 93 Ala. 453 (1890).

But the facts required to be proved to sustain an attachment upon the ground that the debtor is about to dispose of his property for the purpose of defrauding his creditors should be such as will leave no reasonable doubt on the mind of the officer that the debtor is about to commit such acts, and such as would induce him, where uncontradicted or unexplained, to convict the debtor of the charge if he were on trial on a criminal charge. Morrison v. Ream, 1 Pinney, 244 (1843).

And proof of fraudulent intent, consisting chiefly of conflicting evidence and conclusions based upon an examination of the books of the debtor, which might be dissipated by cross-examination of the witnesses, will not support an attachment. Von Moppes v. Leimbach, 22 N. Y. Week. Dig. 337 (1885).

And evidence that a debtor, while residing in another state and over ten years before, was embarrassed and had put his property out of his hands, is irrelevant and inadmissible to prove that he is about to dispose of or remove his property with intent to defraud his creditors, to sustain an attachment. Lewis v. Kennedy, 3 G. Greene, 57 (1851).

The question of the existence of a fraudulent intent which will support an attachment is generally one of fact to be arrived at from the existence of other facts which tend to show it, and whether such other facts exist in any particular case is a question for the jury, and whether such facts, when they exist, are sufficient to indicate conclusively an intent to hinder and delay creditors, is a question of law. Butts v. Peacock, 23 Wis. 359 (1868) (*dictum*).

The intent which will sustain an attachment must appear as a fact in the case, and is the material inquiry in the case. Ryhiner v. Ruegger, 19 Ill. App. 157 (1886) (*dictum*); First Nat. Bank v Steele, 81 Mich. 93 (1890).

It is not enough to show that one has conveyed his property. First Nat. Bank v. Steele, *supra*.

A disposition of property with intent to defraud creditors will support an attachment, however, though they were not actually defrauded. Main v. Lynch, 54 Md. 658 (1880).

It is not necessary that a transfer of property shall have actually taken place. It is sufficient if there be a fully formed purpose to make it. Ditchburn v. Jermyn & G. Co-Op. Asso. 3 Pa. Dist. R. 635 (1894).

And circumstances sufficient to establish in law an intent to defraud creditors justify an attachment, though there is no positive proof of the removal or concealment of property with such intent. Kipling v. Corbin, 66 How. Pr. 12 (1883).

But an intent to make a fraudulent conveyance on the part of a debtor, which is retracted before any one sustains an injury, will not sustain an attachment. McCrosky v. Leach, 63 Ill. 61 (1872).

And evidence that the debtor was about to dispose of her property and failed to do so will not support an attachment upon the ground that she had disposed of her property with intent to hinder and delay or defraud creditors. Pierce v. White, 22 Week. L. Bull. 98 (1889).

So, the disposition of property with intent to de-

by false representation as to his financial ability is guilty of fraud which will avoid the sale, without regard to the motive with which the representation was made; it is wholly immaterial what the vendee's intention was as to paying for the goods.

Reed v. *Pinney*, 35 Ill. Rep. 610; 8 Am. & Eng. Enc. Law, p. 753.

The intent or intention is regarded as shown by acts and declarations, and, as acts speak louder than words, if a party is guilty of an act which defrauds another, his declaration that he did not by the act intend to defraud is weighed down by the evidence of his own act.

Wait, Fraud. Conv. 2d ed. §§ 8, 9; 8 Am. & Eng. Enc. Law, p. 753; *Moore* v. *Wood*, 100 Ill. 451; *Ryhiner* v. *Ruegger*, 19 Ill. App. 156; *Whedbee* v. *Stewart*, 40 Md. 424.

The giving of a deed, absolute on its face, as a security, is strong evidence of an intention on the part of the grantor to hinder, delay, and defraud his creditors.

See *Fuller* v. *Griffith* (Iowa) 60 N. W. Rep. 247; *McClure* v. *Smith*, 14 Colo. 297; *Stevens* v. *Hinckley*, 43 Me. 440; *Moore* v. *Roe*, 35 N. J. Eq. 90; *Earnshaw* v. *Stewart*, 64 Md. 513; *Whedbee* v. *Stewart*, *supra*; *Kemper* v. *Campbell*, 44 Ohio St. 210; *Hazeltine* v. *Espey*, 13 Or. 301; *Samuel* v. *Kittenger*, 6 Wash. St. 261; *Muchmore* v. *Budd*, 53 N. J. L. 369; *Gaffney*

---

fraud creditors is a sufficient ground for attachment though such disposition took place in another state. Kibbe v. Wetmore, 31 Hun, 424 (1884).

And the intent of a debtor in making a conveyance need not be to forever defeat the creditor, but will be complete if it is coextensive with the effect of the conveyance as hindering or delaying his creditors. Shove v. Farwell, 9 Ill. App. 256 (1881).

And a debtor who has formed a fraudulent intent to dispose of his property is about to dispose of his property so as to hinder or delay his creditor within the meaning of the Illinois statute authorizing an attachment therefor, whether the design is to be executed at once or after a little delay. Dueber Watch Case Mfg. Co. v. Young, 155 Ill. 226 (1895), 54 Ill. App. 383 (1894).

So, an intent to dispose of property for the purpose of delaying or defrauding a particular creditor is good ground for an attachment in his behalf. Correy v. Lake, 1 Deady, 469 (1868).

And a conveyance by a debtor with intent to delay or defraud any one creditor will justify an attachment of his property by any other. Sherrill v. Bench, 37 Ark. 560 (1881).

And a general intention on the part of the debtor to prevent the collection of certain debts, whenever it should be attempted, will sustain an attachment. Correy v. Lake, *supra*.

And an intent to hinder or prevent the creditor from taking his property on execution is sufficient. *Ibid.*

So, it is not necessary to establish that a debtor has disposed of all his property with intent to defraud his creditors to uphold an attachment; it will lie where he has disposed of a part thereof with that intent. Hyman v. Kapp, 22 N. Y. Week. Dig. 310 (1885); Wildman v. Van Gelder, 60 Hun, 443, 21 N. Y. Civ. Proc. Rep. 143 (1891) (*dictum*).

And proof that a debtor disposed of his property with intent to defraud creditors is sufficient to warrant an attachment, without proof that he did not retain sufficient property to pay his debts. Flannagan v. Donaldson, 85 Ind. 517 (1882); Pickard v. Samuels, 64 Miss. 822 (1887).

And where the creditor gives evidence sufficient to establish the fraud, it devolves upon the debtor to repel the inference. Pickard v. Samuels, *supra*.

In Pickard v. Samuels, *supra*, Montague v. Gaddis, 37 Miss. 453, and Myers v. Farrell, 47 Misc. 281, *supra*, V., *For removal of property*, were distinguished upon the ground that they were cases in which an attachment was asked upon the ground of the removal by the debtor of his property from the state.

But affirmative evidence that the defendant is about to dispose of all his unencumbered property with the intent to defraud his creditors is essential to an attachment under the Louisiana statute providing for its issuance on that ground. Hoy v. Weiss, 24 La. Ann. 269 (1872).

So, a conveyance made by a debtor with intent to hinder and delay his creditors is a conveyance for the purpose of avoiding the payment of his debts, which is made a ground for attachment by Ga. Code, § 3297. Gray v. Neill, 86 Ga. 188 (1890).

And a conveyance made by a debtor for the purpose of hindering and delaying creditors and to gain time, with the intent eventually to pay them if he could do so, will sustain an attachment. *Ibid.*

And a transfer of property, effected by means of a sheriff's sale under a fraudulent and collusive judgment, is a transfer with intent to defraud within Pa. attachment act 1869. Simon v. Johnson, 7 Kulp, 166 (1893).

And even under the Missouri statute providing for an attachment where the debtor has disposed of property so as to defraud his creditors, an intent to hinder, defraud, and delay creditors by the fraudulent concealment, removal, or disposal of property is the real substance of the issue, and it is not necessary to prove that all of the debtor's property was included. Taylor v. Myers, 34 Mo. 81.

But in that state fraud in attachment cases is a question of law and the court should specifically direct the jury as to what purposes are honest in a legal sense. Estes v. Fry, 22 Mo. App. 53 (1886).

An attachment may be issued under the Iowa Code upon the ground that the debtor has property which he refuses to give in payment or security, without any showing of an intent to defraud creditors. Bates v. Robinson, 8 Iowa, 318 (1859).

And the removal of property by a tenant from the premises, which would endanger the landlord in the collection of his rent, justifies the issuing of an attachment under the Missouri attachment act, without reference to the intention with which the removal was made. Morris v. Hammerle, 40 Mo. 489 (1867).

And no design on the part of the debtor to do anything that will render the collection of his debt less certain is necessary to an attachment under the Kentucky statute, on the grounds that the debtor has not property enough to satisfy the plaintiff's demands, and the collection thereof will be endangered by the delay in obtaining judgment. Burdett v. Phillips, 78 Ky. 246 (1880).

b. *Participation in fraudulent intent by transferee.*

As a general rule an intent to defraud, in a conveyance of property which will support an attachment, need not be participated in by the vendee. Miller v. McNair, 65 Wis. 452 (1886); Pettingill v. Drake, 14 Ill. App. 424 (1883); Spear v. Joyce, 27 Ill. App. 456 (1888); Ryhiner v. Ruegger, 19 Ill. App. 157 (1886).

And an assignment for the benefit of creditors will sustain an attachment as a conveyance with intent to defraud, where the assignor entertained that intent though the trustee was innocent. Foley v. Bitter, 34 Md. 646 (1871).

The fraudulent intent which will justify a sale of lands under attachment for a fraudulent conveyance thereof, under 2 Ind. Rev. Stat. 1876, § 526, providing that lands fraudulently conveyed with in-

v. *Signaigo*, 1 Dill. 158; *Metropolitan Bank* v. *Godfrey*, 23 Ill. 579; *North* v. *Belden*, 13 Conn. 376, 35 Am. Dec. 83; *Smith* v. *Lowell*, 6 N. H. 67; *Bird* v. *Wilkinson*, 4 Leigh, 266; *Peck* v. *Whiting*, 21 Conn. 206; *Ives* v. *Stone*, 51 Conn. 446; *Stearns* v. *Porter*, 46 Conn. 313; *Gulley* v. *Macy*, 84 N. C. 434; *Campbell* v. *Davis*, 85 Ala. 56; *Tryon* v. *Flournoy*, 80 Ala. 321; *Smith* v. *Carlisle*, 16 N. H. 464; *Stratton* v. *Putney*, 63 N. H. 577; *Corpman* v. *Baccastow*, 84 Pa. 363; *McCulloch* v. *Hutchinson*, 7 Watts, 434, 32 Am. Dec. 776; *Curtis* v. *Leavitt*, 15 N. Y. 9; 8 Am. & Eng. Enc. Law, p. 753; Wait, Fraud. Conv. 2d ed. §§ 8, 9.

Any device to obscure the title to real estate and thereby hinder or delay creditors is fraudulent.

Lewis v. *Lanphere*, 79 Ill. 187; *Metropolitan Bank* v. *Godfrey*, 23 Ill. 579; *Bullock* v. *Battenhousen*, 108 Ill. 28, affirming *Battenhousen* v. *Bullock*, 11 Ill. App. 665; *Bostwick* v. *Blake*, 145 Ill. 85; *Moore* v. *Wood*, 100 Ill. 451; *Davidson* v. *Burke*, 143 Ill. 139; *Sims* v. *Gaines*, 64 Ala. 392; 8 Am. & Eng. Enc. Law, p. 753.

Mr. W. S. Coy, for Jane Druley, appellee:

The making of the deed to Jesse Druley, in trust for Jane Druley, was not fraudulent in fact, and will not support an attachment.

Shore v. *Farwell*, 9 Ill. App. 256; *First Nat. Bank* v. *Kurtz*, 22 Ill. App. 213.

---

tent to delay or defraud creditors may be attached, however, must be participated in by the grantee. Johnston v. Field, 62 Ind. 377 (1878).

So, a transfer of property easily separable of a much larger quantity than is necessary to pay the debt in payment of which it is given will support an attachment of the property transferred when the creditor was privy to the fraudulent design. McDonald v. Gaunt, 30 Kan. 693 (1883).

But a general attachment of all a debtor's interest in real estate will not hold lands fraudulently conveyed by him by deed recorded before the attachment and subsequently conveyed by his fraudulent grantee to an innocent purchaser for value. Ashland Sav. Bank v. Mead, 63 N. H. 435 (1885).

c. *Gifts.*

Whether or not a gift will amount to a disposition of property with intent to defraud, would seem to depend upon the amount of the indebtedness of the giver as compared with the amount of his property.

Thus a gift by a husband to his wife, in good faith when he was not owing anything, is not a disposition of property with intent to defraud creditors which will sustain an attachment at the suit of one who subsequently becomes the husband's creditor. Tootle v. Coldwell, 30 Kan. 125 (1883).

And a conveyance by a father to his natural daughter of real estate worth $350, without actual consideration, but for the nominal consideration of $100, when he possessed no other real estate out of which execution could be satisfied, does not show an intent to defraud which would justify an attachment, where there is nothing to show that he did not have ample personalty with which to pay his debts. Hinds v. Fagebank, 9 Minn. 68 (1864).

And an arrangement by which a debtor transfers real estate to his wife in exchange for other real estate, made at a time when he was not indebted to any considerable extent as compared with the amount of his property, which was upwards of $500,000, is not evidence of an intent to defraud which will sustain an attachment sought two years afterwards. Iosco County Sav. Bank v. Barnes, 100 Mich. 1 (1894).

So, the gift of a piano by a debtor to his daughter which was intended for her own use and paid for in part with money which had been given her in small sums at various times does not show a fraudulent intent which will sustain an attachment by a subsequent creditor. Keith v. McDonald, 31 Ill. App. 17 (1888).

But when a conveyance is attacked as fraudulent and as a ground for attachment by pre-existing creditors, the burden to show that a valuable and adequate consideration was paid rests with the purchaser, and when the transaction is between near relatives, clearer and more conclusive proof is required. Marx Bros. v. Leinkauff, 93 Ala. 453 (1890).

And the execution and placing on record by a debtor of a deed conveying a lot of land to his wife for a nominal consideration, without explanation, will sustain an attachment by existing creditors. Washburn v. McGuire, 19 Neb. 98 (1886).

And evidence that an insolvent debtor, against whom judgments were about to be perfected, transferred his property to his wife through a third person and procured her to execute a mortgage for the benefit of his mother-in-law for which no consideration was paid, and that he continued to use and control the property the same as before the conveyance, justifies an inference of a disposition of property with intent to defraud which will support an attachment. Allen v. Meyer, 73 N. Y. 1, 7 Daly, 229 (1878).

d. *Sales of property.*

The mere fact that a debtor has sold his property, or some part of it, does not establish a fraudulent intent which will sustain an attachment, though creditors are thereby hindered or delayed in the collection of their debts. Dempsey v. Bowen, 25 Ill. App. 192 (1887); Decker v. Bryant, 7 Barb. 182 (1849); Frank v. Levie, 5 Robt. 599 (1868).

That a debtor is selling his property at fair rates for the purpose of paying his creditors, does not show an intent to defraud which will support an attachment. Knapp v. Joy, 9 Mo. App. 47 (1880); Dempsey v. Bowen, 25 Ill. App. 192 (1887).

And the sale of his entire stock of goods by a debtor, and the application of the money received therefor to the payment of his debts, do not authorize an attachment upon the ground that he had conveyed his property with intent to cheat and defraud his creditors. Tenney v. Dise, 32 Neb. 61 (1891).

And such a transfer for the purpose of raising money does not warrant an attachment upon that ground where it is not shown to be fraudulent or for an inadequate consideration. Ladew v. Hudson River Boat & S. Mfg. Co. 61 Hun, 333 (1891).

And proof that a debtor is offering his property for sale in order to realize funds for the payment of his debts, accompanied by a declaration of such purpose, will not justify an attachment upon the ground that he is about to dispose of his property with intent to defraud his creditors or give an unfair preference, or to place it beyond the reach of creditors. Lehman v. McFarland, 35 La. Ann. 624 (1883).

So, the daily disposal of his goods in the usual course of business by a solvent merchant, and the use of the money received for his own private purposes and placing it where it cannot be reached by his creditors except at his own pleasure, are not a disposal of his property with intent to defraud creditors for which an attachment will lie, though he may not intend to pay that particular money over to his creditors. Willis v. Lowry, 86 Tex. 540 (1896).

And the daily selling of goods by a permanent dealer in the regular course of his business does not indicate a fraudulent intent to place his property beyond the reach of creditors, or to give an

Messrs. **J. H. Breckenridge** and **George S. House** for appellees.

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

On the 3d day of September, 1890, the Weare Commission Company commenced its suit in assumpsit, by attachment, against William M. Druley and Albert A. Druley. The grounds for the attachment, as stated in the affidavit were: (1) That the defendants had, within two years then last past, fraudulently conveyed or assigned their effects, or part thereof, so as to hinder and delay their creditors; (2) that they had, within two years then last past, fraudulently concealed or disposed of their property so as to hinder and delay their creditors; and (3) that they were about fraudulently to conceal or dispose of their property or effects so as to hinder and delay their creditors. William M. Druley, at the date of the writ, was in his last illness, and on September 5, 1890, which was two days thereafter, he died. It appears from the return to the writ that the sheriff, on September 5, 1890,—the day of William M. Druley's death,—attached a tract of land in Cook county, containing 2 acres, the land then being, or shortly prior to the date of the writ having been, the individual

---

unfair preference to some of them, which will justify an attachment, though he is financially embarrassed. Hernsheim v. Levy, 32 La. Ann. 340 (1880).

So, sales of property by a debtor for the purpose of obtaining money with which to purchase necessities for his family will not support an attachment, as a fraudulent conveyance or assignment of his property or effects. Estes v. Fry, 22 Mo. App. 53 (1886); Dempsey v. Bowen, 25 Ill. App. 122 (1887).

Whether or not such a disposition of property amounts to a transfer with fraudulent intent depends upon the attending circumstances and conditions.

Thus, an attachment on the ground that the debtor assigned, disposed of, and secreted his property with intent to defraud his creditors will not issue upon proof that he was badly embarrassed and had ineffectually tried to sell out his business, and that he owed largely and was not ready to say what steps would be taken in disposing of his property. Thompson v. Dater, 57 Hun, 316 (1890).

And proof that a debtor, whose factory was destroyed by fire, had gone out of business and sold what remained of his machinery and utensils for a small sum and contracted to sell the balance of his stock, and collected the insurance on the property destroyed, and paid or secured other creditors, will not support an attachment by an unsecured creditor upon the ground that he was about to dispose of his property and leave the state with intent to defraud creditors. Andrews v. Schwartz, 55 How. Pr. 190 (1878).

And making a conveyance of real estate absolute on its face, which was intended for the purpose of securing the grantee who was a bona fide creditor, is not evidence of a disposition of property with fraudulent intent which will support an attachment. Rigney v. Tallmadge, 17 How. Pr. 556 (1859).

So, a debtor who was a professional trader and bought upon credit, and sold and traded nearly everything that he possessed, and sold machinery at or about cost, is not subject to attachment on the ground of a disposal or removal of property with intent of defraud creditors, where that was the usual way in which he conducted his business and the sales at cost were made for the purpose of drawing trade. Reed v. Bagley, 24 Neb. 322 (1888).

And the making by a debtor of two assignments of property to the same person and then stating that he had no property and could pay no debts, will not support an attachment. Miller v. Brinkerhoff, 4 Denio, 118, 47 Am. Dec. 242 (1847).

And an attachment upon the ground that the debtor is about to convert his property into money for the purpose of defrauding his creditors should not issue on evidence that the attaching creditor had furnished him with supplies for his crop of cotton, and that after ginning five bales of cotton, four were turned over to the creditor and one was sold and taxes upon the debtor's store paid with the proceeds, the debtor remaining upon the place, and pursuing his usual business. Bridge v. Ennis, 28 La. Ann. 309 (1876).

But a sale, by a debtor who had purchased goods on credit, of his store to his wife, the debtor remaining in charge of the business after such sale and there being no actual and continued change of possession, creates a presumption of an intent to defraud creditors which will prima facie sustain an attachment. Schumann v. Davis, 38 N. Y. S. R. 191 (1891).

And a deed from a father to his daughter, absolute in form, for an express consideration of $10,000, but intended as a security for advances not to exceed $6,000, and to become absolute only in the event of the grantor's death, is calculated to hinder and delay creditors, and will support an attachment. Evans v. Laughton, 69 Wis. 138 (1887).

And evidence that a debtor contemplated a sale of all of his estate to his sons upon long credits, and transferring to his creditors his son's notes, is sufficient to establish an intent to defraud which will sustain an attachment. Clark v. Smith, 7 B. Mon. 273 (1847).

So, selling a few articles cheaply will not support an attachment upon the ground of an intended disposal of property to defraud creditors, where it was done for the purpose of pushing trade and the stock consisted in part of goods bought at an insolvent sale, and the whole stock was successfully sold. Mack v. Jones, 31 Fed. Rep. 189 (1887).

And evidence of an offer by a debtor to sell her stock in trade to another for less than to any other person, with a request to keep the matter secret, is not sufficient to sustain an attachment on that ground, particularly where the stock of goods was worth $2,000, while her indebtedness did not appear to exceed $400. Frank v. Levie, 5 Robt. 509 (1866).

And the sale of his stock of goods by an insolvent debtor at their fair value, taking land warrants not yet located but to which good titles could be made, the purchaser agreeing that if the lands fell short of a certain price he would make up the deficiency, will not support an attachment as a disposal of property with intent to defraud where the debtor seemed to have been actuated by honest motives. Heidenheimer v. Ogborn, 1 Disney (Ohio) 351 (1857).

But that debtors who are largely indebted if not insolvent have sold and are rapidly selling their large stock of goods at less than the original cost, and have disposed of other valuable property recently for cash, will warrant an attachment upon that ground. Gashine v. Baer, 64 N. C. 108 (1870).

And an unsuccessful effort by a debtor to borrow money from a creditor, after which the debtor sells the entire contents of his store to him, for much less than they are worth, deducting the creditor's claim, the creditor giving his check for a part of the amount, most of which the debtor sent to his mother, and giving his note payable in nine months for the balance, with an arrangement that the creditor may give his notes to other credit-

property of William M. Druley, and that, after his death, the sheriff also summoned certain insurance companies, who, as it was claimed, were then indebted to William M. Druley individually, as garnishees. No personal service of the attachment writ was had on either of the defendants.

The plaintiff, in its original declaration, declared against the defendants as copartners under the firm name of Druley Bros., upon six promissory notes payable to the order of the plaintiff, two for $2,500 each, and one for $1,000, signed by Druley Bros., and two for $2,000 each, and one for $200, signed by Druley Bros., and by William M. Druley individually. On the 17th day of October, 1890, Albert A. Druley entered a special appearance, and suggested on the record the death of William M. Druley, and also filed his affidavit, stating, in substance, that the firm of Druley Bros. was composed of William M. Druley and the affiant, and was formed for the purpose of carrying on a grain trade or business in Will county; that William M. Druley, at the time of his death, was a resident of Cook county, the affiant being a resident of Will county; that neither had been served with process, and that no property, rights, or credits belonging to the affiant, or in which he had any interest, had

---

ors and indorse the amount thereof on the note given to the debtor, will sustain a finding by a jury of the existence of the fraudulent intent necessary to sustain an attachment. Pettingill v. Drake, 14 Ill. App. 424 (1883).

And proof that a debtor was rapidly selling all his stock of goods, which was purchased mainly on credit, at about cost; and that he had no other property; that he had borrowed money and refused to pay it, and was endeavoring to borrow more, and was indebted to numerous persons whom he refused to pay, and neglected and refused to pay his workmen though he had money constantly coming in; together with a statement that if he failed he intended to make something,—is prima facie sufficient to support an attachment at the suit of a creditor whose claim he had denied and refused to pay. Cooney v. Whitfield, 41 How. Pr. 6 (1871).

And an attempt by an absent debtor, through his attorney in fact, to realize money on his business in haste, by offering to sell it at much less than its real value if payments were made at once, and proof that he had directed his wife to draw all money from the bank and leave none on the premises, and that she had told creditors while carrying a large amount of money that she had none and declared while making a payment on account that it was the last the creditors would ever get,—warrant an attachment on the ground that the debtor was about to dispose of his property with intent to defraud. Union Distilling Co. v. Ruser, 39 N. Y. S. R. 128 (1891).

So, a pretended sale by a debtor of no pecuniary responsibility, after which he remains in possession of the goods sold and conducts the business as before, constitutes a disposal of his property with intent to defraud, which will support an attachment. Scott v. Simmons, 34 How. Pr. 66 (1867).

And an attachment will lie under Ga. Code, § 3297, for a pretended sale by a debtor for the purpose of avoiding his creditors, and the interposition of a court of equity is not necessary. Haralson v. Newton, 63 Ga. 163 (1879).

But a sale by an insolvent debtor of his entire stock of goods in his store, together with the furniture and the outstanding notes and accounts, to his son for notes payable in one, two, and three years, which were placed in a bank to be collected, the proceeds to be applied upon certain indebtedness, will not support an attachment upon the ground of a disposition of his property with intent to defraud his creditors, when the son had expectations as a devisee in his grandmother's will, since making which she had become demented. Miami Powder Co. v. Hotchkiss, 29 Fed. Rep. 767 (1887).

So, a warrant of attachment upon the ground that the debtor has disposed of or secreted property with intent to defraud his creditors is properly issued in favor of a creditor to whom he transferred property as security, which he was permitted to hold and sell, provided he applied the proceeds in payment of the indebtedness, where he secretly and fraudulently sold it, and refused to say what he had done with the proceeds. German Bank v. Meyer, 55 Hun, 86 (1889).

But an attachment upon the ground that the debtor was about to convert his property into money with intent to place it beyond the reach of creditors is not sustained by proof that he sold several bales of cotton to pay his landlord who had taken out a provisional seizure, and sent two or three work animals to his brother's plantation after having agreed with the attachment creditor to ship him all the cotton he could get from his lessees and debtors and pay to him what he could realize from the sale of his goods. Bussey v. Rothschilds, 26 La. Ann. 258 (1874).

And evidence that a debtor, who was a retail merchant, refused to inform his creditors as to his financial standing, and had been making sales of his property for cash and retaining the proceeds and not replenishing his stock, and had disposed of a large part thereof, will not support an attachment, where it appears that it was a season of the year when goods were sold and not bought by retailers, and that he had bought goods during the month and had paid over $3,000 to his creditors. Stringfield v. Fields, 13 Daly, 171, 7 N. Y. Civ. Proc. Rep. 356 (1885).

So, a conveyance by a father, who was surety for his son, of his property to a daughter and her husband to carry out the wishes of his deceased wife and redeem promises made to his children when the property was conveyed to him, and to perform a contract with and pay a debt due the daughter and her husband, does not show such a corrupt motive or fraudulent intent as will justify an attachment, where he did not know at the time he executed the conveyance that his son was financially embarrassed. First Nat. Bank v. Kurtz, 22 Ill. App. 213 (1886).

And a sale of attached property after the institution of the attachment suit and during its pendency does not raise an inference that an intention to dispose of the property and defraud creditors existed when the suit was brought so as to sustain an attachment in chancery under the Kentucky statute, it being necessary to show the existence of a fraudulent intent before the issuance of the attachment. Warner v. Everett, 7 B. Mon. 262 (1847).

But the disposal by a debtor, for his own benefit, without consent of his creditor, of goods for which warehouse receipts had been issued and delivered as collateral security for money borrowed, is an act done with the fraudulent intent to cheat, hinder, and delay the creditor within the meaning of the Kentucky statute, allowing an attachment for such act. Bank of Commerce v. Payne, 86 Ky. 446 (1887).

And the exchange by a debtor of a stock of goods worth about $2,000 for unproductive real estate of doubtful value, taken subject to a mortgage for $400, is sufficient to authorize an attach-

been attached under the attachment writ directed to the sheriff of Cook county; that neither the affiant nor the late firm of Druley Bros. had any property in Cook county; and that all the property, rights, and credits seized under the writ were the individual property of William M. Druley. Upon this affidavit, Albert A. Druley moved to dismiss, and quash the writ of attachment. This motion was overruled by the court, and at the same time the plaintiff discontinued its suit as to Albert A. Druley, and by leave of the court amended all the papers and proceedings in the cause by striking out the words, "copartners as Druley Brothers," wherever they occurred. It was also ordered that Mary A. Druley, the administratrix of the estate of William M. Druley, deceased, be substituted as defendant in place of her intestate, and also that Jesse Druley and Ralph Druley, the heirs at law of William M. Druley, be made parties to the attachment issue only, and be summoned as such. The plaintiff also, by leave of the court, filed a new affidavit in attachment, setting up the indebtedness sued for as being from William M. Druley, in his lifetime to the plaintiff, and since his death as being due and owing from his administratrix to the plaintiff, and setting up, as against William Druley individually,

---

ment under the Nebraska statute, providing therefor where the debtor has disposed of his property with intent to defraud his creditor. Robinson Notion Co. v. Ormsby, 33 Neb. 665 (1891).

So, that the debtor was making an effort to sell his property or place it out of his hands is sufficient to sustain an attachment on the ground of an alleged conversion of property into money with intent to place it beyond the reach of his creditors, on motion to dissolve. Wetherow v. Croslin, 24 La. Ann. 128 (1872).

And that the debtor went to a young lady to whom he was engaged, and urged immediate marriage for the reason that his business affairs were becoming involved, and that he wanted to deed his lands to her and make over to her his personal property so that nobody could get them away, desiring her to go to a neighboring city the next morning and be married and he would make the transfer, will sustain an attachment upon the ground that the debtor is about to dispose of his property with intent to defraud his creditors. Curtis v. Hoadley, 29 Kan. 566 (1883).

As to fraudulent contraction of debt as evidence of fraudulent disposition, see *supra*, III.

e. Mortgaging or pledging property.

Securing a creditor by mortgaging or pledging property does not establish a fraudulent intent which will sustain an attachment, though other creditors are thereby hindered or delayed in the collection of their debts. Dempsey v. Bowen, 25 Ill. App. 132 (1887).

So, the giving of a chattel mortgage on his personal property by a debtor to a trustee for the benefit of designated creditors is not evidence of an intent to defraud which will sustain an attachment, but is evidence of an attempt to secure such creditors. Rickel v. Strelinger, 102 Mich. 41 (1894).

And giving a mortgage to a creditor to secure his claims does not constitute a ground for attachment under the Louisiana attachment act, art. 240, No. 4, where there is nothing to show that it was given with intent to defraud creditors or give a fraudulent preference. Abney v. Whitted, 28 La. Ann. 818 (1876).

And giving a chattel mortgage upon personal property which is by law exempt from levy under execution or attachment is not a disposal of property with intent to defraud creditors which will support an attachment. Wyman v. Wilmarth, 1 S. D. 172 (1890).

And that a debtor mortgaged a stock of goods and the assignee of the mortgagee took possession within a few days after the execution of the mortgage and proceeded to sell the property do not show an intent to defraud which will sustain an attachment, where it is not shown that the mortgage was not given to secure bona fide debts. Pierce v. Johnson, 93 Mich. 125, 18 L. R. A. 486 (1892); Ripon Knitting Works v. Johnson, 93 Mich. 129 (1892).

So an offer by a debtor to mortgage property to a creditor, including in the mortgage the claim of another creditor not yet due which it was stipulated should be paid after the debt due the first creditor was discharged, will not support an attachment upon the ground of a disposition of property by the debtor with intent to defraud creditors. C. D. Smith Drug Co. v. Casper Drug Co. (Wyo.) 40 Pac. Rep. 979 (1895).

And the mere failure or neglect of a creditor to record a deed given him by his debtor for security without evidence or suspicion that the debtor knew of, or requested or desired such failure, does not show an intent on the part of the debtor to hinder, delay, or defraud creditors which will support an attachment. Burrues v. Trant, 88 Va. 980 (1892).

And the withholding of a chattel mortgage upon a stock of goods from record is not a ground for attachment under a statute authorizing it, where the debtor transfers his property with intent to defraud creditors, because while the mortgage was thus withheld it was void as to creditors. Lord v. Wirt, 96 Mich. 415 (1893).

And a purchase of mining stock of unknown and uncertain value, by a debtor who placed a mortgage upon his property in part for the purpose of paying for such stock and in part to make a payment upon his indebtedness, though a foolish adventure, is not a disposal of property with intent to defraud creditors which will support an attachment. Thurber v. Sexauer, 15 Neb. 541 (1884).

So, an offer by a married woman to pledge her property, pursuant to Alabama Code, § 2349, authorizing it, does not furnish ground for an attachment against her, unless the offer was made with fraudulent intent. Schloss v. Rovelsky (Ala.) 18 So. 71 (1895).

But a mortgage by merchants who were indebted in amount nearly equal in value to their assets made to a creditor, containing a stipulation that the mortgagor should dispose of the mortgaged property in a regular course of mercantile sales at customary prices, will support an attachment upon the ground of a disposal of property with intent to defraud creditors, as the effect of the stipulation is to hinder and delay creditors. Gallagher v. Goldfrank, 75 Tex. 562 (1890).

And such a mortgage, under which it is understood between the parties that the mortgagor should do as he pleased with the proceeds, constitutes a conveyance or disposal of the debtor's property with intent to defraud his creditors which will support an attachment. Anderson v. Patterson, 64 Wis. 557 (1885); City Bank v. Westbury, 16 Hun, 458 (1879).

So, a mortgage placed by a debtor upon his stock of merchandise and fixtures is a ground for attachment when it can be inferred that the intention was that the mortgagor was to continue to carry on his usual trade and business. Eby v. Watkins, 39 Mo. App. 27 (1889).

And a chattel mortgage under which the mortgagor is permitted to retain possession and to sell

the same grounds for an attachment alleged in the original affidavit. The administratrix afterwards appeared specially, and moved the court to quash the attachment, which motion was overruled. Summons having been served on her, she appeared generally, and filed a plea of none assumpsit, and certain special pleas to the declaration, and also a plea traversing the affidavit for attachment. Issues being formed on these pleas, a trial was had before the court and a jury, at which the court, after the evidence had been heard, instructed the jury to find the issues formed by the plea traversing the attachment affidavit in favor of the defendant. The jury thereupon returned their verdict finding the issues upon the merits of the action in favor of the plaintiff, and assessing the plaintiff's damages at $13,500, and finding the issues upon the attachment affidavit in favor of the defendant; and the court, after overruling a motion by the plaintiff for a new trial, gave judgment in favor of the plaintiff for the amount of the damages assessed by the jury and costs, but setting aside and quashing the attachment writ. That judgment has been affirmed by the appellate court, and this appeal is from the judgment of affirmance.

The principal controversy, as presented here, turns upon the propriety of the per-

---

the mortgaged property in the regular course of trade, without any provision as to what disposal should be made of the proceeds, is sufficient where there is no agreement outside of the mortgage as to what disposal should be made thereof, in connection with a statement by one of the mortgagors that except for the attachment the mortgage might never have been foreclosed, to sustain such attachment upon the ground of a disposal of property with intent to defraud creditors. Leser v. Glaser, 32 Kan. 546 (1884).

In Leser v. Glaser, *supra*, Frankhouser v. Ellett, *infra*, was distinguished upon the ground that in that case the mortgage was executed in good faith and the proceeds of the sales were to be applied in payment of the mortgage debt.

But where a mortgage is given upon a stock of goods and by agreement outside the mortgage the mortgagor is permitted to continue the business and dispose of the goods in the ordinary way, and uses some of the proceeds to support his family, the transaction will not be regarded as showing an intent to defraud creditors which will support an attachment where the arrangement is carried out in good faith. Frankhouser v. Ellett, 22 Kan. 127, 31 Am. Rep. 171 (1879).

And sales made by the mortgagor from the stock of goods mortgaged in the ordinary course of business with the knowledge and implied consent of the mortgagee will not sustain an attachment. Rhode v. Matthai, 35 Ill. App. 147 (1889).

So the mortgaging by a debtor of his personal property for the purpose of hindering and delaying his creditors justifies an attachment against him, and that he caused the fraudulent mortgage to be released a short time before the attachment is no defense where he immediately remortgaged the property to others under suspicious circumstances. Buford & G. Implement Co. v. McWhorter, 41 Kan. 262 (1889).

And the execution by a debtor of a mortgage to another without any consideration, for the purpose of covering up and concealing his interests in real estate, will sustain an attachment upon the ground of a disposition of property with intent to defraud. Taylor v. Kuhuke, 26 Kan. 132 (1881).

So, a mortgage by an insolvent debtor to a creditor securing the payment of more than the mortgagee's demand, showing upon its face that it was given to cover agreed future advances, will sustain an allegation that the debtor had conveyed a part of his property with intent to defraud creditors, for which an attachment will issue. Rice v. Morner, 64 Wis. 599 (1885).

And mortgaging all of his property by a debtor to a creditor as security for his indebtedness is prima facie sufficient to justify an attachment upon the ground of the disposition of his property with intent to defraud his creditors, where the value of the property was greatly in excess of adequate security for the debt. Smith v. Boyer, 29 Neb. 76 (1890).

And the giving of a chattel mortgage by a failing debtor to a creditor who knew his circumstances, upon all his property for an amount greater than was owing and in excess of the value of the property, and a claim of the mortgagee to hold the property for the full amount against a creditor, are conclusive evidence of an intent to hinder and delay creditors which will support an attachment. Butts v. Peacock, 23 Wis. 359 (1868).

So, the execution, by an insolvent debtor who is being pressed by his creditors, of a chattel mortgage upon his personal property to secure the payment of a sum of money to his attorney, most of which is in consideration of future legal services, is an assignment and disposal of his property with intent to defraud, hinder, and delay his creditors for which an attachment may be had under the Kansas statute. Shellabarger v. Mottin, 47 Kan. 451 (1891).

And a mortgage executed by a firm of druggists upon their entire stock, including a large quantity of intoxicating liquors, which is void for that reason, constitutes a hindrance to creditors, and will sustain an attachment upon that ground. First Nat. Bank v. Gerson, 50 Kan. 589 (1893).

As to constructive fraud in mortgaging property, see *supra*, II.

f. Assignments for the benefit of creditors.

The mere fact that an assignment for the benefit of creditors will hinder and delay creditors does not make it fraudulent, and is not a sufficient ground for an attachment, unless there was also an intent to hinder and delay them. Gates v. Labeaume, 19 Mo. 17 (1853); Decker v. Bryant, 7 Barb. 182 (1849).

So, in Luckemeyer v. Seitz, 61 Md. 317 (1883), an assignment by a debtor of all his property in trust for the benefit of all his creditors without exacting releases, was held insufficient to support an attachment upon the ground that it was a fraudulent transfer, where the evidence was not legally sufficient to show any fraudulent intent or antecedent fraud on the part of the grantor.

And a deed of assignment, reciting in the preamble that one of the purposes thereof was to prevent an undue sacrifice of the property assigned, does not show an intent to defraud which will sustain an attachment. McPike v. Atwell, 34 Kan. 142 (1885).

Nor is an assignment by a debtor for the benefit of creditors, giving preference in excess of one third of the assigned assets, prohibited by the New York statute, a disposition of his property with intent to defraud his creditors which will support an attachment. Rose v. Renton, 37 N. Y. S. R. 683 (1891).

And an assignment for the benefit of creditors made in good faith and upon a valid consideration, in which a preferred claim is stated to be a few dollars more or less than it actually is, does not show an intent to defraud creditors which will

emptory instruction to the jury to find the issues upon the attachment affidavit for the defendant. If that instruction, and the consequent verdict and judgment, are sustained, it is manifestly immaterial whether the court erred in refusing to quash the attachment on motion of Albert A. Druley, or on the subsequent motion of the administratrix. At the trial, evidence was introduced tending to show the following facts: Some time about the year 1885, Jesse Druley, William M. Druley's father, sold a farm in McLean county, and of the proceeds loaned to William M. Druley, or put into his business, about $18,000. William M. Druley afterwards advanced to his father and mother various sums of money, and about March 10, 1887, a settlement was had between them, at which it was found that William M. Druley was indebted to his father in the sum of $10,000. For this sum William M. Druley, with his father's consent, executed his promissory note, dated March 10, 1887, payable to Jane Druley, his mother, five years

---

support an attachment. Strauss v. Rose, 59 Md. 525 (1882). As to preferences generally, see *infra*, h.

So an assignment for creditors, giving the assignee power to compromise all claims and sell on credit, is not alone sufficient evidence of a disposition of the property with intent to defraud creditors which will warrant an attachment. Milliken v. Dart, 26 Hun, 24 (1881).

And an assignment for the benefit of creditors, empowering the assignee, for the proper execution of the trust, to employ and retain competent attorneys to defend and protect it if it be assailed and pay him a just and reasonable compensation, is not invalid, and an assignment of property with intent to defraud creditors which will sustain an attachment. Bickham v. Lake, 51 Fed. Rep. 892 (1892).

Nor will an assignment be deemed to have been made with intent to defraud creditors so as to support an attachment, because the assignee removed a part of his goods from the debtor's store on the morning after the conveyance, where the assignee acted discreetly and on his own responsibility without consulting the assignor or preferred creditors. Strauss v. Rose, *supra*.

In Strauss v. Rose, *supra*, Main v. Lynch, 54 Md. 658 (1880) *infra*, in this subdivision, was distinguished upon the ground that in that case the question whether the assignment was fraudulent in fact was submitted to the jury, while in this there was no evidence from which a jury could reasonably find a fraudulent purpose.

So, an agreement between a debtor and a creditor that the debtor will execute an assignment if at any time it becomes necessary for the creditor's protection, does not constitute fraud in fact which will support an attachment under the Mississippi statute. Anderson v. Lachs, 59 Miss. 111 (1881).

And an agreement by certain creditors that they will accept one half their claims in full satisfaction, the debtors agreeing that if they should find it necessary to make an assignment they would secure the payment of such one half by a preference for confidential debts, followed by an assignment, preferring debts which were not confidential as well as those which were, and the claims of a number of creditors including those who had agreed to the compromise, does not constitute a transfer with intent to defraud which will support an attachment. Powers v. Graydon, 10 Bosw. 630 (1863).

And the fraudulent execution of an assignment will not justify the issuing of an attachment three days previous to such execution, unless the fraudulent intent existed at the time the attachment was sued out, though it may afford some evidence that the fraudulent assignment was contemplated at that time. Donnell v. Jones, 17 Ala. 689, 52 Am. Dec. 194 (1850).

To sustain an attachment on the ground that an assignment subsequently made is fraudulent, it must appear that at the time the attachment was issued the debtor contemplated making such fraudulent assignment, and the question as to whether it was thus contemplated is one for the jury. Bickham v. Lake, 51 Fed. Rep. 892 (1893).

And proof of fraudulent conduct prior to an assignment for the benefit of creditors will not support an attachment on the ground of a disposal of property with intent to defraud, where the assignment itself is not impeached. Belmont v. Lane, 22 How. Pr. 365 (1862).

As to effect on assignment of fraud in the contraction of debts, see *supra*, III.

A fraudulent disposition of property by way of an assignment for the benefit of creditors, however, may be a disposition of property with intent to defraud for which an attachment might be issued. Skinner v. Oettinger, 14 Abb. Pr. 109 (1861).

And the execution of an instrument by a debtor purporting to convey all of his property for the benefit of his creditors, showing on its face that it was executed for the purpose of defrauding his creditors, in connection with evidence *aliunde* of the same fact, will sustain an attachment under the Kansas statute. Johnson v. Laughlin, 7 Kan. 359 (1871).

And a general assignment providing for the payment of fictitious or simulated debts is fraudulent and void for all purposes, and will support an attachment upon the ground of a disposition of property with intent to defraud creditors. Bickham v. Lake, 51 Fed. Rep. 892 (1893).

The questions as to whether debts provided for in an assignment for the benefit of creditors are simulated and fictitious, and whether or not the assignor knew or had reasonable cause to know their invalidity, are questions of fact for the jury. *Ibid.*

And the assignor is presumed to know it though such presumption is rebuttable. *Ibid.*

So, an assignment of a stock of goods to a trustee for the benefit of designated creditors will support an attachment as a fraudulent disposition of property where it was the intent of the parties thereto that the grantor should be allowed to remain in possession and dispose of the property in the usual course of business until default. Stanley v. Bunce, 27 Mo. 269 (1858).

And an assignment for the benefit of creditors, intended to aid the grantors in dishonestly withholding a large portion of their property from their creditors, and at the same time to enable them to obtain releases from their debts by fraudulently pretending by its terms to convey all their property, is a conveyance with intent to defraud which will support an attachment. Foley v. Bitter, 34 Md. 646 (1871); Main v. Lynch, 54 Md. 658 (1880).

And the concealment by a debtor of a large portion of his property for the fraudulent purpose of assigning the balance for the benefit of his creditors and inducing them to accept terms of compromise advantageous to himself is a ground for attachment. Kleine v. Nie, 88 Ky. 542 (1889).

And an assignment for the benefit of creditors, followed by a statement by the debtor to a preferred creditor that he would not pay some of his creditors who pushed him if he could prevent it,

after date, with interest at the rate of 6 per cent per annum, payable quarterly. This note remaining wholly unpaid, William M. Druley, some weeks prior to his death,—but whether in payment of or as security for the note is left by the evidence somewhat in doubt,—signed and acknowledged a deed conveying the 2-acre tract of land upon which the attachment writ was afterwards levied to Jesse Druley, his father, in trust for Jane Druley, his mother. This deed was executed as the result of considerable negotiation between William M. Druley and an attorney representing Jesse and Jane Druley, such negotiation resulting in an agreement that the deed should be executed, but that, if William M. Druley recovered from his illness, he should have the land back, or that the deed should be returned to him. The deed, after it was signed and acknowledged,

---

and that instead of paying such debts he would make him a preferred creditor, is sufficient evidence of an intent to defraud which will authorize the issuance of an attachment. Wilson v. Eifler, 7 Coldw. 31 (1869).

So, a general assignment by a partner for the benefit of creditors preferring a dormant partner will support an attachment upon the ground of a disposition with intent to defraud, against the firm property at the suit of a firm creditor. Claflin v. Hirsch, 19 N.Y. Week. Dig. 248 (1884).

And proof that a domestic corporation had conveyed all of its property to a large creditor by a conveyance absolute on its face, together with evidence that the latter had declared his intention to satisfy his own claim first, will warrant an attachment on that ground, though it is claimed that the creditor was to act as trustee to pay the creditors ratably. Bicknell v. Speir, 45 N. Y. S. R. 651 (1892).

So, under the Missouri provision an assignment for the benefit of creditors will support an attachment as a disposal of property so as to defraud and delay creditors where it was made with fraudulent intent, though it may be valid as to the trustee and creditors secured. Enders v. Richards, 33 Mo. 598 (1863).

But an intent upon the part of the debtor to defraud or delay creditors is necessary to render a deed of assignment for the benefit of creditors which is fair on its face fraudulent so as to support an attachment. Spencer v. Deagle, 34 Mo. 455 (1864).

So, a reservation in a deed of assignment for the benefit of creditors of any surplus remaining after the satisfaction of the grantor's debts is not a fraudulent reservation to his own use as against creditors upon which an attachment will lie. Douglass v. Cissna, 17 Mo. App. 44 (1885).

And an assignment for the benefit of a creditor empowering the assignee to sell the property conveyed in the usual course of business and reserving to the grantor the surplus remaining after payment of the debt secured by the assignment, without providing for other debts, is not *per se* a fraudulent conveyance or a conveyance with intent to defraud creditors which will support an attachment. Anderson v. Lachs, 59 Miss. 111 (1881).

But an assignment in trust for the benefit of creditors who shall accept and release the grantor, which makes no disposition of the surplus which may remain after paying the releasing creditors, is fraudulent and void and will support an attachment. Whedbee v. Stewart, 40 Md. 414 (1874).

And a bill of sale conveying all of a debtor's property to a creditor with the provision that the creditor is to sell it and after satisfying his own claim return the balance, if any, to the debtor, is an assignment for the benefit of a particular creditor, and is fraudulent and void as to other creditors and will support an attachment. Rigor v. Simmons, 47 Ill. App. 428 (1893).

A purpose on the part of a debtor which, if declared in writing and inserted in a general assignment, would render it void as legally fraudulent, ought, when declared by the debtor verbally to be the object of an intended assignment, to be considered as fraudulent and sufficient to support an attachment. Gasherie v. Apple, 14 Abb. Pr. 64 (1861).

As to assignments constructively fraudulent, see *supra*, II.

g. Threats to assign or dispose of property.

The question as to what threats to assign or dispose of property will establish an intent to defraud which will justify an attachment is an unsettled one. But it would seem that the question whether or not the threatened act is a lawful one might be regarded as the test adopted in most cases.

Thus, a threat to make an assignment for the benefit of creditors will not sustain an attachment upon the ground that the debtor is about to dispose of his property with intent to defraud his creditors. Stamp v. Herpich, 8 N. Y. S. R. 446 (1887).

And a threat to make an assignment with preferences does not show such an intent. Kipling v. Corbin, 66 How. Pr. 12 (1883).

So, a statement by a debtor to his creditor that if suit was brought upon his demand he would make an assignment, and that he owed a large amount of confidential debts, which he would first provide for, does not justify an attachment upon that ground. Dickinson v. Benham, 19 How. Pr. 410, 10 Abb. Pr. 390 (1860).

And such a threat will not support an attachment, though the debtor had agreed to furnish collateral security, which he not only failed to do but appropriated the whole of his means to a different object. Dickerson v. Benham, 20 How. Pr. 343 (1860).

And a statement by a debtor that he would fix things in such a way as to prevent some of his creditors from getting much will not support an attachment on the ground of an intended fraudulent disposition of his property. Scott v. Dexter, 1 N. Y. Week. Dig. 25 (1875).

So, an offer by a debtor to compromise with his creditors, accompanied by a statement that if the creditor did not agree to take it he would make an assignment, and that the creditor would not get anything, and that he would put his property out of his hands, is not sufficient proof of fraudulent intent to justify an attachment in the absence of proof of such intent derived from contemporaneous or subsequent acts. Wilson v. Britton, 26 Barb. 562 (1858).

And a statement by a debtor that unless his creditor would accept his offer of compromise he would at once make an assignment of all of his property, preferring another creditor, which would prevent his obtaining the amount of the compromise, will not warrant an attachment upon that ground. Evans v. Warner, 21 Hun. 574 (1880).

So when he threatened that they would get nothing. Farwell v. Furniss, 67 How. Pr. 188 (1884).

In Farwell v. Furniss, *supra*, Anthony v. Stype, 19 Hun. 268 (1879) *infra*, in this subdivision, was distinguished upon the ground that in that case there were other facts besides the threats which tended to show a fraudulent design.

In Newman v. Kraim, 34 La. Ann. 910 (1882), however, threats made by a debtor that he would dispose of his property to protect himself if he were sued were held to constitute a sufficient ground for attachment.

remained in the possession of the grantor about two weeks, and he then handed it to his brother, Edwin P. Druley, who was attending and taking care of him in his illness, saying to him that he should take it, and carry it in his pocket, and that if he, the grantor, got well, he should return it to him, but if he did not, he should put it on record. On the 2d day of September, 1890, Edwin P. Druley, having learned that the firm of Druley Bros. was about to fail, or supposing that it had failed, put the deed on record, and about six weeks afterwards he got it from the recorder's office, and delivered it to his father and mother. This deed, and the circumstances attending its execution, constituted the only evidence given by the plaintiff in support of the grounds for an attachment alleged in its attachment affidavit.

It is urged, and with some show of reason,

So, a statement by one of a firm of debtors that they thought they would have to turn over their business, and that creditors might be left and they would have to protect themselves, does not establish an intent to transfer property to defraud creditors which will sustain an attachment. Haulenbeck v. Coenen, 20 N. Y. Civ. Proc. Rep. 6 (1890).

And a request by a debtor to his creditor for an extension of time in consequence of the failure of the cotton crop, accompanied by a statement of his business showing a solvent balance of over $20,000 together with a declaration that if pressed he would be compelled to make a general assignment, will not support an attachment upon that ground, where there is nothing to impeach his good faith except a gift of land worth $500 to his mother. Wingo v. Purdy, 87 Va. 472 (1891).

And a false statement by debtors that they were solvent, upon which they obtained an extension of credit, and their announcement of their insolvency a month later with the threat that if the creditor brought suit they would make an assignment, preferring another, does not establish a fraudulent intent which will sustain an attachment, whether the representations were innocently or dishonestly made, and though the state prohibits preferences of all the assignor's property. Atlas Furniture Co. v. Freeman, 70 Hun, 13 (1893).

But other facts in conjunction with the threat to assign or dispose of property may be sufficient to show the fraudulent intent necessary to sustain an attachment.

Thus, evidence that a debtor is able to pay a debt but that he put the creditor off from time to time and threatened to assign his property for the benefit of his creditors if sued, is sufficient to go to the jury on the question of the existence of a fraudulent intent which will support an attachment under the California attachment act of 1858, § 4. White v. Leszynsky, 14 Cal. 165 (1859).

And a statement by a debtor to his creditor, made upon demand for payment, that he would not pay the debt and should sell and dispose of his property immediately and remove it out of the creditors reach, sufficiently establishes an intent to defraud which will sustain an attachment. Pratt v. Pratt, 2 Pinney, 395, 2 Chand. 48 (1850).

And proof that a firm of debtors had claimed to be entirely solvent, and made a statement of their affairs, showing a large surplus of assets, and soon after claimed to be insolvent and proposed a compromise, giving no explanation of their sudden insolvency, and made threats that unless their offer was accepted they would make an assignment, preferring a designated creditor, in which case the others would get little or nothing, followed by an assignment and the selection of a foreign assignee, is sufficient evidence of fraudulent intent to give jurisdiction to issue an attachment. National Park Bank v. Whitmore, 104 N. Y. 297 (1887).

And in Hanks v. Andrews, 53 Ark. 327 (1890), it was held that representations by a debtor to a creditor that he was doing a prosperous business upon assets three times greater than his liabilities, in order to get an extension of time, and threats that if he declined to allow it he would make such a disposition of his property as to prevent the creditor from realizing, justifies an inference of fraud which will support an attachment.

In that case the court said that the case is to be distinguished from a threat merely to make an assignment, which, being a lawful act and standing alone, furnishes no evidence of an intended fraudulent disposition of property. *Ibid.*

So, a threat by a debtor that if sued he would make an assignment with preference leaving out those suing so that they would get nothing, coupled with his keeping his store open after his admitted insolvency, and continuing to dispose of his goods and appropriate the avails to other purposes than the payment of his debts, refusing to pay anything and declaring that he would not pay unless his creditors all agreed to take his goods and discharge him, is sufficient to warrant an attachment on the ground of an attempt to dispose of his property with intent to defraud his creditors. Anthony v. Stype, 19 Hun, 265 (1879).

And a conveyance by an insolvent debtor of his entire property in consideration of a sum of money in cash and the assumption by the purchaser of a debt which he pretended to owe to his brother, and giving on the same day a mortgage to such brother, securing such debt, together with a statement to certain creditors that he would give them twenty-five cents on the dollar, and that they might take that or nothing, and that he had got matters fixed so that they could not disturb him, is sufficient to show an intent to defraud which will support an attachment. Miller v. McNair, 65 Wis. 452 (1886).

Some of the cases, however, have seemed to look at the purpose of the threat, and to have acted upon the rule that a threat to do an act though lawful in itself will uphold an attachment where its purpose was to impose conditions upon the creditor or to intimidate him from pursuing the remedies provided by law for the collection of his claim.

Thus, a statement by a debtor to a creditor that if he continued to press him he would make an assignment preferring others, which would result in his not getting a cent, is an effort to intimidate the creditor and thus force him to refrain from exercising his legal right and will warrant an attachment on the ground that the debtor is about to dispose of his property with intent to defraud his creditors. United States Net & T. Co. v. Alexander, 42 N. Y. S. R. 668 (1891).

In that case it was said that the question is not as to the debtor's right to assign or prefer creditors, but the effort by his threats to impose upon the plaintiff a condition and thus prevent the creditor from using a legal remedy.

So, the using by a debtor of his power of assigning his property preferentially to intimidate creditors into abstaining from pressing the remedies allowed by law to collect debts, is sufficient to charge him with an intent to defraud them which will support an attachment. Gasherie v. Apple, 14 Abb. Pr. 64 (1861).

And proof that a debtor, who was able to pay all debts, threatened upon being asked to do so that he would make an assignment, and that the creditor could get nothing, and that he would do business under somebody else's name, will support an attachment upon that ground. *Ibid.*

that the deed was never delivered so as to become effectual as a conveyance. The contention is that Edwin P. Druley took and held the deed merely as agent of the grantor, and that by delivering it to him with instructions to keep it in his pocket, and return it to the grantor in case of his recovery, and to record it only in case of his death, the grantor did not, and did not intend to, absolutely yield dominion over it, but that it remained, down to the time of his death, subject to his control, and liable to be recalled by him at any time. And it would seem that, if the deed was never delivered, it has no tendency to prove the charge of fraud made by the attachment affidavit. But, without determining the question of delivery, we prefer to place our decision upon another ground.

Even if the deed is to be regarded as having been effectually delivered, it must be

---

In that case the court distinguished Wilson v. Britton, 26 Barb. 562 (1858), and Dickinson v. Benham, 10 Abb. Pr. 390 (1860), set forth *supra*, in this subdivision, saying that the fact that the condition accompanied the threat to assign seems to have been overlooked in both cases as affecting the question in case of an action by the party threatened.

So, in Livermore v. Rhodes, 27 How. Pr. 506, 3 Robt. 638 (1864), it was held that a threat by a debtor that if he was sued he would turn over all his property and that the creditor wouldn't get a cent, evidences an intention to dispose of property so as to baffle the creditor in the speedy collection of his debt, which of course, could only be done by illegal means, and will therefore sustain an attachment.

See also *infra*, o, *Statements and misrepresentations by debtor*.

h. *Making preferences.*

Payment of honest debts to one creditor to the exclusion of others cannot be made the basis of a charge of fraud which will sustain an attachment. First Nat. Bank v. Steele, 81 Mich. 93 (1890) (*dictum*); Stamp v. Herpitch, 8 N. Y. S. R. 446 (1887); Morton v. Sterrett, 4 W. L. G. 132 (1859); Scott v. Dexter, 1 N. Y. Week. Dig. 25 (1875).

The intent of an insolvent debtor to secure and take care of persons to whom he claimed to owe confidential moneys, to the exclusion of other creditors, does not justify an attachment upon the ground that he is about to dispose of property with intent to defraud his creditors. Ellison v. Bernstein, 60 How. Pr. 145 (1880).

And a creditor may take adequate security from a debtor without being chargeable with seeking to hinder and delay other creditors so as to justify an attachment against the debtor. Smith v. Boyer, 29 Neb. 76 (1890) (*dictum*).

The preference by a debtor in good faith of some creditors over others, either by making payment or transferring his property, or by giving chattel mortgages, is not an assignment or disposal of his property with fraudulent intent to hinder, cheat, and delay his creditors for which an attachment may be had. Abernathy Furniture Co. v. Armstrong, 46 Kan. 270 (1891).

Thus, a failing debtor who in good faith pays a debt which he justly owes, and secures an indorser against liability, does not thereby subject himself to attachment upon that ground. Walker v. Adair, 1 Bond, C. C. 158 (1857).

And a conveyance or mortgage by a debtor within sixty days prior to making an assignment for the benefit of creditors, with intent to prefer a particular creditor, is not evidence in itself of an intent to defraud creditors which will support an attachment. Wachter v. Famachon, 62 Wis. 117 (1885).

And a conveyance in contemplation of insolvency and with a design to prefer will not support an attachment in the absence of anything to show that the preference was fraudulent. Stamper v. Hibbs, 94 Ky. 358 (1893).

And that an insolvent debtor is about to sell property consisting of an exempted homestead and other real estate, for a fair price with the purpose of applying the proceeds less that received for his homestead to the payment of his just debts owing to a portion of his creditors, does not establish that he is about to dispose of his property with intent to defraud or delay his other creditors. Eaton v. Wells, 18 Minn. 410 (1872).

So, the execution of mortgages by failing debtors upon their property to creditors to satisfy bona fide debts, thus giving them a preference, will not sustain an attachment at the suit of an unsecured creditor upon the ground that the debtor had or was about to dispose of his property for the purpose of defrauding, hindering, and delaying his creditors. Gregory Grocery Co. v. Young, 53 Kan. 339 (1894); Campbell v. Warner, 22 Kan. 604 (1879); Avery v. Eastes, 18 Kan. 505 (1887); Tootle v. Coldwell, 30 Kan. 125 (1883); Miller v. Wichita Overall & S. Mfg. Co. 53 Kan. 75 (1894).

And the execution by a debtor of a mortgage on a portion of his property, and his refusal to confess judgments or give security to another creditor, declaring an intention to manage his property himself, does not justify an attachment on the ground of an intended fraudulent disposition of his property. Connell v. Lascells, 20 Wend. 77 (1838).

So, an assignment for creditors by a debtor, made in good faith and upon a valid consideration, providing for the payment of one class of creditors in preference to another, does not show an intent to defraud which will support an attachment. Strauss v. Rose, 59 Md. 525 (1882).

Nor does a voluntary assignment. Bryce v. Foot, 25 S. C. 467 (1886); Foley v. Bitter, 34 Md. 643 (1871).

And an assignment for the benefit of creditors in which debts due the debtor's wife and brother are preferred does not establish an intention to defraud creditors which will sustain an attachment, where the indebtedness to the wife and brother is bona fide and clearly proved. Farwell v. Brown, 1 Fed. Rep. 123 (1880).

And an assignment for the benefit of creditors by a banker after notice given to two depositors with the banker's knowledge, upon which they drew out their deposits, does not show such an intent to defraud creditors as will support an attachment. Wearne v. France, 3 Wyo. 273 (1889).

So, proof that a firm of debtors were insolvent and had turned over to two creditors portions of their goods amounting to less than one half of their respective debts, and had refused to turn over any goods to another creditor, will not sustain an attachment at the suit of the latter upon the ground that they had disposed of or were about to dispose of their property with intent to defraud creditors. Horton v. Fancher, 14 Hun, 172 (1877).

But an assignment for the benefit of creditors by a firm preferring a debt due to one of the partners will sustain an attachment as a transfer with intent to defraud. Citizens' Bank v. Williams, 35 N. Y. S. R. 542 (1891).

So, a debtor who induces home creditors to attach his property does not thereby render himself liable to attachment by other creditors, where he was actuated by the purpose to secure their debts in preference to others, and it was not done with a view to secure any advantage to himself, though it had the effect to hinder and delay the others. Heideman-

conceded that there is no evidence of express fraud, or what is usually termed "fraud in fact." There is no evidence of any actual intention on the part of the grantor to hinder or delay his creditors. But the evidence tends to show that the deed, though absolute on its face, was intended by the parties as a mortgage to secure the $10,000 note given by the grantor to his mother, and the rule is supported by many authorities that a conveyance of lands, absolute on its face, but intended as a mortgage or security for a debt, is fraudulent and void as against existing creditors, although there may have been no actual intent to defraud. Among the authorities so holding, the following may be consulted: *Sims* v. *Gaines*, 64 Ala. 392; *Watkins* v. *Arms*, 64 N. H. 99; *Gregory* v. *Perkins*, 4 Dev. L. 50; *Halcombe* v. *Ray*, 1 Ired. L. 340; *Coolidge* v. *Melvin*, 42 N. H. 510;

Benoist Saddlery Co. v. Urner, 24 Mo. App. 534 (1887).

And that insolvent debtors instigated and caused attachment suits to be commenced for the purpose of preferring the attaching creditors at the expense of other creditors, will not defeat the attachment where there is nothing to show that the claims of the attaching creditors were not honest or that there was any secret trust created. Landauer v. Victor, 69 Wis. 434 (1887).

And the refusal of a debtor to pay the money she had, being about one third of the creditor's claim, and using the same for other purposes, coupled with a denial in general terms that she had money, is not fraudulent and does not show such an intent to hinder or delay creditors as will furnish grounds for an attachment by those who are not paid, as she has the right to prefer one to another. Keith v. McDonald, 31 Ill. App. 17 (1888).

So, an intent to defraud which will sustain an attachment will not be imputed from a preference by a debtor in failing circumstances in the payment of his debts, though such a preference would operate to defeat a voluntary assignment for the benefit of creditors. McPike v. Atwell, 34 Kan. 142 (1885).

And a wrongful preference by a corporation of one creditor over others, or the giving of notes and permitting judgment to be taken thereon so as to give such preference, does not furnish ground for an attachment at the suit of the unpreferred creditor. Stone v. Bank, 1 Ohio Dec. 369 (1894).

And a preference given by an insolvent corporation in a transfer of its property is not such fraud in fact as will support an attachment by an unpreferred creditor. Holbrook v. Peters & M. Co. 8 Wash. 344 (1894).

But, although a debtor has a right to prefer a particular creditor, if he conveys his property to a trustee, not for that purpose merely, but for the express purpose and with the deliberate intent, to defraud a particular creditor or class of creditors and wholly defeat the recovery of their debts, such intent being the controlling motive in the debtor's mind, it will justify an attachment upon the ground of a disposition of his property with intent to defraud creditors, though the conveyance might be valid as to the trustee. Wilson v. Eifler, 7 Coldw. 31 (1869).

And an intent to give an unfair preference is a ground for attachment under the Louisiana statute. See Chaffe v. Mackenzie, 43 La. Ann. 1062 (1891).

And an unfair preference given by an insolvent debtor to a creditor who was his sister-in-law, together with misrepresentations intentionally made to lull creditors into a sense of security, justifies an attachment of his property. Stevens v. Helpman, 29 La. Ann. 655 (1877).

See also, *supra*, e, *Mortgaging or pledging property*: *infra*, i, *Transfers in payment of debts*; and *infra*, j, *Confession of judgment*.

i. *Transfers in payment of debts.*

A transfer of property by an insolvent debtor to a creditor in payment of a debt, accompanied by delivery of possession, is not a ground for an attachment if there be no intent to hinder, delay, or defraud creditors, though it may have that tendency, where there is no question of bankruptcy. Bentz v. Rockey, 69 Pa. 71 (1871).

And is not fraudulent and will not support an attachment though he made false representations as to his condition and intention at or about the time of the sale, unless the vendees were parties to the fraud. Chouteau v. Sherman, 11 Mo. 385 (1848).

So, the turning out by a debtor of the property of a firm of which he was a member to pay and secure a particular debt, and thereby to prefer that to other obligations of the firm, does not warrant an attachment upon the ground of a disposition of property with intent to defraud, where the bona fides of the obligation are in no wise impeached. Dintruff v. Tuthill, 62 Hun, 501 (1892).

And an assignment by a partner of his interest in the assets of the firm to pay a debt he owed his wife for borrowed money will not support an attachment on that ground where it does not appear that it was not an honest debt. Edick v. Green, 38 Hun, 202 (1885).

And proof that a debtor had permitted a note to go to protest, and had been sued on another note, and transferred some of his goods to different parties to liquidate their accounts, and was about to make a general assignment, will not warrant the issue of an attachment upon the ground that he had disposed or was about to dispose of his property with intent to defraud. Newwitter v. Mansell, 38 N. Y. S. R. 595 (1891).

So, a promise by a debtor to allow his creditors to take possession of his property at any time that he might feel insecure does not tend to show that the debtor is about to dispose of his property with the fraudulent intent for which an attachment may be had. Parsons v. Stockbridge, 42 Ind. 121 (1873).

But a transfer of all his property by an insolvent debtor to a creditor in payment of a debt, accompained by an understanding that the debtor should get back a part of the property for working out the stock, is invalid and a good ground for attachment. Bentz v. Rockey, 69 Pa. 71 (1871).

And an attachment issued on proof that the debtor, who has made a general assignment, made a payment of over $2,000 to his wife one day previous thereto, will not be vacated upon proof that about ten years before his wife had obtained $2,500 from her mother which she had delivered to her husband, as that does not establish an indebtedness of the attachment debtor to his wife. Hyman v. Kapp, 22 N. Y. Week. Dig. 310 (1885).

So, a transfer by a debtor whose property is easily separable, of a quantity thereof in excess of the amount of the indebtedness, the creditor paying the difference in money, is fraudulent and will sustain an attachment; and where the creditor is privy to the fraudulent design the purchase cannot be supported as against attachment creditors. McDonald v. Gaunt, 30 Kan. 603 (1883).

And a debtor who is oppressed with debt and unable to meet his obligations cannot transfer practically all of his unencumbered property to secure, not only an existing debt, but also a new debt then created for an advance of a large amount in cash, without rendering himself subject to attachment upon the ground of a disposal of property with intent to defraud creditors. Gallagher v. Goldfrank, 75 Tex. 562 (1890).

And an intent to defraud which will sustain an

Winkley v. *Hill*, 9 N. H. 31, 31 Am. Dec. 215; *Friedley* v. *Hamilton*, 17 Serg. & R. 70; *Harris* v. *Sumner*, 2 Pick. 129. See also *Metropolitan Bank* v. *Godfrey*, 23 Ill. 579. But we do not wish to be understood as expressing any opinion upon the question whether a deed absolute on its face, but intended as a mortgage, is constructively fraudulent or not.

The question thus arises whether, under our statute, an attachment will issue where the fraud charged is a legal or constructive fraud only, as contradistinguished from express or intentional fraud, usually denominated "fraud in fact." This question, so far as we are advised, has never been decided by this court, but it has received consideration by the appellate courts in several cases, and in each case it has been decided in the negative. It first arose in the second district, in

---

attachment is established by proof that a debtor in embarrassed circumstances has transferred to a creditor an amount of property largely in excess of his indebtedness, to the exclusion of other creditors, without any previous negotiations and almost immediately after other creditors had pressed him for payment, and that the vendee did not know the value of the property he bought. Nelson Distilling Co. v. Vossmeyer, 25 Mo. App. 573 (1887).

j. Confession of judgment.

It would seem that the right of a debtor to confess judgment for an honest indebtedness without subjecting himself to a charge of entertaining a fraudulent intent must be coextensive with his right to pay or perfer such indebtedness.

Thus, a confession of a judgment by a debtor in favor of a bona fide creditor for a just and honest debt is not a disposal of, or evidence of an intent to dispose of, property to defraud creditors which will support an attachment. Wyman v. Wilmarth, 1 S. D. 172 (1890).

And a confession of a judgment by a debtor in favor of his wife does not show an intent to defraud which will sustain an attachment in the absence of any showing that it was not for an actual debt, or that the property was sold thereunder for less than it would bring at a public sale. Thomas v. Dickinson, 33 N. Y. S. R. 786 (1890).

And a confession of judgment made by a debtor who had received a fund raised by a charitable contribution for the benefit of his brother in trust, which he had used in erecting a house on the rear of his own lot for the use of such brother, made to the brother to the amount of the trust fund, does not show a disposition of property with fraudulent intent which will support an attachment. Kline v. O'Donnell, 6 Kulp, 334, 11 Pa. Co. Ct. 38 (1891).

So, in Lennig v. Senior, 21 W. N. C. 379 (1886), it was held that a confession of judgment by an insolvent father to his son could not be held to be a fraudulent disposition of property within the Pennsylvania fraudulent attachment act, as he did not dispose of his property, the law disposed of it.

And in Wright v. Ewen, 24 W. N. C. 111 (1889), it was held that a confession of judgment by a partner in favor of creditors who claim to be creditors of the firm, and who are admitted to stand in that relation by the confessing partner, does not constitute an assignment and disposal of property with intent to defraud which will sustain an attachment, as a confessed judgment cannot be presumed to be fraudulent.

In Ditchburn v. Jermyn & G. Co-Op. Asso. 3 Pa. Dist. R. 635 (1893), however, the court disapproved of and refused to follow Lennig v. Senior, and Wright v. Ewen, *supra*.

And in that case it was held that a confession of judgment by a failing debtor which virtually swallows up his whole assets made without consideration, is a disposition of property within the meaning of the fraudulent attachment act of 1869, which will support an attachment.

So, the giving of judgment notes by an insolvent debtor in good faith for a genuine indebtedness does not establish such a fraudulent intent as will justify an attachment at the suit of another creditor. Standard Oil Co. v. Morrison, A. & A. Co. 54 Ill. App. 531 (1894).

But a confession of a judgment by a debtor with intent to hinder and delay creditors by having his property held up under execution issued thereon is a fraudulent disposition of property which will support an attachment under the Missouri attachment act. Field v. Liverman, 17 Mo. 218 (1852).

And confessions of judgments by a debtor, upon which execution was issued and the debtor's property seized for the purpose of forcing other creditors to agree to a settlement because the property was placed beyond their reach, will support an attachment upon the ground of a disposition of property with intent to defraud, though the confessions were given for debts actually owed. Galle v. Tode, 21 N. Y. Civ. Proc. Rep. 147 (1891).

So, judgment voluntarily confessed by a debtor to a creditor, which had no consideration for one half its entire amount, in connection with other circumstances rendering it difficult to regard it as a straightforward, honest transaction, will support an attachment under the Pennsylvania fraudulent attachment act of 1869. Rubinsky v. Walenk, 16 Pa. Co. Ct. 401 (1895).

And a confession of judgment by a debtor six days before the execution of an assignment for the benefit of creditors in favor of one of the assignees is a proper circumstance to go to the jury on the question of the existence of an intent to defraud which will support an attachment, where there is proof to connect such assignee with the assignor in the fraudulent disposition of his property. Main v. Lynch, 54 Md. 658 (1880).

k. Transfers and withdrawals by partners.

As a general rule any disposition of partnership effects which operates to defeat the right of joint creditors and to give individual creditors priority over them will be regarded as showing an intent to defraud them which will support an attachment.

Thus, a fraudulent transfer by a partner of his interests in the firm to his copartner makes him sole owner of the firm property, and gives his individual creditors a preference over the joint creditors in the marshaling of the assets, and will support an attachment on the ground of a transfer with intent to defraud firm creditors. Hirsch v. Hutchison, 64 How. Pr. 368, 3 N. Y. Civ. Proc. Rep. 106 (1883).

And a transfer by one partner to another of his partnership interest at a time when both partners and the firm were insolvent, and an assignment by the purchasing partner for the benefit of his creditors without preference or mention of partnership liabilities, made upon the same day, followed by an offer to settle at 60 cents on the dollar, is fraudulent and void, and a ground for attachment as to partnership creditors, as having been made for the purpose of covering up and concealing the debtor's property, and to defeat the right of partnership creditors to preference in the firm assets. Collier v. Hanna, 71 Md. 253 (1889).

So, an assignment for the benefit of creditors by a firm in which a debt due from one of the individual partners was preferred is a transfer with intent to

Shove v. *Farwell*, 9 Ill. App. 256, and there the court said: "The law does not allow a creditor to ignore the process of the common law in the collection of his debt, and resort to a summary seizure of the debtor's property upon mesne process, from the fact alone that the debtor has, within two years, sold his property, or any part of it, or has secured some other creditor by mortgaging or pledging it, even though the attaching creditor should thereby be hindered or delayed in the collection of a just debt. Another element must exist in the transaction—the fraud of the debtor. And in our opinion the statute contemplates that this fraud shall be one of fact as contradistinguished from a legal or constructive fraud. If a man has shown himself to be dishonest, by making a conveyance of his property, designing thereby to delay and hinder his creditors, and such effect is

---

defraud creditors, which will justify an attachment. Citizens' Bank v. Williams, 35 N. Y. S. R. 542 (1891); Keith v. Fink, 47 Ill. 272 (1868); Heye v. Bolles, 2 Daly, 231, 33 How. Pr. 266 (1867).

And an assignment by a partner of partnership property for the payment of firm and individual debts, without providing that the firm debts shall be first paid, warrants an inference of fraudulent intent which will support an attachment. Friend v. Michaelis, 15 Abb. N. C. 354.

And such an assignment preferring a dormant partner will sustain an attachment. Claflin v. Hirsch, 19 N. Y. Week. Dig. 248 (1884).

So, a conveyance of his property by a partner with intent to defraud his creditors will support an attachment by a firm creditor though it is not shown that all of the partners participated in the fraudulent intent, as the firm creditors are his creditors. Evans v. Virgin, 69 Wis. 153 (1887).

And the appropriation by a debtor of money belonging to his firm to the payment of his individual debts is a fraud upon creditors of the firm and will support an attachment. Keith v. Armstrong, 65 Wis. 225 (1886).

And the absconding of one partner, and the disposition of the whole partnership effects by the other partner, who remained in possession and was insolvent, are sufficient to establish an intent to delay and hinder creditors of the firm which will sustain an attachment. Sellew v. Chrisfield, 1 Handy (Ohio) 86 (1854).

In Citizens' Bank v. Williams, 128 N. Y. 77 (1891), however, it was held that the giving of joint and several promissory notes by copartners for the individual debt of one of them, and the subsequent execution as a firm and as individuals of an assignment in which they declared that the notes should be paid out of the proceeds of the firm property, does not constitute an assignment with intent to defraud creditors which will support an attachment.

So, the turning out by a partner of firm property to pay or secure a particular debt, thereby preferring that to other obligations of the firm, does not of itself show an intent to defraud which will sustain an attachment. Dintruff v. Tuthill, 62 Hun, 591 (1892).

And an assignment by a partner of his interest to pay a debt due his wife will not support an attachment where the debt was an honest one. Edick v. Green, 38 Hun, 202 (1885).

Nor will a transfer by a limited partnership of its effects in payment of a valid debt, for the purpose of preferring the creditor, sustain an attachment, though such transfer is forbidden by law. Casola v. Vasquez, 147 N. Y. 258 (1895).

And a creditor cannot sue out an attachment against a surviving partner because he has been faithless to the trust which the law clothed him with for the benefit of firm creditors, but must bring him within the letter of the attachment statute by showing a disposition with intent to defraud, the same as in case of any other debtor. Roach v. Brannon, 57 Miss. 490 (1879).

And the use of the firm property by a surviving partner in good faith and with the acquiescence of the representative of the deceased partner to continue the business on his own account and in his own name and raising money upon the credit given him by the possession of such property and the disposal thereof, do not show an intent to defraud which will sustain an attachment. Fitzpatrick v. Flannagan, 106 U. S. 648, 27 L. ed. 211 (1882).

Nor are the failure of a debtor, upon winding up his interests in a store and getting out his share of the partnership, to apply the money to his debts, and the payment only of a debt due to his mother, alone sufficient to show a fraudulent intent upon which an attachment will lie. Mack v. Jones, 31 Fed. Rep. 189 (1887).

And an investment by a surviving partner of a part of the firm's assets in a retail liquor license will not sustain an attachment of the firm property on the ground of a disposal of firm property with intent to defraud creditors, where his intent was to sell out the stock at retail to realize a profit for the benefit of firm creditors. Roach v. Brannon, 57 Miss. 490 (1879).

And a confession of judgment by a partner in favor of persons claimed to be creditors of the firm does not constitute a disposition of property with intent to defraud which will support an attachment. Wright v. Ewen, 24 W. N. C. 111 (1889).

So, simply drawing moneys upon private account by merchant partners within small and reasonable limits, whether for the payment of their individual expenses or the payment of their honest individual obligations, does not show an intent to defraud creditors which will support an attachment, though they knew that they were in some difficulty, so long as they had reasonable expectation of extricating themselves. McKinney v. Rosenband, 23 Fed. Rep. 785 (1885).

But the drawing by members of a firm about to make an assignment of much larger amounts from the funds thereof than they had previously been accustomed to do, not for the purpose of paying debts then due, constitutes a withdrawal of firm assets from the reach of firm creditors for the purpose of applying them to their individual use, and will support an attachment though the property thus taken was subsequently returned. Globe Woolen Co. v. Carhart, 67 How. Pr. 403 (1884).

And the taking, by insolvent partners who have made an assignment, of a sum in excess of the amount exempted by statute from levy and sale under execution from the assets in the hands of the assignee to be appropriated to their own uses and withheld from creditors unless they should be able to secure a compromise at a certain figure, is a disposition of property with intent to defraud creditors, which will sustain an attachment. Victor v. Henlein, 34 Hun, 562 (1885).

The supporting by the surviving partner of the family of the deceased partner out of the firm assets for a short time after an epidemic of yellow fever is not a disposal of the property of the firm with intent to defraud creditors which will support an attachment. Roach v. Brannon, 57 Miss. 490 (1879).

1. *Formation of and transfer to corporation or partnership.*

The formation of a corporation by a debtor, and the transfer of property to it, cannot be regarded as

produced, then, for the space of two years, the statute permits the creditor to treat him as one who may repeat the fraud, and authorizes its prevention by a seizure of his property, upon mesne process, and hold it to answer any judgment that may be rendered in the action." The same question arose in the same district in *First Nat. Bank* v. *Kurtz*, 22 Ill. App. 213, where the same conclusion was again announced. So in the first district the same conclusion was announced in *Dempsey* v. *Bowen*, 25 Ill. App. 192, and in *Rhode* v. *Matthai*, 35 Ill. App. 147. The decision of the appellate court in the present case is merely an application of what has become a settled rule of law in that court. In *Spencer* v. *Deagle*, 34 Mo. 455, an attachment writ was issued under a statute apparently identical with ours, and it was held to be error for the court to refuse to instruct

---

a fraudulent transfer which will support an attachment, unless an actual fraudulent design is shown. Market Nat. Bank v. Bethel, 32 Ohio L. J. 135 (1884); Union Rolling Mill Co. v. Packard, 13 Bull. 501, 1 C. C. 76, as given in 4 Bates' (Ohio) Dig. 34.

And an insolvent debtor having a large stock of raw material on hand, and with large contracts to sell the articles to be manufactured from it, is not liable to attachment for disposing of his property with intent to defraud his creditors by reason of converting his business into a corporation and taking shares of stock in lieu thereof and conveying all his business and property to it in the reasonable belief and with the intent of being able thereby to provide better for his creditors, although creditors first getting judgment and levying might have collected in full. Beitman v. McKenzie, 11 Bull. 272 (1879), as given in 4 Bates' (Ohio) Dig. 34.

So, a transfer by a debtor having a large stock of goods on hand which he bought at an insolvent sale, of a part of the stock to his brother under an arrangement for a partnership whereby the brother was to manage the new store then started and put in an equal amount of money, which was done, does not show a fraudulent intent which will support an attachment. Mack v. Jones, 31 Fed. Rep. 189 (1887).

m. *Overbuying.*

Overbuying by a debtor, who was dazed with the success of his business and thought he could enlarge it, does not show an intent to defraud which will support an attachment and can only be looked to as a circumstance tending to show that some specific transfer was made with intent to defraud creditors. Mack v. Jones, 31 Fed. Rep. 189 (1887).

And that a debtor was insolvent when he made purchases, and bought more goods than he needed, and failed to disclose his insolvency, does not, in the absence of false statements, show such an intent. Ellison v. Bernstein, 60 How. Pr. 145 (1880).

But extraordinary purchases of goods far greater than the usual course of business requires, by a debtor knowing himself to be insolvent, is sufficient evidence of fraudulent intent to support an attachment. Claflin v. Einstein, 8 W. N. C. 398 (1878).

n. *Refusal to pay.*

It is actual fraud and evil intent to hinder and delay creditors, and not a mere refusal or failure to pay debts, which will support an attachment upon the ground that a debtor is fraudulently withholding his property from the payment of his debts. Durr v. Jackson, 59 Ala. 203 (1877).

And a refusal by a debtor to pay a debt at a time when he owed not to exceed $150 and had over $1,600 in cash which could have been used to pay it, is not sufficient to sustain an attachment upon the ground that he is about to dispose of his property with intent to defraud his creditors. Tootle v. Coldwell, 30 Kan. 125 (1883).

And that a debtor has been requested to pay a debt and failed to do so, and is about to sell his stock and remove to another state, will not support an attachment under the New York Code in the absence of anything to show that such disposal was with intent to defraud creditors. Seltman v. Jaschenorosky, 3 Ohio L. J. 9 (1880).

And evidence that a debtor had made promises to pay which he had broken, and that he was in a precarious situation if pressed, and that he intended to retain control of his property as long as the indulgence of his creditors and the law might permit, are not alone sufficient to warrant an attachment upon the ground of the secretion or disposition of property with intent to defraud. O'Reilly v. Freel, 37 How. Pr. 277 (1867).

But the refusal by a debtor to pay while admitting her ability, and refusal of all information as to stock on hand and as to assets, and proof that persons in her employ were seen taking goods from her store in a suspicious manner and leaving them with her brother-in-law, will sustain an attachment on the ground that she had disposed of or was about to dispose of her property with intent to defraud her creditors, where she denied making sales to such brother-in-law. Rothschild v. Mooney, 36 N. Y. S. R. 565 (1891).

And refusal by a debtor to pay, together with a declaration that he would not pay unless his creditors all agreed to take his goods and discharge him, and a threat that if sued he would assign with preferences, leaving out those who sued, and his keeping his store open and disposing of goods and appropriating the avails, in addition to his admitted insolvency, warrant an inference of intent to defraud which will sustain an attachment. Anthony v. Stype, 19 Hun, 265 (1879).

And a debtor owing a large debt that is past due, and having a large sum of money that he ought to pay upon it, who refuses to pay anything without giving any reason for such refusal, and attempts to settle upon his intended wife a large sum of money wholly disporportionate to his property, and declares that he does not intend to pay his chief creditor until he gets ready but does intend to bring him to terms, and that he can speedily fix his property so that he can get nothing, and threatens that if he pushes him he will make him lose all he can, —is subject to attachment upon the ground that he is about to remove or dispose of his property with intent to defraud. Ross v. Wigg, 6 N. Y. Civ. Proc. Rep. 263 (1884).

o. *Statements and misrepresentations by debtor.*

The debtor frequently furnishes evidence of his fraudulent intent by his own statements.

Thus, a presumption of a disposition of property with intent to defraud creditors which will sustain an attachment under the Nevada statute is raised by the debtor telling the creditor that he has disposed of all of his property and will pay when he gets ready. Bowers v. Beck, 2 Nev. 139 (1866).

So, a statement by a debtor to his creditor that he would not pay his claim unless all his creditors would compromise, and that he had mortgaged all his property upon a claim which he had a year to pay, and was not obliged to pay his creditors, and that he had done so to protect himself from creditors, in connection with the fact that he continued in possession of the stock of mortgaged goods, disposing of them daily, will sustain an attachment upon the ground of a disposal of his property with intent to delay, if not to defraud, his creditors. Blake v. Sherman, 12 Minn. 420 (1867).

the jury that, to render the deed of trust there in question fraudulent as to the defendant's creditors, it must appear that it was executed for that purpose,—that it was not enough that the effect of the deed was to delay his creditors, but it must have been executed with that purpose and intent. While some decisions perhaps may be found in other states supporting the contrary view, we are disposed to think that the interpretation put upon our statute by the appellate court is the correct one. It seems to be the policy of our attachment law to give creditors the right to seize the property of their debtors on original or mesne process, and hold it for the satisfaction of such judgments as may be subsequently recovered, in those cases where the situation or conduct of the debtors is or has been such as to raise a reasonable apprehension that the ordinary common-law processes of the court will be thwarted, and thus rendered unavailing.

The Revised Statutes of 1845 authorized attachments for only the first five of the nine

---

And statements by a debtor engaged in general mercantile business, disclosing a determination to defeat the claims of a creditor, and arrangements made pursuant to such intention, together with the fact that the stock of goods had during several months been converted into cash as rapidly as possible, and depleted in the aggregate several thousand dollars, and no satisfactory account given of the disposition of the proceeds, will sustain a finding of a disposal or concealment of property with fraudulent intent necessary to sustain an attachment. Reed Bros. Co. v. First Nat. Bank (Neb.) 64 N. W. Rep. 701 (1895).

And a statement by debtors to a creditor that they had executed to their sister a bill of sale of all their stock for a specified amount, and a statement by the sister that she had loaned money to the debtors and taken no security for it, and that no bill of sale had been executed by her, sufficiently show a transfer with intent to defraud which will support an attachment. Boyd v. Miller, 34 N. Y. Supp. 1026 (1895).

So, a statement by a debtor that he would be glad if a creditor ever got his pay, together with evidence that he had left the county and gone to Canada with intent to remain there, taking a part of his personal property with him, and that he was offering his property in the county for sale, sufficiently shows a design to dispose of property with intent to defraud creditors to sustain an attachment. Rosenfield v. Howard, 15 Barb. 546 (1853).

And proof that a wife allowed her husband to take possession of all her money, coupled with a falsehood as to the purpose for which he took it, sufficiently establishes an intention to defraud her creditors to sustain an attachment. Anderson v. O'Reilly, 54 Barb. 620 (1869).

Statements made by a debtor to a creditor that he could recover nothing, and that judgment against him would be worth nothing, however, will not support an attachment upon the ground of the disposal or intended disposal of property with intent to defraud creditors, where no such disposal or intended disposal is shown and it is shown that he has just rented another shop and extended his business. Moulor v. Rosengarden, 22 La. Ann. 531 (1870).

And evidence that a debtor had made two assignments of property to the same person, and had then said that he had no property and could pay no debts, will not support an attachment on that ground. Miller v. Brinkerhoff, 4 Denio, 118, 47 Am. Dec. 242 (1847).

And a statement by a debtor upon being pressed by a creditor that he expects to realize money from sources not within his reasonable expectation does not tend to prove that he is about to dispose of his property with fraudulent intent, for which an attachment will lie under the Indiana statute. Parsons v. Stockbridge, 42 Ind. 121 (1873).

So, misrepresentations by a debtor as to his financial condition will not sustain an attachment upon the ground that he had disposed of or secreted his property with intent to defraud. Fleitmann v. Sickle, 13 N. Y. S. R. 399 (1888); Stamp v. Herpich, 8 N. Y. S. R. 446 (1887); Goldschmidt v. Herschorn, 13 N. Y. S. R. 560 (1888).

Want of precision in statements made to creditors, and discrepancies between such statements and the exact showing by the debtor's books, are not to be taken as circumstances showing a fraudulent intent for which an attachment will lie. Mack v. Jones, 31 Fed. Rep. 189 (1887).

And false representations by a debtor as to his condition and intention, followed by a conveyance of property to pay a debt justly due, will not support an attachment unless the vendees were parties to the fraud. Chouteau v. Sherman, 11 Mo. 385 (1848).

And the exhibit by a failing debtor of his liabilities showing cash on hand and book debts but not the value of his stock is not such a concealment of assets with intent to defraud creditors as will support an attachment, where it appears that the stock consisted of manufactured articles in an unfinished state which were not readily marketable and the value of which was subject to fair conjecture. Kipling v. Corbin, 66 How. Pr. 12 (1883).

But the utter insolvency of a debtor and his assignment for the benefit of creditors nine months after a showing made by him of the ownership of net assets of nearly $30,000, justify the conclusion that the assignment was made with intent to defraud creditors, and warrant an attachment. Buhl v. Ball, 41 Hun, 61 (1886).

And a claim by a debtor to be solvent and to have a surplus of from $10,000 to $20,000, followed by a bill of sale of his entire stock, fixtures, etc., on the following day to his wife for a consideration of $1 and a past-due debt of $7,500, and an announcement of his suspension and insolvency upon the next day, and a general assignment two days thereafter, —sufficiently indicate a fraudulent intent for which an attachment may issue. Seckendorf v. Ketcham, 67 How. Pr. 526 (1884).

So, representations by a debtor to his creditor that he was doing a prosperous business upon assets three times greater than his liabilities for the purpose of obtaining an extension of time, in connection with threats to dispose of his property so as to prevent the creditor from realizing anything in case of refusal, will sustain an attachment. Hanks v. Andrews, 53 Ark. 327 (1890).

And proof of representations by a firm of debtors that they were doing a good business and had ample means to meet their obligations, and that four weeks later they failed and confessed judgments chiefly to relatives, having hardly sufficient property to pay them, and were largely indebted to the trade, is sufficient prima facie to sustain an attachment upon the ground of a disposition with intent to defraud. Wickham v. Stern, 28 N. Y. S. R. 154 (1889).

And proof that debtors stated that they were worth $40,000, and were doing a cash business at the time of purchasing goods, and that a few weeks later, when the indebtedness became due, they declared they had no money and did not know whether they were solvent or not, and that within a month their stock which had amounted to $20,000 in value, had become reduced to $2,000 and

causes for attachment specified in our present attachment act, *viz.*: (1) Where the debtor is not a resident of the state; (2) where he conceals himself, or stands in defiance of an officer, so that process cannot be served upon him; (3) where he has departed from the state with the intention of having his effects removed from the state; (4) where he is about to remove from the state with the intention of having his effects removed from the state; and (5) where he is about to remove his property from the state, to the injury of the creditor suing. Rev. Stat. 1881, p. 123. Here the writ was given only where the debtor was already a nonresident, and so beyond the reach of the ordinary processes of the law, or where there was an affirmative intention and design on his part to place his person and property, or his property alone, beyond the reach of those processes. The writ was given for the purpose of seizing the property so as to forestall its threatened removal, and to hold it as security for the judgment to be recovered.

It cannot be doubted, we think, that when the statute was so amended as to add the three causes for attachment set up in this case, the legislature was acting in furtherance of the same general intention expressed in the original act. The writ was not given for the

---

that they were then packing it up and removing it, —will support an attachment upon that ground. Talcott v. Rosenberg, 8 Abb. N. S. 287 (1870).

As to disappearance or depreciation of stock, see also *infra*, q, *Miscellaneous cases*.

p. *Conversion of property.*

A fraudulent conversion of property will not support an attachment, though possession was obtained with intent to convert it. Finlay v. Bryson, 84 Mo. 664 (1884).

And that a debtor employed money received from his creditor for purposes other than that for which it was received, furnishes no ground for an attachment upon the ground of an intended fraudulent disposition of property. Allen v. Herschorn, 9 Abb. Pr. N. S. 80 (1870).

And proof that one who held property for another with liberty to sell it and pay for it out of the proceeds sold such property and applied the proceeds to his own use, will not sustain an attachment upon the ground of a disposition of property with intent to defraud, as it does not appear that the debtor disposed of any of his own property. German Bank v. Dash, 60 How. Pr. 124 (1880).

But a failure by a debtor, who had received goods from a creditor for sale upon an agreement to account, to make return for a large sale for cash made by him will sustain an attachment. Powell v. Matthews, 10 Mo. 49 (1846).

q. *Miscellaneous cases.*

The cases in this subdivision, not properly falling within any of the above subdivisions, are here collected because, from their miscellaneous character, they are not readily susceptible of further or different classification.

Evidence that a debtor's stock had decreased at a more rapid rate than could be accounted for by his legitimate business will uphold an attachment upon the ground that he was disposing of property with intent to defraud his creditors. White v. Reichert, 14 N. Y. Week. Dig. 285 (1882).

And evidence that a debtor firm had a stock of goods worth $40,000 two and one half years before, and during that time it had borrowed $45,000, and that the business had not been unprosperous but that its stock had greatly diminished in quantity and value, and that they were insolvent and one of the firm had proposed a scheme for the purpose of defrauding certain firm creditors, is prima facie sufficient to warrant an attachment upon that ground. Frankel v. Hays, 20 N. Y. Week. Dig. 417 (1885).

So, evidence that after nightfall mules belonging to a debtor were clandestinely taken out of the town and run off to a distance of some 10 miles when they were captured, and that the person in charge made contradictory statements as to whom they belonged, will sustain an attachment upon the ground that the debtor was about to dispose of or secrete his property with intent to defraud creditors. Brown v. Hawkins, 65 N. C. 645 (1871).

And in Blackinton v. Rumpf (Wash.) 40 Pac. Rep. 1063 (1895), an attachment upon the ground that the debtors were assigning, secreting, or disposing of their property, or were about to do so, with intent to defraud their creditors, was sustained upon a statement of a secret agreement to carry on business in the name of one and to divide the proceeds and to defraud persons from whom they might purchase, and evidence that they purchased goods of the attachment creditor which were not paid for and that the debtor in whose name the business was carried on disposed of his property to the other.

But the secretion of a debtor's books by an employee will not support an attachment upon the ground that he was about to secrete his property with intent to defraud his creditors, where there is nothing to connect him with the act of his employee, or to show that he acted under authority. Fitzgerald v. Belden, 49 How. Pr. 225 (1875).

And an attachment on the ground of secreting property with intent to defraud creditors, and concealment to avoid service of a summons, will not be granted because the debtor, who failed to pay at the promised time, had drawn all of his money out of the bank and was absent from his place of business when his creditor called for payment, where the place was open and his business was being conducted in the usual course by the clerk, who made no apparent effort to conceal his employer's whereabouts. Reynolds v. Horton, 67 Hun, 122 (1893).

And the removal of property of a debtor from his store by a third person claiming to be his assignee when no assignment had been filed in the clerk's office will not warrant an attachment upon the ground of a disposition of property with intent to defraud creditors. Denzer v. Mundy, 5 Robt. 633 (1866).

And mere neglect to defend actions brought against a debtor without any showing of fraud of or collusion between the debtor and creditor, in which judgment is obtained and the property of the debtor is taken, will not support an attachment upon that ground. Rigney v. Tallmadge, 17 How. Pr. 556 (1859).

So, the payment by a mutual benefit association of death claims subsequently maturing is not a disposition of or secreting the property of the association with intent to defraud its creditors which will sustain an attachment at the suit of the holder of a claim which had previously matured. Knorr v. New York State Mut. Ben. Asso. 79 Hun, 83 (1894).

And that the debtor has become dissipated, careless, and almost a sot, is greatly in debt and daily becoming more so, and is truly insolvent, together with a statement of the creditor's belief that he will dispose of his property in order to defraud his creditors, will not support an attachment. Jackson v. Burke, 4 Heisk. 610 (1871). F. H. B.

purpose of enabling the creditor to attack a transaction which is only constructively fraudulent, but to enable him to seize the property of his debtor in cases where fraud has been committed or contemplated of such character as to raise a reasonable apprehension that by further fraudulent acts the debtor will put his property and effects beyond the reach of legal process. But such apprehension does not arise from the commission of a mere legal or constructive fraud. There evil intention, moral turpitude, and actual dishonesty are wanting. Equity, it is true, will set such transactions aside in a proper proceeding, at the instance of creditors; but no inference arises that the debtor will attempt, by any dishonest disposition of his property, to interfere with his creditors in the assertion of their just rights. We are of the opinion, then, that granting writs of attachment in cases where only legal or constructive fraud is shown is outside of the general scheme and purpose of the attachment law.

It is apparent that any other construction of the statute would often lead to consequences extremely oppressive. Thus, a sale of goods, where possession has not actually been delivered to the purchaser, though valid as between the parties, is constructively fraudulent as to the creditors of the seller, and the goods may be seized by them on execution as his goods, however honest he may have been in the transaction. In contemplation of law he has made, or attempted to make, a disposition of his property which is constructively fraudulent, and, if attachments may issue for constructive frauds, he has thereby subjected himself, however innocent he may have been, to all such attachment writs as his creditors may see fit to sue out against his property for the period of two years. So, if a debtor, in perfect good faith, executes a chattel mortgage to secure an honest debt, but fails to have it executed, acknowledged, and recorded in all respects as required by the statute, the transaction is constructively fraudulent and void as against his creditors. But can it be said that he thereby subjects himself, for a period of two years, to attachments by any of his creditors? Other similar illustrations without number will suggest themselves. In view of these various considerations, it seems to us to be very clear that the legislature, in authorizing writs of attachment in cases where the debtor has fraudulently conveyed or assigned his property so as to hinder or delay his creditors, could have had in mind only such conveyances or assignments as are fraudulent in fact, and that it was not their intention to grant this writ where the debtor acts honestly, and with no fraudulent purpose or design. It follows that the instruction to the jury to find the issues upon the attachment affidavit for the defendant was properly given.

The administratrix, by cross errors, seeks to attack the judgment on the merits. Without pausing to investigate the points thus raised, it is sufficient to say that no practical benefit can result to her, or to the estate which she represents, by a reversal of the judgment. It seems to be admitted on all hands that the estate is insolvent, and it also appears that the promissory notes for which the judgment was rendered were, some time prior to the trial of this case, presented to the probate court as a claim against the estate, and that they were duly allowed as such, and there is no suggestion that the allowance of the claim is now called in question by any one. It thus appears that the administratrix is conclusively bound to pay the claim in due course of administration, and its being evidenced by a judgment of the circuit court adds nothing to her obligation in that respect.

The judgment of the Appellate Court will be affirmed.

Rehearing denied June 15, 1895.

Frank E. VOGEL, Impleaded, etc., *Appt.*,
v.
John PEKOC.

(157 Ill. 339.)

1. The acceptance by the master of a written contract of employment signed by the servant is equivalent to its formal execution by him.

2. A contract whereby the first party agrees to employ the second party to perform such work as he may assign to him from time to time imposes no obligation on the first party; and a provision therein for the forfeiture of a specified sum by the servant in case he shall leave the employment without a specified notice constitutes no defense to an action by the latter for his wages, as the contract is void for want of mutuality.

3. The restriction to a designated class of persons of the right to recover attorneys' fees, granted by Laws 1889, p. 362, in suits for wages, does not render the statute obnoxious to the constitutional prohibition against special legislation, as it applies to all persons in the state similarly engaged.

(June 15, 1895.)

APPEAL by defendant Vogel from a judgment of the Superior Court for Cook County in favor of plaintiff in an action brought to recover wages alleged to be due and unpaid. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Dupee, Judah, Willard, & Wolf,** for appellant:

The contract in question was not void for want of mutuality and consideration.

Preston v. *American Linen Co.* 119 Mass. 400; *Pottsville Iron & S. Co.* v. *Good*, 116 Pa. 385; *Hayes* v. *O'Brien*, 149 Ill. 403, 23 L. R. A. 555.

A contract signed by one and accepted by the other is binding.

Short v. *Kieffer*, 142 Ill. 258.

NOTE.—The constitutionality of statutes providing for attorneys' fees in a limited class of cases is considered in a *note* to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 586. See also, in conflict with the present case, the late case of Hocking Valley Coal Co. v. Rosser (Ohio) 29 L. R. A. 388.

See also 31 L. R. A. 553; 45 L. R. A. 201.

The constitutional provisions mean, if they mean anything, that all classes of the community shall have and enjoy equally the benefit of all the laws of the state, whether remedial, beneficial, prohibitory, or otherwise, so far as they may be made generally applicable, and that there shall not be any special or private laws affecting the rights of private individuals or classes of individuals.

Braceville Coal Co. v. *People*, 147 Ill. 66, 22 L. R. A. 340; *Ramsey* v. *People*, 142 Ill. 380, 17 L. R. A. 853; *Frorer* v. *People*, 141 Ill. 171, 16 L. R. A. 492; *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869; *Hocking Valley Coal Co.* v. *Rosser*, 52 Ohio St. —, 29 L. R. A. 386.

On rehearing.

The present decision of the court is, in effect, that a promise to give employment, followed by actual performance of that promise for more than a year and a half, was not a sufficient consideration to support the promise made by appellee when he accepted the employment and without which he could not have gotten it. This is such an astonishing departure from fundamental principles and from the previous decisions of this court that we cannot believe the court will adhere to the decision.

Plumb v. *Campbell*, 129 Ill. 101.

The court should hold the attorneys' fees act unconstitutional.

Hawthorn v. *People*, 109 Ill. 302, 50 Am. Rep. 610; *Braceville Coal Co.* v. *People*, 147 Ill. 66, 22 L. R. A. 340; *Hocking Valley Coal Co.* v. *Rosser*, 52 Ohio St. —, 29 L. R. A. 386.

Messrs. **Olson, Frazier, & Bantle,** for appellee:

Mutuality is essential; if one party is bound, the other must be bound also.

Weaver v. *Weaver*, 109 Ill. 225.

The provision of the contract forfeiting the amount of wages withheld is in the nature of a penalty, and only actual damages can be recovered thereunder.

Bryton v. *Marston*, 33 Ill. App. 211; *Scofield* v. *Tompkins*, 95 Ill. 190; *Evans* v. *Chicago & R. I. R. Co.* 26 Ill. 189; Sedgw. Damages, § 492.

The contract should have been signed by appellant in order to have been admissible in evidence and binding upon appellee.

Waggeman v. *Bracken*, 52 Ill. 468; *Bardill* v. *Trustees of School*, 4 Ill. App. 94; *Hedstrom* v. *Baker*, 13 Ill. App. 104; *Mendel* v. *Fink*, 8 Ill. App. 378.

The act providing for attorneys' fees in no way infringes upon section 2 of article 2 of the Constitution.

State v. *Hitchcock*, 1 Kan. 178, 81 Am. Dec. 503; *Gentile* v. *State*, 29 Ind. 409; *Hawthorn* v. *People*, 109 Ill. 302, 50 Am. Rep. 610; *Streeter* v. *People*, 69 Ill. 595; *Potvin* v. *Johnson*, 108 Ill. 70; *Chicago L. Ins. Co.* v. *Auditor of Public Accounts*, 101 Ill. 82; *Johnson* v. *Chicago & P. Elevator Co.* 105 Ill. 462.

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

This was an action originally brought before a justice of the peace by John Pekoc, against Nelson Morris, Frank E. Vogel, and Edward Morris, a firm doing business as Nelson Morris & Co., to recover the sum of $25 for wages claimed to be due as a cooper. On a trial before the justice the plaintiff recovered the amount claimed, and the defendants appealed to the superior court of Cook county, where a jury was waived and a trial had before the court, resulting in a judgment for the amount sued for, and also attorneys' fees. To reverse this latter judgment the defendants have appealed to this court.

The defendants requested the court to hold the following propositions of law, but the court refused so to hold, and this ruling is relied upon as error:

1. "That the evidence in the case is not sufficient, in law, to sustain a finding for the plaintiff.

2. "That the act providing for attorneys' fees in suits for wages, approved June 1 and in force July 1, 1889, is unconstitutional and void.

3. "That the evidence in the case does not show a suit for wages, within the meaning of said act, and that no attorneys' fees can be allowed thereunder."

The evidence shows that plaintiff worked as a cooper for Nelson Morris & Co., and that there was a balance in their hands, for wages unpaid, of $25. The defendants, however, claim that the amount said to be due was forfeited, for the reason that plaintiff quit the services of defendants without giving two weeks' notice, as they claim he was required to do under a contract in writing which they put in evidence, as follows:

"This agreement, made and signed this 12th day of September, 1892, between Fairbank Canning Company and Nelson Morris & Co., the parties of the first part, and John Pekoc, the party of the second part:

"*Witnesseth*, the said parties of the first part agree to employ the said party of the second part to perform such work as they may assign to him from time to time, such service to continue only so long as satisfactory to the said parties of the first part. And in consideration of such employment, and the peculiar nature of the business of the said first parties, and of the wages to be paid by the parties of the first part, the said second party agrees that he will not quit said service and employment without giving two weeks' notice, in writing, to said first parties of his intention so to do, and as a guaranty for the faithful performance of this agreement on his part the said party of the second part agrees to deposit with said first parties the sum of $25, and in case of the violation of this agreement by said second party the said first parties shall retain said amount as liquidated damages, and in satisfaction and payment of all damages by them sustained. It is further agreed that the said first parties shall retain $2.50 per week of the wages earned by said second party until said sum of $25 shall be in their hands, to be held by them according to the terms of this agreement.

"John Pekoc. [Seal.]
" ..... [Seal.]
" ..... [Seal.]"

On the other hand, the plaintiff insists that the contract is void for the want of mutuality.

It will be observed that the written con-

tract was not signed by the parties named therein as parties of the first part, and it is insisted by the plaintiff that as they failed to sign the contract it never became binding on him or any other person. The acceptance of the contract by the parties of the first part, and holding it and acting upon it as a valid instrument, may be regarded as equivalent to its formal execution on their part, as held in *Johnson* v. *Dodge*, 17 Ill. 442, and *Short* v. *Kieffer*, 142 Ill. 266. Regarding the contract in the same way, it would be treated as if it had been signed by the persons named as parties of the first part.

The next question to be determined is whether the contract is mutual. It is a general rule, well understood, that a contract between parties must be mutual. *Weaver* v. *Weaver*, 109 Ill. 233; Chitty, Contr. 15; Bishop, Contr. § 78, p. 32; *Tucker* v. *Woods*, 12 Johns. 190, 7 Am. Dec. 305. In the case last cited it is said: "In contracts, where the promise of the one party is the consideration for the promise of the other, promises must be concurrent and obligatory upon both at the same time." 1 Chitty, Cont. 297; *Livingston* v. *Rogers*, 1 Cai. 584. In Chitty on Contracts, *supra*, the author says: "The agreement, as before observed, must, in general, be obligatory upon both parties. There are several cases satisfactorily establishing that if the one party never was bound, on his part, to do the act which forms the consideration for the promise of the other, the agreement is void, for want of mutuality." In Wharton on Contracts, § 2, the author says: "The parties to a contract, therefore, must be both bound. Supposing that if one promises in consideration of the promise of the other, the one is not bound unless the other is bound. A promise to do a thing on an executed consideration is not a contract; nor is a promise to do a thing in consideration of an illegal or impossible engagement on the other side. Without this reciprocal obligation, no contract can be constituted. 'It is a general principle,' says Mr. Fry, 'that when from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from difficulty attending its execution in the former.'"

Upon looking into the contract read in evidence, it will be found that the parties of the first part practically agree to do nothing, and there is substantially no obligation imposed upon them by the contract. The only portion of the contract claimed to impose any obligation on the parties of the first part is the following: "The said parties of the first part agree to employ the said party of the second part to perform such work as they may assign to him from time to time, such service to continue only so long as satisfactory to the said parties of the first part." What obligation does this impose? When are they to employ the party of the second part? What sum are they to pay? How long is the employment to continue? Suppose they refuse to employ the party of the second part; can an action for damages be maintained for a breach of the contract? The answer to these inquiries is obvious. We think it is plain that the parties of the first part were not bound, under the terms of the contract, to employ the party of the second part for a single day or hour, and if they had absolutely refused to employ him he was without remedy in any court of the country. It may be true that the plaintiff might have entered into a contract which would require him to give two weeks' notice before he could quit the services of his employer without being liable to respond in damages, as might reasonable be provided in the contract; but no such case is presented by this record. Here the contract imposes no obligation on one of the parties, and hence it is void for the want of mutuality.

The contract being void, it will not be necessary to inquire whether the amount which it was provided might be retained was a penalty or liquidated damages.

It is next claimed that the court erred in allowing attorneys' fees. This involves a construction of an act of June 1, 1889 (Laws 1889, p. 362), which in substance provides that whenever a mechanic, artisan, miner, laborer, servant, or employee shall have cause to bring suit for wages, and shall establish, by the decision of the court or jury, that the amount is justly due and owing, and that demand has been made in writing, etc., then it shall be the duty of the court to allow the plaintiff, when the foregoing facts appear, a reasonable attorneys' fee in addition to the wages. It is claimed that the statute is private or special legislation, and hence is in conflict with that provision of the Constitution prohibiting special legislation. It is true, this statute does not provide that all persons who may recover judgments may, at the same time, recover attorneys' fees, but the recovery is restricted to a designated class of persons, and legislation of this character has never been regarded obnoxious to the Constitution. Indeed, in *Hawthorn* v. *People*, 109 Ill. 303, 50 Am. Rep. 610, it was expressly held that a statute is not obnoxious to the constitutional objection that it is not a general law because it applies to a class of persons. It is a general law if it applies to all persons in the state similarly engaged. See also *Potwin* v. *Johnson*, 108 Ill. 70, where the same doctrine is announced. The statute in question confers the right to recover attorneys' fees upon a certain class of persons who bring actions to recover for wages. All persons who bring such actions fall within its provisions, and hence it is in no sense special legislation.

We think the judgment of the Superior Court, upon the facts as they appear in the record, correct, and it will be affirmed.

Rehearing denied October 28, 1895, when the following opinions were handed down:

Per Curiam:

The petition for rehearing filed in this cause greatly emphasizes the previous contention that the act of 1889, providing that a reasonable attorneys' fee shall be allowed

to successful plaintiffs in suits for wages, to be taxed as costs, is a partial and special statute, working deprivation of property without due process of law, and therefore unconstitutional. Reliance is placed in *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869; *Frorer* v. *People*, 141 Ill. 171, 16 L. R. A. 492; *Ramsey* v. *People*, 142 Ill. 380, 17 L. R. A. 853; and *Braceville Coal Co.* v. *People*, 147 Ill. 66, 22 L. R. A. 340,—as sustaining the position taken. Those cases do not, however, control the present case, or decide the question here involved. Without discussing separately the facts of the cases relied upon, it may be said generally, that in each of those cases a principal and controlling question was the right of miners of coal (no less than their employers) to make contracts regulating the time and manner of the payment of wages and the method of computing such wages, and in each case cited a law restricting in some manner this important right of contract was held invalid. It was with great propriety said that the privilege of contracting is both a liberty and a property right, of which a portion of the people cannot be deprived by an arbitrary statute, and without due process of law. It was further said (*Braceville Coal Co.* v. *People*, *supra*): "The right to contract necessarily includes the right to fix the price at which labor will be performed, and the mode and time of payment. Each is an essential element of the right to contract, and whosoever is restricted in either as the same is enjoyed by the community at large is deprived of liberty and property." It might, perhaps, have been said with equal propriety that no legislative act, however general and universal its application, could invade the fundamental right of the citizen to make contracts not against public policy, or injurious to society.

The statute here in question interferes with no one's right to contract. It embraces a well-defined class of cases and persons, not singled out, as is contended, wholly without reason and arbitrarily; but upon grounds which may, we think, properly serve as a basis for valid legislative action. Those to whom the wages of labor are due, and who, after demand in writing of a sum no greater than that subsequently recovered, are compelled to establish, and do establish, their rights as demanded by judgment of court, are within the provisions of the act; and we cannot say this classification is so arbitrary and unreasonable, and the law so partial and unequal, as to be beyond legislative discretion and power. If this law were to be held unconstitutional for the reasons assigned, then many other acts long in force in this state, hitherto deemed to be salutary, and against which no constitutional objection has been heard, would certainly fall with it. Why, for instance, should the seller of materials for a building have by law a lien for their price, not only upon the specific things sold, but upon the whole structure, with the land it stands on, while the seller of a horse, a piano, or a corn sheller is denied any lien even on the specific thing sold? Why should he whose labor constructs a house be secured by a lien on his product, while he who raises a crop must look only to the personal responsibility of his hirer? Surely, it could be said the lien law makes classes of beneficiaries quite as arbitrary in character as that marked out to receive benefit by the act under discussion. Again, why should the wages of a defendant, who is head of a family, to an amount not exceeding $50, be exempt from garnishment (Laws 1879, p. 176), while sums due other defendants are protected by no such exemption? And why, again, it might be asked, should heads of families, earning wages, be made the subject of advantageous provisions not applied to all other wage earners, if not to all other persons? The general exemption law also makes heads of families a distinct class, who may claim as exempt $300 worth more of personal property than other judgment defendants are allowed, while a further section (Rev. Stat. 1874, p. 499) declares that where a judgment is for the wages of a laborer or servant, and noted by the court as such, no personal property whatever shall be free from levy, whatever the estate or condition of the debtor. An analogous case for this purpose is found in the provision of the general assignment law that "all claims for the wages of any laborer or servant which have been earned within three months next preceding the making of the assignment, etc., shall, after the payment of costs, etc., be preferred and first paid to the exclusion of all other demands." Hurd Stat. 1893, p. 166, § 6. It is difficult to see how any of these statutes, and many similar ones which might be named, could be sustained if the strict rule of constitutional validity, so strenuously urged in this case, were applied to them.

The petition for rehearing will be denied.

Magruder, J., dissenting:

I am unable to agree with so much of the opinion in this case as holds the act of June 1, 1889, to be a constitutional law. The act belongs to that species of class legislation which has been recently condemned by this court in the following cases: *Millet* v. *People*, 117 Ill. 294, 57 Am. Rep. 869; *Frorer* v. *People*, 141 Ill. 171, 16 L. R. A. 493; *Ramsey* v. *People*, 142 Ill. 380, 17 L. R. A. 853; *Braceville Coal Co.* v. *People*, 147 Ill. 66, 22 L. R. A. 340; and *Ritchie* v. *People*, 155 Ill. 98, 29 L. R. A. 79. In the case of *Hocking Valley Coal Co.* v. *Rosser*, 52 Ohio St.—, 29 L. R. A. 386, the supreme court of Ohio has had occasion to consider and condemn a similar statute. The opinion in that case expresses what seems to me to be the correct view of the subject, and a quotation therefrom is hereinafter set forth as sufficiently indicating the reasons for this dissent. The Ohio statute (89 Ohio Laws, p. 59, § 6563*a*) provides: "If the plaintiff in any action for wages recover the sum claimed by him in his bill of particulars, there shall be included in his costs such fee as the court may allow, but not in excess of $5 for his attorney. But no such attorney fee shall be taxed unless said wages have been demanded in writing and not paid within three days after such demand. If the defendant appeal from any such judgment and the plaintiff on

appeal recover a like sum exclusive of the interest from the rendition of the judgment before the justice, there shall be included in his costs such additional fee not in excess of $15 for his attorney as the court may allow." In the course of the opinion in the *Rosser Case* the Ohio court says: "Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulcted in an attorney fee, if an honest but unsuccessful defense should be interposed? A statute that imposes this restriction upon one citizen, or class of citizens, only denies to him or them the equal protection of the law. It is true that no provision of the Constitution of 1851 declares in direct and express terms that this may not be done, but, nevertheless, it violates the fundamental principles upon which our government rests as they are enunciated and declared by that instrument in the bill of rights. The first section of the Constitution declares that the right to acquire, possess, and protect property, is inalienable, and the next section declares, among other things, that 'government is instituted for the equal protection and benefit' of every person, while section 16 of article 1 provides that 'all courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law, and justice shall be administered without denial or delay.' The right to protect property is declared, as well as that justice shall not be denied, and every one entitled to equal protection. Judicial tribunals are provided for the equal protection of every suitor. The right to retain property already in possession is as sacred as the right to recover it, when dispossessed. The right to defend against an action to recover money is as necessary as the right to defend one brought to recover specific real or personal property. An adverse result in either case deprives the defeated party of property. If the general assembly has power to enact the statute in question, it could also enact one providing that lawyers, doctors, and grocers, or any other class of citizens might make out their accounts, and demand in writing their payment within a short time, which, if not complied with, would entitle the plaintiff to an attorney fee in addition to his claim if he recovered the amount demanded. We do not think the general assembly has power to discriminate between persons or classes respecting the right to invoke the arbitrament of the courts in the adjustment of their respective rights. The legislative power to compel an unsuccessful party to an action—generally the defendant—to pay an attorney fee to his opponent has received the attention of a number of courts of last resort, as well as laws which impose as a penalty double damages or some similar penalty for some wrongful or negligent act injurious to another. Where the penalty has been imposed for some tortious or negligent act the statute has generally, though not always, been sustained, but, on the contrary, where no wrongful or negligent conduct was imputed to the defeated party, any attempt to charge him with a penalty has not prevailed. *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869; *State* v. *Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359; *Durkee* v. *Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *South & North Ala. R. Co.* v. *Morris*, 65 Ala. 193; *Wilder* v. *Chicago & W. M. R. Co.* 70 Mich. 382; *Braceville Coal Co.* v. *People*, 147 Ill. 66, 22 L. R. A. 340; *Wally* v. *Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Vanzant* v. *Waddel*, 2 Yerg. 260; *Atchison & N. R. Co.* v. *Baty*, 6 Neb. 37, 29 Am. Rep. 356; *State* v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789; *San Antonio & A. P. R. Co.* v. *Wilson* (Tex.) 19 S. W. Rep. 910; *Peoria, D. & E. R. Co.* v. *Duggan*, 109 Ill. 537, 50 Am. Rep. 619. Various phases of this subject have received attention in the foregoing cases as well as in some others, to which we do not deem it necessary to refer. The general tendency of these authorities is towards the result which we have reached; but whether they do or do not support our conclusions, we are satisfied that the fundamental principles of government declared by our bill of rights clearly and unequivocally prohibit legislation of the character of that involved in this case. Judgment allowing an attorney fee reversed."

TENNESSEE SUPREME COURT.

G. H. JARNAGIN, Assignee of the State Savings Bank, *Appt.*,

v.

F. A. STRATTON.

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

A statute making all joint obligations joint and several applies to the indorsement of a promissory note, so that notice of nonpayment given to any one of several joint indorsers is sufficient to bind him.

(November 15, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Washington County in favor of defendant in an action brought to enforce defendant's alleged liability as indorser of a promissory note. *Reversed.*

The facts are stated in the opinion.

Messrs. **Isaac Harr** and **Crumley & Crumley** for appellant.

Messrs. **Kirkpatrick, Williams, & Bowman**, for defendant:

The note being made payable to Singiser and

NOTE.—The above case is believed to be one of first impression so far as it touches the effect of a statute making joint obligations joint and several upon the rights of joint indorsers to notice of nonpayment.

30 L. R. A.

See also 37 L. R. A. 89.

Stratton, who are not shown to be partners, it can be transferred only by their joint indorsement.

1 Dan. Neg. Inst. §§ 684, 701*a*; *Sneed* v. *Mitchell*, 1 Hayw. (N. C.) 289; *Ryhiner* v. *Feickert*, 92 Ill. 305, 34 Am. Rep. 130.

Notwithstanding the order in which their names are indorsed, they are not to be regarded as successive, but as joint, indorsers.

1 Dan. Neg. Inst. § 704; *Lane* v. *Stacy*, 8 Allen, 41.

Being joint indorsers, notice of protest must be given to both in order to render either liable.

Story, Prom. Notes, § 255; 2 Dan. Neg. Inst. § 999*a*; Tiedeman, Com. Paper, § 584; *Willis* v. *Green*, 5 Hill, 232, 40 Am. Dec. 351; *People's Bank* v. *Keech*, 26 Md. 524, 90 Am. Dec. 118; *Sayre* v. *Frick*, 7 Watts & S. 383, 52 Am. Dec. 249; *Hubbard* v. *Matthews*, 54 N. Y. 50, 13 Am. Rep. 562; *Miser* v. *Trovinger*, 7 Ohio St. 286.

Tenn. Code (Milliken & Vertrees), §§ 3484–3486, do not change the rule.

Caruthers, History of a Lawsuit, 49.

There may be an obligation joint in nature. *Flint* v. *Tillman*, 2 Heisk. 202; *Henry* v. *Walker*, 11 Heisk. 194.

If it be true that a change in the character of the contract is wrought by the Code provisions, those cases holding that an unqualified release of one joint obligor releases the other are ill based.

Richardson v. *McLemore*, 5 Baxt. 590; *Simpson* v. *Moore*, 6 Baxt. 372; *Williams* v. *Hitchings*, 10 Lea, 328; *Greenlaw* v. *Pettit*, 87 Tenn. 469.

Similar provisions have been incorporated in the Codes of nearly all the states.

Tiedeman, Com. Paper, § 13; Caruthers, History of a Lawsuit, 49; Pom. Rem. & Rem. Rights, § 118.

Yet no decision has been found holding that such a provision changes the liability of joint indorsers.

Willis v. *Green*, 5 Hill, 232, 40 Am. Dec. 351, anterior to New York Code, reaffirmed in *Hubbard* v. *Matthews*, 54 N. Y. 50, 13 Am. Rep. 562; *Gates* v. *Beecher*, 60 N. Y. 523, 19 Am. Rep. 207.

That portion of the Tennessee statute that provides that right of suit shall survive only had the effect to give the remedy in common law that had all the while been given in courts of equity.

Saunders v. *Wilder*, 2 Head, 578.

No motives of policy could prompt a legislature to deny to citizens the right to make a joint contract; and it may be doubted whether it would be in its constitutional power to do so.

Com. v. *Perry*, 155 Mass. 117, 14 L. R. A. 825; *Godcharles* v. *Wigeman*, 113 Pa. 431; *Leep* v. *St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264; *State* v. *Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359.

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

The plaintiff in error, who was plaintiff below, sued the defendant as indorser of the following note:

"Duluth, Minn., Feb. 28, 1893.

"$2,500.

"July the 15, 1893, after date, we promise to pay to the order of F. A. Stratton and T. F. Singiser twenty-five hundred dollars. Payable at the Iron Exchange Bank, Duluth, Minn.; value recd.; with interest at the rate of 6 per cent per annum.

"A. R. Merritt.
"E. T. Merritt."

Indorsed:

"T. F. Singiser.
"F. A. Stratton."

This note had been presented by Stratton to the City Savings Bank of Chattanooga, indorsed as above shown, for discount, and he received the money thereon. The note was sent to the bank at Duluth for collection, was not paid, and duly protested, notice thereof being given to Stratton alone. The City Savings Bank assigned, and its assignee brought this suit against Stratton. He resisted payment on the ground that both he and Singiser were discharged by reason of the failure to give Singiser notice. The circuit court held him not liable, and the plaintiff appealed in error.

Here the argument is made for Stratton that he was a joint indorser of the paper with Singiser, and that his obligation as such was a joint obligation, and notice to his co-obligor was essential to bind him. On the contrary, it is insisted by plaintiff that, treating him as a joint indorser, notice to his co-obligor was not essential to bind him, but notice to one joint indorser was sufficient. There is very persuasive and respectable authority for this proposition. *Dodge* v. *Bank of Kentucky*, 2 A. K. Marsh. 917; *Higgins* v. *Morrison*, 4 Dana, 100. But the weight of authority is that (except in case of partners) notice to one joint indorser is not sufficient to bind either. Story, Prom. Notes, §§ 239, 255; 3 Kent, Com. § 44, p. 105, and note; Tiedeman, Com. Paper, § 336; 1 Dan. Neg. Inst. §§ 594, 595; 2 Dan. Neg. Inst. § 999*a*; 1 Parsons, Notes & Bills, chap. 12, p. 502. So, if the question stood only as put on the right of defendant as joint indorser, the judgment would be sustained by the weight of authority; whether by the weight of reason, and treated by us as controlling, we need not now determine, for plaintiff's right of recovery does not depend on the question thus settled, if it is assumed to be settled by the principles of the common law. Our statute provides that "all joint obligations and promises are made joint and several and the debt or obligation shall survive against the heirs and personal representatives of deceased obligors as well as against the survivors, and suits may be brought and prosecuted on the same against all or any part of the representatives of deceased obligors as if such obligations and assumptions were joint and several." Mill. & V. Code, § 3486. In addition to this statutory creation of joint and several liability on joint obligations and promises, with its added right of suit, another section provides for right of suit only, as follows: "Persons jointly or severally or jointly and severally bound on the same instrument or by judgment decree or statute, including the makers and indorsers of negotiable paper, and sureties may all or any part of them be sued in the same action." Mill.

& V. Code, § 3484. This latter section (which is first in order of Code arrangement) relates alone to procedure. The first quoted relates, not only to procedure, but fixes the right. It must be given its full legal effect. And its effect is to make defendant, not only a joint, but several, indorser with Singiser; not only a joint obligor, but a several obligor in the liability of indorser assured by his indorsement. The authorities and cases by them referred to, sustaining the proposition advanced that a joint indorser is not bound unless all are notified, deal with issues where the questions are as to presentment and demand of joint makers of a note, and as to notice to joint indorsers, as to wh.ch, on these questions, the rules of law are practically the same; but our statute devests such an indorsement of its character of joint indorsement, and makes it joint and several, just as the joint note of the makers is made joint and several. Respecting such a note Mr. Story says: "Where the note is the several as well as the joint note of the makers, . . . the holder is at liberty to elect upon whom he will make the demand and presentment." Story, Prom. Notes, § 256. To the same effect see 1 Dan. Neg. Inst. § 596. The reason of the rule in both cases is the same. It is only necessary to make demand in the one case of all the makers where they are joint makers, and to give notice to all the indorsers where they are joint indorsers, to bind those notified. If they are joint and several indorsers, notice to any one is sufficient to bind him.

It follows that defendant Stratton is bound, and *the judgment of the circuit judge to the contrary is reversed*, and judgment will be rendered here against him, and for all costs.

RHODE ISLAND SUPREME COURT.

John ALLEN
v.
John P. ALLEN.

(19 R. I. —.)

1. Any inhabitant may take shellfish anywhere in the waters of the state and on the shores below high-water mark as it exists from time to time, in the absence of any express restriction on such right.

2. Disturbing the thatch of a riparian owner by digging clams below high-water mark is not a trespass, as the public right of fishery is paramount to the private right to cut grass or sedge.

(May 24, 1895.)

EXCEPTIONS by defendant to rulings of the Supreme Court in Washington County made during the trial of an action to recover damages for defendant's alleged wrongful destruction of plaintiff's thatch while digging clams, which resulted in a verdict in plaintiff's favor. *New trial granted.*

The case sufficiently appears in the opinion.

Mr. **Frederick C. Olney** for defendant.

Mr. **Samuel W. K. Allen** for plaintiff.

Per Curiam:

A riparian proprietor whose land borders upon tide water has, by the common law, certain private rights to the shore between high and low water mark. These do not amount to seisin in fee, but are in the nature of franchises or easements. *East Haven* v. *Hemingway*, 7 Conn. 186, 202; *Simons* v. *French*, 25 Conn. 346, 352; *Lockwood* v. *New York & N. H. R. Co.* 37 Conn. 387. The right to build wharves and to fill out the upland may be exercised, as against any one but the state, provided navigation is not impeded or a nuisance created thereby. *Engs* v. *Peckham*, 11 R. I. 210; *Bailey* v. *Burges*, Id. 330. Some of these rights may be alienated, or annexed to other upland estates, as the right to cut sedge or grass (see citation by Potter, J., in *Providence Steam-Engine Co.* v. *Providence & S. S. S. Co.* 12 R. I. 369, 34 Am. Rep. 652), and the right to take seaweed which is stranded on the beach (*Bailey* v. *Sisson*, 1 R. I. 223; *Kenyon* v. *Nichols*, Id. 106; *Hall* v. *Lawrence*, 2 R. I. 218, 57 Am. Dec. 715; *Knowles* v. *Knowles*, 12 R. I. 400). When it is necessary or convenient, these alienable rights may be defined by boundaries, but this circumstance does not enlarge the character of the right. The state holds the legal fee of all lands below high-water mark, as at common law, as has been uniformly and repeatedly decided by this court. *Bailey* v. *Burges*, 11 R. I. 320; *Engs* v. *Peckham*, Id. 210, 224; *Brown* v. *Goddard*, 13 R. I. 81; *Folsom* v. *Preeborn*, Id. 200, 204. By the common law of Massachusetts and Maine, based upon or declared by a colonial ordinance, the fee in lands, to a certain distance below high-water mark, was given to the upland proprietor, and this rule applies to such portions of our shore as have been ceded from Massachusetts. This right of the state is held, however, by virtue of its sovereignty, and in trust for all the inhabitants,—not as a private proprietor. The public rights secured by this trust are the rights of passage, of navigation, and of fishery, and these rights extend, even in Massachusetts, to all land below high-water mark, unless it has been so used, built upon, or occupied as to prevent the passage of boats, and the natural ebb and flow of the tide. *Weston* v. *Sampson*, 8 Cush. 347, 54 Am. Dec. 764; *Moulton* v. *Libbey*, 37

NOTE.—Upon the question of the right of the owner of land bounding on tide water to control the shore below high-water mark, see authorities collected in *notes* to Miller v. Mendenhall (Minn.) 8 L. R. A. 89, and Eisenbach v. Hatfield (Wash.) 12 L. R. A. 632.

Me. 472, 59 Am. Dec. 57; *Packard* v. *Ryder*, 144 Mass. 440, 59 Am. Rep. 101. The establishment of a harbor line permits the riparian owner to carry the upland or high-water mark out a certain distance from the natural shore. Actual extension of the upland to the new line extinguishes all public rights within it. The land which was formerly shore becomes upland, and, while the rights to shore and upland are not changed, they are carried further out into the tidal stream or sea. *Engs* v. *Peckham*, 11 R. I. 224; *Providence Steam-Engine Co.* v. *Providence & S. S. S. Co.* 12 R. I. 348, 355, 34 Am. Rep. 652. Until actual filling out, the public rights exist as before. *Gerhard* v. *Seekonk River Bridge Comrs.* 15 R. I. 334. Shellfisheries are public rights which may be regulated for the public good (*State* v. *Cozzens*, 2 R. I. 561; *State* v. *Medbury*, 3 R. I. 138; *New England Oyster Co.* v. *McGarvey*, 12 R. I. 392), as may also the rights of navigation. In the absence of any express restriction, any inhabitant may take shellfish anywhere in the waters of the state, and on the shores below high-water mark as it exists from time to time. In doing so, he may disturb the soil, and dig up the grass or sedge, if necessary. The public right of fishery is paramount to the private right to cut grass or sedge. *Bigott* v. *Orr*, 2 Bos. & P. 472; *Parker* v. *Cutler Mill Dam Co.* 20 Me. 353, 37 Am. Dec. 56; *Peck* v. *Lockwood*, 5 Day, 22; *Lakeman* v. *Burnham*, 7 Gray, 437; *Proctor* v. *Wells*, 103 Mass. 216; and other Massachusetts cases cited above.

The instructions of the judge before whom the case was tried were erroneous in affirming that it was a trespass in the defendant to disturb the plaintiff's thatch in digging clams.

A new trial must be granted.

TEXAS SUPREME COURT.

HANOVER FIRE INSURANCE COMPANY, *Pff in Err.*, v. SHRADER & ROGERS.

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

1. **Sunday cannot be excluded from the computation of the thirty days** after motion for rehearing before filing an application for a writ of error, although it is the thirtieth day and the clerk is not bound to file the application on that day, since he may lawfully do so.

2. **The right to file papers on Sunday** during the progress of a suit is clearly implied by Rev. Stat. art. 1184, prohibiting the commencement of suits on that day or the issue of process, with certain exceptions.

3. **An application for a writ of error is sufficiently filed on Sunday** when the clerk received it on that day, but, being doubtful as to his power to file it, merely noted the fact and date of its receipt, and upon the next day marked it filed.

(December 9, 1895.)

APPLICATION for a writ of error to the Court of Civil Appeals, Second Supreme Judicial District, to review a judgment affirming a judgment of the District Court for Hardeman County in favor of plaintiffs in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Writ refused.*

The case sufficiently appears in the opinions.

An application for a writ of error having been filed in this case and a motion to dismiss the application having been made, **Gaines**, Ch. J., on November 21, 1895, delivered the following opinion:

In this case the motion for a rehearing was overruled in the court of civil appeals on the 18th day of October, 1895, and on the 17th day of November the application for a writ of error was delivered to the clerk of that court, who noted upon it the fact and date of its delivery, retained it in his custody, and marked it "Filed" on the 18th. The 17th of November was the thirtieth day after the motion for a rehearing was overruled, and was Sunday. The parties adversely interested in the proceeding have met the application *in limine* by presenting a motion to dismiss. If the application was not filed in time, it is the duty of the court to dismiss it without a motion. The precise question presented has not been passed upon in this court, and we therefore invite written arguments or citations of authorities from counsel for the respective parties upon the point or points presented. Was the filing on Monday, the 18th, too late? If so, was the delivery to the clerk on the Sunday, the 17th, of any effect? The clerk will notify counsel, and action upon the application will be suspended until the 3d day of December, next.

Messrs. **Morgan & Thompson, A. G. Walker,** and **D. E. Decker** for applicant.

Mr. **Burton P. Eubank,** *contra.*

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

Counsel for the respective parties in this case, in response to the request of the court made at a former day of this term, have filed written arguments upon the questions to which their attention was then called, and have materially diminished the labors of the court.

Upon the first question, our conclusion is that Sunday, although the thirtieth day from that on which the motion for a rehearing was overruled by the court of civil appeals (32 S. W. Rep. 344), cannot be excluded from the computation. Such is the general

NOTE.—For *note* on extension of time when last day falls on Sunday, see Brown v. Vailes (Colo.) 14 L. R. A. 120.

See also 36 L. R. A. 796; 38 L. R. A. 749.

rule, although there are some conflicting decisions. It was adopted by this court, after a careful consideration, in *Burr* v. *Lewis*, 6 Tex. 76, and we have found no case in this court which modifies that decision. Where the time allowed for doing an act is very short, it is usual to exclude a Sunday. The principle would seem to be that, when but a few days are allowed in which to do the act, it is not to be presumed that the legislature intended further to abbreviate it, in effect, by including a day ordinarily observed as a day of cessation from all ordinary business. For example, where two days are designated, it is not reasonable to hold that it was the purpose to include a Sunday, when the practical effect of the ruling would be to reduce the time to one day only. But, where weeks are included in the time allowed, the reason does not apply. Sunday at common law is *dies non juridicus*. *Swan* v. *Broome*, 1 W. Bl. 496, 526. When the point was first raised in the case cited, Lord Mansfield was evidently in great doubt whether a court could not render a valid judgment upon a Sunday, but, after full consideration, the question was resolved in the negative. That a judgment rendered on that day is void may now be regarded as settled law. It was so held by the court of appeals in *Shearman* v. *State*, 1 Tex. App. 215. But it was also recognized that, while a judgment could not be pronounced, a verdict might be returned on Sunday. See also *Heghtaling* v. *Osborn*, 15 Johns. 118. A distinction is made between judicial acts and those of a ministerial character, and it seems to be generally held that, in the absence of a statute, ministerial acts performed on Sunday are valid. The service of process on Sunday was forbidden by the statute of 29 Car. II., and we think that the English cases which hold the ministerial acts of officers of the court void because performed on Sunday are referable to that act. Expressions of opinions may be found in the books to the effect that the statute was merely declaratory of the common law. Early decisions of the courts at Westminster hold to the contrary. *Mackalley's Case*, 9 Coke, 66*b*; *Bedoe* v. *Alpe*, W. Jones, 156; *Swan* v. *Broome*, *supra*. See also *Sayles* v. *Smith*, 12 Wend. 59, 27 Am. Dec. 117. But we have not found it necessary to determine that question. In 1846 our legislature provided that "no civil suit shall be instituted, nor shall any process be had on Sundays, except in cases of attachment or sequestration." Pasch. Dig. art. 1424. The substance of this provision is found in article 1184 of the Revised Statutes, which reads as follows: "No civil suit shall be commenced, nor shall any process be issued or served, on Sunday or any legal holiday, except in cases of injunction, attachment, or sequestration." The prohibition against the filing of a petition (which is the commencement of a suit under our law), and against the issue and service of process, clearly implies that the filing of papers during the progress of the suit was to be allowed. See *Houston, E. & W. T. R. Co.* v. *Harding*, 63 Tex. 162; *Crabtree* v. *Whitesell*, 65 Tex. 111. The statute does not refer to judicial acts, and they are left as at common law. The filing of an application for a writ of error in the court of civil appeals is the continuation of a suit and not its commencement. In *Bedoe* v. *Alpe*, cited above, the information was filed on a Sunday, and it was held that the filing was valid. We conclude from these considerations, that an application for a writ of error may be lawfully filed on a Sunday, but do not hold that the clerk is bound to do an official act of that character on that day. We think he may lawfully refuse to act when a paper is tendered to him to be placed upon the file, but that, if he does act, his act is valid. Sunday being regarded by our people generally as a day of rest, and by many as a day of religious observance, in our opinion, save in exceptional cases, the officers of the court are not required to perform any official functions on such a day; and it is their privilege to refuse their performance should they elect to do so. We may imagine cases in which it may be proper to hold that a ministerial duty performed on a Sunday would be voidable, if not void; such, for example, as a sale by a sheriff of personal property under judicial process. But, should it be so held in regard to such a sale, we think the ruling would rest upon the ground that it would be unjust to the defendant in execution that his property should be sold on a day which is usually devoted to a cessation of business, and on which the conscientious scruples of many persons would forbid their attendance upon and bidding at the sale. But see *Sayles* v. *Smith*, *supra*.

It follows from what we have said that we think the file mark put upon the paper on Monday was too late; and it remains, therefore, to consider the effect of the clerk's indorsement as to its receipt upon Sunday. The just inference from the indorsement is that the application was delivered to the clerk for the purpose of filing it, and that the clerk received it, but, being doubtful as to his power to place it upon the file upon that day, noted the fact and date of its receipt, and marked it "Filed" upon the next day. Where a paper is deposited with the clerk of a court for the purpose of making it a part of the records in the case, it is filed. The evidence which is looked to by the court in determining whether the paper has been filed or not is the clerk's indorsement of the fact upon the paper itself. The form of that indorsement is usually the word "Filed," with the date. We think, however, if the indorsement shows the fact in other words, it is sufficient.

We conclude that the application was lawfully filed on Sunday, and that the clerk's indorsement is evidence of the fact of its filing, and therefore that we have jurisdiction of the application; but, having examined it, we also conclude that it shows no error, and it is therefore *refused*.

STATE of Texas, *Appt.*,
v.
AUSTIN CLUB.

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

An incorporated social club is not engaged in the business of selling intoxicating liquors within the meaning of Sayles's Civ. Stat. (Tex.) art. 3226*a*, imposing an occupation tax on such business, where the club does not sell liquors for profit, and sells them only to its members.

(December 9, 1895.)

QUESTIONS certified by the Court of Civil Appeals, Third Supreme Judicial District, for the opinion of the Supreme Court, which arose upon an appeal by the State from a judgment of the District Court for Travis County in favor of defendant in an action brought to enforce payment of the license tax alleged to be due from defendant for selling intoxicating liquors. *Affirmance advised.*

The facts are stated in the opinion.

Messrs. **M. M. Crane,** Attorney General, and **H. P. Brown,** Assistant Attorney General, for appellant:

An incorporated club organized for social and other purposes, that continuously from time to time purchases in bulk spirituous, vinous, and malt liquors, and medicated bitters, and through its authorized agent and employee retails the same to its members only, without regard to profit, in quantities less than one quart, at an agreed price per drink, which each member pays according to the quantity he calls for and consumes, is liable to the payment of the annual tax imposed and levied by virtue of the act of the legislature of this state, passed on the 4th day of April, 1881.

Sayles's (Tex.) Civ. Stat. art. 3226*a*, §§ 1–3; *United States* v. *Wittig*, 2 Low. Dec. 466; *People* v. *Soule*, 74 Mich. 250, 2 L. R. A. 494; *State* v. *Neis*, 108 N. C. 787, 12 L. R. A. 412; *State* v. *Lockyear*, 95 N. C. 633, 59 Am. Rep. 287; *State* v. *Horacek*, 41 Kan. 87, 3 L. R. A. 687; *State* v. *Tindall*, 40 Mo. App. 271; *State* v. *Essex Club*, 53 N. J. L. 99; *People* v. *Andrews*, 115 N. Y. 427, 6 L. R. A. 128; *Martin* v. *State*, 59 Ala. 34; *Marmont* v. *State*, 48 Ind. 21; *Chesapeake Club* v. *State*, 63 Md. 446; *State* v. *Easton Social, L. & M. Club*, 73 Md. 97, 10 L. R. A. 64; *State* v. *Mercer*, 32 Iowa, 405; *Rickart* v. *People*, 79 Ill. 85; *State* v. *Tindall*, 40 Mo. App. 271; *People* v. *Luhrs*, 7 Misc. 503; *Com.* v. *Tierney*, 148 Pa. 552; *Nogales Club* v. *State*, 69 Miss. 218; *Com.* v. *Steffner*, 2 Pa. Dist. R. 152; *People* v. *Sinell*, 34 N. Y. S. R. 898; *People* v. *Bradley*, 33 N. Y. S. R. 562; *Com.* v. *Jacobs*, 152 Mass. 276.

Article 3226*a*, being applicable to all persons or corporations engaged or engaging in the business of selling spirituous, vinous, and malt liquors, etc., in quantities less than one quart, and such liquors having been sold by said Austin Club within the quantity prescribed by statute, and said corporation or its agents having made a business of so selling such liquors, the sales constituted the business of selling, and was in violation of law.

Barden v. *Montana Club*, 10 Mont. 330, 11 L. R. A. 593.

Though the Austin Club may have been incorporated for other purposes, and its main business was the advancement and promotion of other objects, yet if, as an incident to such other business, it also engaged in the sale of spirituous, vinous, and malt liquors, it was guilty of a violation of the statute, and liable to the payment of the taxes sued for in this case.

La Norris v. *State*, 13 Tex. App. 34, 44 Am. Rep. 699.

Messrs. **J. L. Peeler and Fisher & Townes,** for appellee:

A club organized and maintained for social purposes only, and not with the view of conducting the business of a vendor of liquors for profit, is not subject to a state license tax; and such a club is not within the law requiring a license to be paid before liquors dispensed for a price paid by members can be distributed to and among them. The purpose of the legislature was to regulate the dealing in liquors as an occupation or business, and to require a license to vendors of liquor only where the selling is engaged in as an occupation or business followed as a means of or with a view to profit.

Sayles's (Tex.) Civ. Stat. art. 3226*a*; Crim. Code, art. 110; *Koenig* v. *State* (Tex.) 26 S. W. Rep. 835; *State* v. *St. Louis Club*, 125 Mo. 308, 26 L. R. A. 573; *Tennessee Club* v. *Dwyer*, 11 Lea, 452, 47 Am. Rep. 298; *Seim* v. *State*, 55 Md. 566, 39 Am. Rep. 419; *Graff* v. *Evans*, L. R. 8 Q. B. Div. 373; *Com.* v. *Pomphret*, 137 Mass. 564, 50 Am. Rep. 340; *Piedmont Club* v. *Com.* 87 Va. 540; *Barden* v. *Montana Club*, 10 Mont. 330, 11 L. R. A. 593; *State* v. *McMaster*, 35 S. C. 1; *Standford* v. *State*, 16 Tex. App. 331; *Williams* v. *State*, 23 Tex. App. 499.

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

The court of civil appeals of the third supreme judicial district certified to this court the following statement and question:

"On September 21, 1893, the state of Texas brought this suit to recover $1,200, alleged to be due from the Austin Club, a corporation, as occupation taxes for continuously engaging in the business of selling spirituous, vinous, and malt liquors, and medicated bitters, in quantities less than one quart, from December 27, 1889, up to the date the petition was filed. The pleadings, evidence, and assignments of error raise the question herein certified. The trial court's findings of facts consist of an agreed statement of the facts upon which the case was there, and is here, submitted. Said statement is as follows:

"'It is agreed by and between the parties hereto, the state of Texas acting by and through her district attorney, A. S. Burleson, and the Austin Club, acting by and through its attorneys of record, John L. Peeler, Esq., and Messrs. Fisher & Townes, that this cause shall be submitted to the court for its determination upon the following agreed statement of facts:' The Austin Club is a corporation created under the laws of the state

NOTE.—See, in connection with the above case, that of State v. St. Louis Club (Mo.) 26 L. R. A. 573, and other cases cited in *footnote* thereto.

See also 31 L. R. A. 510; 34 L. R. A. 94.

of Texas, the charter of which is, in substance, as stated below, except where it is copied. Article 1 provides that James R. Johnson, Lewis Hancock, A. P. Wooldridge, W. H. Tobin, E. Saunders, John Orr, and M. D. Mather, and their associates, are to constitute the body politic known as the 'Austin Club,' with the usual powers of contracting and being contracted with, suing and being sued, and the right to purchase and hold real, personal, and mixed property, to have a seal, and exist for a term of fifty years. Section 2 of the charter is as follows: 'Sec. 2. The purpose and objects of this corporation are the encouragement of social intercourse among its members, the support of literary undertakings and cultivation of literature, the maintenance of a library and reading room, and the promotion of fine arts.' Section 3 provides that the business shall be transacted in the city of Austin, and that it shall be under the control of a board of eleven directors, to be elected at the annual meetings of the members, to be held on the first Tuesday in January of each year. It provides for the filling of vacancies in the board, and names the directors for the first year. Section 4 provides that there shall be no capital stock, the funds of the club to be made up of initiation fees and monthly dues. The charter was duly executed and filed in accordance with law, and the corporation organized thereunder. 'Second. That, since the date of the incorporation of said club, it has from time to time purchased, in bulk, spirituous liquors and medicated bitters, and, through its authorized agent and employee, retailed same to its members in quantities less than one quart, and at an agreed price per drink, and has continuously so done to this day. Third. That each member of said club pays for the quantity of spirituous liquors, etc., he calls for and consumes. Fourth. That only members of said club are permitted to purchase, in any quantity, from said club, spirituous, vinous, and malt liquors, etc. Fifth. That said club is carrying on its business and is domiciled in the second story of a building situated on lot No. 1, in block No. 84, in Austin, Travis county, Tex., and is using, in connection therewith, the following stock, fixtures, and personal property: two billiard tables and one pool table, and billiard racks, cues, and balls therefor; one oak sideboard; seven oak tables; two oak desks; ten upholstered chairs, and two upholstered sofas; thirty-six chairs in billiard room and reading rooms; three carpets, and bar glasses, fixtures, etc. Sixth. That said club has not paid to the collector of taxes of Travis county, for the state of Texas, the annual tax levied on every person engaged in selling spirituous liquors, etc., in quantities less than a quart,—$300 for the year ending December 27, 1890, nor $300 for the year ending December 27, 1891, nor $300 for the year ending December 27, 1892, nor $300 for the year ending December 27, 1893,—nor any part thereof. Seventh. That said club has continuously, since its incorporation, paid internal revenue license to the United States as liquor dealers. Eighth. That said club does not sell spirituous liquors, etc., for profit, and that the money arising from sales of spirituous liquors, etc., to members is placed in the treasury of the club, and is only used for the expenses of the club, and replenishing the stock of liquors, etc. Ninth. That said club is now in debt about $1,000, which is the excess of expense over the revenues derived from the sales of liquors, etc., dues, and initiation fees, received since its organization. Tenth. That said club numbers 100 members. Eleventh. That said club sells only the finest imported whiskies, and the price charged therefor is 25 cents for two drinks; and beer it sells in bottles, for 15 cents per pint and 25 cents per quart. Twelfth. That said club keeps on hand, for use of its members, the latest and most advanced literary periodicals and magazines. Thirteenth. That its by-laws, and rules for its regulation, are as follows.'"

The association adopted by-laws, of which we will make extracts, substantially, and by quotation, where necessary, of so much as are material to the question certified for our decision. The first article of the by-laws states the purpose of the corporation to be the same as that stated in the charter. Article 3 of the by-laws provides for the membership of the club,—in substance, that such membership is not to be limited; each member is to be elected by the board of directors by ballot,—then proceeds to prescribe the qualifications of the members, and the method of proposing candidates and acting upon such application. Article 4 of the by-laws fixes the entrance and initiation fee at $25, and the annual subscription for all members at $30, payable monthly, in advance, on the 1st of each month. Article 7 makes it the duty of the president of the club, on the first day of each quarter, to appoint three members of the board of directors, called the "house committee," whose duty it is to exercise control and supervision, "in the broadest sense of these terms," over the management and conduct of the clubhouse. Article 8 is in these words: "Nonresidents of Travis county may be admitted as contributing members upon the payment, in advance, of the initiation fee provided for members: provided, that they shall be proposed and elected in accordance with article 3. Such contributing members shall be entitled to all the privileges accorded to regular members, except that of voting and holding office." Article 9 permits any member to introduce, on his own responsibility, a stranger, who does not live in the limits of Travis county, and is not engaged in business therein, for a period of one week, under certain regulations, and contains this provision: "In event of strangers so invited failing to settle their accounts, the member introducing them shall become liable for the amount of their indebtedness."

Under authority conferred by the by-laws, rules were adopted for the government of the club. Rule 2 authorizes and directs the house committee to make all purchases or direct the same, to regulate the prices to be charged for all articles served by the club, report to the secretary the names of members who may be in arrears, etc. Rule 4 permits strangers, not residing or engaged in business in Travis

county, to be introduced as visitors, and makes the members introducing any visitors responsible for their deportment and for any debts contracted by them. No person residing or engaged in business in Travis county, not a member of the club, would be permitted to visit the club. Rule 6 of the club is as follows: "The club shall be open at 8 o'clock A. M., and shall be closed against the admission of members at 2 o'clock A. M. The lights shall be turned off, and the clubhouse closed, at 2 o'clock A. M. every night." Rule 16 is as follows: "No supplies furnished by the club shall be sold on credit. Supplies shall be paid for at the time of receipt, in such manner as the house committee shall from time to time direct."

"The statute under which the state claims that the Austin Club is subject to an occupation tax reads as follows: 'Hereafter there shall be levied upon and collected from any person, firm, or association of persons engaged in the business of selling spirituous, vinous, or malt liquors, or medicated bitters, an annual tax upon every such occupation or separate establishment, as follows: For selling spirituous, vinous, or malt liquors, or medicated bitters, in quantities of less than one quart, $300.' Sayles's (Tex.) Civ. Stat. art. 3226a.

"The material and controlling question in the case is this: Under the agreed facts as above set out was the Austin Club engaged in the business of selling spirituous, vinous, and malt liquors, and medicated bitters, within the meaning of the statute? That question the court of civil appeals for the third district has decided to certify, and it is hereby certified, to the supreme court for decision."

In addition to the article of the Revised Statutes quoted by the court in its submission of the question certified, we call attention to section 4 of that article, which requires all persons desiring to engage in the sale of spirituous, vinous, or malt liquors to give bond, among the conditions of which are the following: That "he shall keep an open, quiet, and orderly house or place for the sale of spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication." In the same section, "open house" is defined as follows: "An open house within the meaning of this act is one in which no screen or other device is used or placed, either inside or outside of such house or place of business, for the purpose of or that will obstruct the view through the open door or place of entrance into any such house or place where intoxicating liquors are sold in quantities less than a quart." The same section defines "quiet house" in this language: "A quiet house or place of business within the meaning of this act is one in which no music, loud and boisterous talking, yelling, or indecent or vulgar language is allowed, used, or practiced, or any other things calculated to disturb or annoy persons residing or doing business in the vicinity of such house or place of business, or those passing along the streets or public highway." The 8th section of the same article provides: "The license required by this act shall be posted in some conspicuous place in the house where the business or occupation for which such license is necessary is carried on; and for a failure to so conspicuously post such license at or in such place of business, any person or any member of any firm or association of persons so failing shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not to exceed $25; and each day of such failure to so conspicuously post such license shall constitute a separate offense." Sections 9 and 10 of the said article apply particularly to persons engaged as retail liquor dealers, under the license required by the law.

The question presented is: Was the Austin Club, in dispensing, to its members and their guests, liquors, in the manner stated, engaged in the "business of selling spirituous, vinous, or malt liquors," within the meaning and intent of article 3226a, as above quoted?

In the cases of *Williams* v. *State*, 23 Tex. App 499, and *Standford* v. *State*, 16 Tex. App. 331, the prosecutions were based upon article 110 of the Penal Code of this state, which is in the following language: "Any person who shall pursue or follow any occupation, calling, or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes so due, and not more than double that sum." In the cases cited above, the court defined the word "occupation" as follows: "'Occupation,' as used in this statute, and as understood commonly, would signify a vocation, calling, trade,—the business which one principally engages in to procure a living or to obtain wealth. It is not the sale of liquor that constitutes the offense. It is the engaging in the business of selling without paying the occupation tax. It does not require even a single sale to constitute the offense, for a person may engage in the business without succeeding in it, even to the extent of one sale." In the case of *Koenig* v. *State* (Tex.) 26 S. W. Rep. 835, the appellant had been prosecuted and convicted for playing cards in a clubroom at Cuero, which club was organized and conducted substantially under the same rules as in the case now before us. The indictment charged that the game was played with cards in "a house for retailing spirituous liquors," and the court of criminal appeals, in an able and exhaustive opinion by Presiding Justice Hurt, held that the clubroom was not "a house for retailing spirituous liquors," within the meaning of the statute. In announcing the conclusion arrived at by the court, the learned judge said: "We are of opinion that, upon authority and reason, it must be held, under the facts of the present case, the transaction was not the sale of the liquor in the way of trade; and that neither the association, its members, nor its steward, were engaged in the occupation of selling liquors. If this be true, was the clubroom a place for retailing liquors? . . . It is very clear, both from the decisions we have cited, and our statutes, that the club, its members, or steward, are not engaged in the occupation of

selling liquors in quantities less than one quart." In the case before us, no question is made as to this being a device to evade the law. It is therefore to be treated as a bona fide club, formed for the purposes expressed in its charter.

The question as to whether or not the transactions of dispensing liquors to the members and guests, as in this instance, constituted sales within the meaning of statutes prohibiting such sales, has been the subject of much judicial investigation, upon which there is a great conflict of authority; but that question is not involved in the case now presented to us, and we refrain from discussing it, and will not undertake to review the many authorities bearing upon that question cited by the counsel for both parties in this case. Clubs like this have been formed and maintained in many of the states, and in some of them the question now before the court has been adjudicated, upon which there is likewise a conflict of authority. But we believe that the decided weight of authority upon this question supports the conclusion arrived at by the court of criminal appeals in the case of *Koenig* v. *State*, cited above, to the extent that it holds that the club was not engaged in the business of selling spirituous liquors. *Martin* v. *State*, 59 Ala. 34; *Piedmont Club* v. *Com.* 87 Va. 540; *Tennessee Club* v. *Dwyer*, 11 Lea, 452, 47 Am. Rep. 298; *State* v. *Boston Club*, 45 La. Ann. 585, 20 L. R. A. 185; *Graff* v. *Evans*, L. R. 8 Q. B. Div. 373. It has been held, on the other hand, by courts of eminent ability, and upon strong reasoning, that persons engaged in like business, either as a voluntary association or as a corporation, were engaged in the business of selling spirituous liquors. *United States* v. *Wittig*, 2 Low. Dec. 466, Fed. Cas. No. 16,748; *People* v. *Soule*, 74 Mich. 250, 2 L. R. A. 494; *State* v. *Bacon Club*, 44 Mo. App. 86.

The conditions of the bond, requiring obligee to keep an open, quiet, and orderly house or place for the sale of spirituous, vinous, or malt liquors, together with the provisions of the statute defining what are open and quiet houses, and the further provision requiring the posting of the license in a public place, indicate that the legislature intended that the business of selling spirituous, vinous, or malt liquors should be conducted in a public place, open to all persons to enter therein, to the observation of those passing by such place, and guarding against all of those things which would be calculated to lure the unsuspecting into such places, or to offend or corrupt those who might visit them. These provisions are inconsistent with the idea that the legislature was attempting to regulate the dispensing of liquors in the private manner shown by the facts of this case, but it shows that the business, as expressed in the article quoted, was intended to be a business conducted in a public manner, and in a place to which the public would have free access as stated above. We think that this tends very strongly to support the position taken by the appellee in this case, that the language of the statute does not embrace the business as transacted by this club. Under the conditions of the bond required of persons engaging in the business of selling liquors and the provisions of the statute regulating the manner of conducting it, no license could be obtained to sell spirituous liquors in the private manner that it was done by this club and has been done by many other clubs in the state for many years. The conclusion must be drawn that the legislature either did not intend that such business as that conducted by the Austin Club should be embraced in the terms of the statute, or it did intend that all sales of a private character should be absolutely prohibited. We do not think that the latter conclusion can be drawn from this and other provisions of the Penal Code upon the subject of selling spirituous liquors. The Penal Code prohibits the sale of liquors under various other circumstances, as, for instance, all sales to Indians, to minors, and in local option districts, without regard to whether the person selling has a license therefor or not; and if the legislature intended to prohibit this class of business, if it be termed a business, it might easily have done so in plain and unambiguous language, as it has done with reference to the prohibited sales above stated.

Article 110 of the Penal Code was enacted for the purpose of enforcing the license law, and compelling persons pursuing the occupations which were taxed by the state to pay the taxes levied and to procure the license required. In fact, it is the most efficient means provided for the collection of such taxes and the enforcement of the law. The court of criminal appeals is the court of last resort in this state in criminal matters, and to its final judgment must be submitted all questions arising upon criminal prosecutions. The statute now being construed by us is so closely related to and dependent upon the criminal statute (Penal Code, art. 110), that we feel constrained to follow the decision of the court of criminal appeals in this matter, more especially as it is well supported by authority, and, in fact, by the weight of authority; and, considering all the provisions of our statute, as cited above, it is not clear that the decision cited is not a correct statement of the law upon the question. If we should hold that a club such as this, transacting its business in the manner that this did, was engaged in the business of selling spirituous liquors by retail, we would, in effect, hold that the place where such club's business was being transacted was a house for the retail of spirituous liquors, and would be in direct conflict with the highest court in criminal matters in this state. If we were to hold that the appellee is liable for the taxes, then, if indicted, under article 110, Penal Code, for selling without having procured license therefor, it would logically follow that, if the case of *Koenig* v. *State* is a correct enunciation of the law, the person dispensing the liquors for the club would not be liable to indictment for so doing, and the court of criminal appeals must so hold. Thus, we would have the state of case in which one branch of this department of the state government would enforce the payment

of a tax, and another branch of the same department would hold that such person was not liable for the tax; each court so holding being supreme in the sphere of its jurisdiction. In this matter, this court is situated differently from any of the courts of other states which have dealt with this subject, for the reason that this court is the court of last resort in civil matters, but has no jurisdiction in criminal matters, while in other states the same court had jurisdiction of matters, both civil and criminal, arising out of the matter in dispute. Harmony of decision between these courts is important, and should be preserved where it can be upon proper principles, and in no case of doubt would we be willing to conflict with the decisions of that court in matters so nearly related and intimately connected with the subjects of its jurisdiction. We therefore, for these reasons and upon the authorities cited, answer that the Austin Club, in the transactions stated by the court of civil appeals, conducted in the manner therein stated, was not engaged in the business of selling spirituous, vinous, and malt liquors and medicated bitters. We call attention to the fact that we have not considered, in this opinion, the difference between article 3226a and the act of the 23d legislature upon the same subject. See Laws 23d Leg. p. 177.

WISCONSIN SUPREME COURT.

Mary E. SMITH, *Respt.*,
v.
MILWAUKEE BUILDERS' & TRADERS' EXCHANGE *et al.*, *Appts.*

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

1. **The reservation by an employer, under an independent contract** for the construction of a building, of the right of inspection of the work, does not change the character of the contract so as to render the employer liable for the negligence of some of the workmen employed by the contractors.
2. **The common council of a city has power to pass an ordinance** requiring any owner or contractor building or causing to be built any building abutting on a public sidewalk, to cause a roofed passageway to be built in front on the sidewalk after completion of the first story, under a charter provision giving them power to control and regulate the construction of buildings, to control and regulate streets, and to regulate the manner of using the streets and pavements.
3. **An ordinance requiring any owner or contractor constructing any building** abutting on a sidewalk to cause a roofed passageway to be built in front of the building after the completion of the first story is a reasonable one, and any owner or contractor who fails to do so is liable for an injury to one passing on the sidewalk not guilty of contributory negligence.
4. **One who undertakes to construct the iron work in a building,** which is an integral and substantial part thereof consisting of iron girders, beams, and floor joists set in the walls, is a contractor within the meaning of an ordinance requiring any contractor who shall build or cause to be built any building abutting on a public sidewalk to cause a roofed passageway to be built in front on the sidewalk after completion of the first story.
5. **One injured by the negligence of another can recover** only for such future pain as the evidence shows she is reasonably certain to endure; not such as there is a reasonable probability that she will endure.
6. **An instruction that plaintiff is not chargeable with** negligence because she did not use the best means of escaping from receiving the injury is misleading, where she did not know or understand that she was in any danger, and did not adopt any course of action while facing an imminent danger.
7. **A deposition taken before certain persons were made parties** to a suit cannot be used as against them.
8. **Negative testimony is not necessarily confined** to that of witnesses who, though present at a transaction, say that they did not see or did not hear, as testimony which is positive in form may amount merely to negative testimony.
9. **An instruction that the positive testimony of a witness** to the existence of a certain thing, and the testimony of another witness that such a thing does not exist, are equally credible, is erroneous.

(November 8, 1895.)

APPEAL by defendants from a judgment of the Superior Court for Milwaukee County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Reversed.*

Statement by **Winslow, J.**:

This is an action brought to recover damages for injuries to the person of the plaintiff, caused by the falling of a brick from the top of the fourth story of a partially completed building in the city of Milwaukee, owned by the defendant the Milwaukee Builders' & Traders' Exchange. The accident happened on the morning of the 18th of April, 1892. At the time of the accident the defendant exchange was constructing a five-story brick and iron building, and the

NOTE.—For exceptions to general rule as to liability for acts of independent contractors, see *note* to Hawvers v. Whalen (Ohio) 14 L. R. A. 823.

As to obstruction of street or sidewalk for building purposes, see also *note* to Flynn v. Taylor (N. Y.) 14 L. R. A. 556.

30 L. R. A.

See also 33 L. R. A. 564; 37 L. R. A. 146; 40 L. R. A. 345.

appellant Neff had contracted with the exchange to build, and was then engaged in building, the masonry of the building, and had completed the walls to the top of the fourth story. The defendants Bayley, who were copartners, had contracted with the exchange to put in place the structural iron for the building. Both Neff and the Bayleys were performing the work undertaken by them under separate and independent contracts with the exchange. Each of said contracts contained a provision that the contractor should well and sufficiently perform and finish his work under the direction and to the satisfaction of Ferry & Clas, architects, acting as agents for the owner." The contracts also contained provisions for the inspection of the work by the architect and his employees. An ordinance of the city of Milwaukee was introduced in evidence, which was in force at the time of the accident, providing in substance that any owner or contractor who should build a building within the fire limits of the city of Milwaukee, abutting upon any public sidewalk, should, after the completion of the first story of the building, cause a passageway to be laid in the front of the building, upon the sidewalk, and cause the same to be roofed at a height not less than 10 feet, and providing for the punishment for failing to comply with the ordinance. The accident to the plaintiff occurred about 8 o'clock on Monday morning. On the Saturday previous Neff had completed the walls of the building to the top of the fourth story, in readiness for the iron girders to be put in place to support the floor of the fifth story. On leaving work Saturday night, Neff's men put canvass upon the walls of the building, with loose bricks thereon to hold it in place. On Monday morning Neff's men were not at work, but the Bayleys were commencing to put the iron girders in place for the fifth story, and hoisting girders and beams to the top of the fourth story by a derrick. The plaintiff resides about a block and a half from the place of the accident, and was thirty years old. She passed along the sidewalk on Fifth street, opposite the building in question, and went to a drug store on Grand avenue, and a few minutes afterwards she returned, and while passing along the sidewalk, within about 6 feet of the building, a brick was in some manner caused to fall from the top of the building, and struck her on the head, fracturing the skull and severely injuring her. The plaintiff claims that all the defendants are liable for her injuries, by reason of negligence. The evidence was conflicting as to whether there were any guards or barriers placed at the north and south ends of the wall, but it was admitted that no roof had been placed over the sidewalk on Fifth street. The jury returned the following special verdict: "(1) At the time the plaintiff first passed along the sidewalk adjacent to the building on Fifth street, on the morning of the accident, had the north end of that sidewalk been guarded by due precaution against accident to pedestrians? *A.* No. (2) At the time the plaintiff first passed along the sidewalk adjacent to the building on Fifth street, on the morning of the accident, was there a barrier across the north end of said sidewalk sufficient to warn pedestrians it was dangerous to pass along said sidewalk? *A.* No. (3) At the time the plaintiff passed along the sidewalk, adjacent to the building on Fifth street, on the morning of the accident, was the south end of said walk guarded by due precaution against accident to pedestrians? *A.* No. (4) At the time the plaintiff first passed along the sidewalk adjacent to the building on Fifth street, on the morning of the accident, was there a barrier across the south end of said sidewalk sufficient to warn pedestrians that it was dangerous to pass along said walk? *A.* No. (5) Was there any plank across the north end of the sidewalk, which was moved by the men at work in hoisting the iron upon said building, before the plaintiff was injured, and before she passed along Fifth street the first time on that day? *A.* No. (6) Was the brick which fell from the building and injured the plaintiff displaced from the pier? *A.* No. (7) Was the brick which fell and injured the plaintiff a loose brick placed on canvass covering the wall or pier? *A.* Yes. (8) Was the brick which fell and injured the plaintiff caused to fall by the men who were at work hoisting the iron upon the building? *A.* No. (9) Were men there employed in the business of hoisting iron upon the building at the time the plaintiff passed along said sidewalk the first time? *A.* Yes. (10) Was the defendant the Milwaukee Builders' & Traders' Exchange guilty of any negligence or want of care which was the proximate cause of the injury to the plaintiff? *A.* Yes. (11) Was the defendant Max Neff guilty of any negligence or want of care which was the proximate cause of the injury to the plaintiff? *A.* Yes. (12) Were the defendants the Bayleys guilty of want of ordinary care which contributed to the injury? *A.* No. (14) If the court shall be of the opinion that plaintiff is entitled to recover, at what sum do you assess her damages? *A.* $5,000." Judgment for the plaintiff against all of the defendants was entered upon the verdict, and they have appealed separately.

Messrs. **Van Dyke & Van Dyke,** for appellant Neff:

If the barriers had remained in place, and had not been moved by the iron men or others, without Neff's knowledge or consent, plaintiff would have been prevented from passing along the sidewalk, and even if the protection of the tops of the wall with canvass and loose brick was negligence, it would not have caused the injury complained of without the independent act of those who removed the barriers. Such an intervening, independent cause was the proximate cause of the injury. *Marcin* v. *Chicago, M. & St. P. R. Co.* 79 Wis. 141, 11 L. R. A. 506.

The special verdict is inconsistent and cannot support the judgment.

Haley v. *Jump River Lumber Co.* 81 Wis. 421; *Dahl* v. *Milwaukee City R. Co.* 65 Wis. 371; *Schweickhart* v. *Stuewe,* 75 Wis. 157; *Darcey* v. *Farmers' Lumber Co.* 87 Wis. 245; *Ohlweiler* v. *Lohmann,* 82 Wis. 203; *Wightman* v. *Chicago & N. W. R. Co.* 73 Wis. 174, 2 L. R. A. 185.

Where a traveler perceives or knows of repairs or other obstructions in the way, he is obliged to exercise more than usual care and attention in passing.

Bowen v. *Rome*, 23 N. Y. Week. Dig. 406; *Jacobs* v. *Bangor*, 16 Me. 187, 33 Am. Dec. 652; *Dickson* v. *Hollister*, 123 Pa. 421; 2 Shearm. & Redf. Neg. 375; *Nolan* v. *King*, 97 N. Y. 565, 49 Am. Rep. 561; *Moore* v. *Richmond*, 85 Va. 538; 2 Thomp. Neg. 1024; *Whitford* v. *Southbridge*, 119 Mass. 564; *Gosport* v. *Evans*, 112 Ind. 133; *Richmond* v. *Courtney*, 32 Gratt. 792; *Peil* v. *Reinhart*, 127 N. Y. 381, 12 L. R. A. 843; *Wilson* v. *Trafalgar & B. C. Gravel Road Co.* 93 Ind. 287; Ray, Negligence of Imposed Duties—Personal, 129; Elliott, Roads & Streets, 469.

The fact that one knows of the defect in a way and notwithstanding passes over it is not conclusive that he is negligent, although it may be a weighty circumstance in determining the issue as one of fact.

Kenworthy v. *Ironton*, 41 Wis. 647; *Kelley* v. *Fond du Lac*, 31 Wis. 179; Buswell, Personal Injuries, 165; Elliott, Roads & Streets, 470, note, and 641, note.

Where a pedestrian sees or knows of an obstruction on the sidewalk, and can avoid it by passing around it, or over another walk by which the distance is no greater, it is his duty to do so.

Quincy v. *Barker*, 81 Ill. 300, 25 Am. Rep. 278; *Lorenguth* v. *Bloomington*, 71 Ill. 238; *Vicksburg* v. *Hennessy*, 54 Miss. 391, 28 Am. Rep. 354; *Schaefer* v. *Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533; *Erie* v. *Magill*, 101 Pa. 616, 47 Am. Rep. 739; *Parkhill* v. *Brighton*, 61 Iowa, 103.

The owner of premises fronting on a street may obstruct the sidewalk providing such obstruction is temporary only and reasonably necessary. The questions of reasonable necessity and contributory negligence are ordinarily for the jury.

Jochem v. *Robinson*, 66 Wis. 638, 57 Am. Rep. 298; *Raymond* v. *Keseberg*, 84 Wis. 302, 19 L. R. A. 643; Elliott, Roads & Streets, 524–545; *Hundhausen* v. *Bond*, 36 Wis. 29; *Van O'Linda* v. *Lothrop*, 21 Pick. 292, 32 Am. Dec. 261; *Palmer* v. *Silverthorn*, 32 Pa. 65; *Clark* v. *Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Com.* v. *Passmore*, 1 Serg. & R. 217; *State* v. *Omaha*, 14 Neb. 265, 45 Am. Rep. 108; *Loberg* v. *Amherst*, 87 Wis. 634.

Where an abutting owner uses the highway in accordance with law, he is not, in the absence of negligence, liable for accidents resulting from such use, and in such case the burden of proof is not upon him to show the necessity of such use.

Hay v. *Weber*, 79 Wis. 587.

Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms.

Sutherland, Stat. Constr. §§ 349–351; *Crumbly* v. *Bardon*, 70 Wis. 385; 1 Wis. Dig. Construct. Statutes; *Atkinson* v. *Goodrich Transp. Co.* 60 Wis. 160, 50 Am. Rep. 352.

Messrs. **George E. Sutherland** and **Winkler, Flanders, Smith, Bottum, & Vilas** for the other appellants.

Messrs. **Austin & Fehr**, for respondent:

When the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees or is authorized to do, the person who employs the contractor and authorizes him to do the act is equally liable to the injured party.

Robbins v. *Chicago*, 71 U. S. 4 Wall. 657, 18 L. ed 427; *Hundhausen* v. *Bond*, 36 Wis. 40; *Whitney* v. *Clifford*, 46 Wis. 146, 32 Am. Rep. 703.

No one can escape from the burden of an obligation imposed upon him by law by engaging for its performance a contractor.

1 Shearm. & Redf. Neg. § 176; *McCall* v. *Chamberlain*, 13 Wis. 637; *Brusso* v. *Buffalo*, 90 N. Y. 679; *Storrs* v. *Utica*, 17 N. Y. 104, 73 Am. Dec. 437; *St. Paul* v. *Seitz*, 3 Minn. 297; *Logansport* v. *Dick*, 70 Ind. 65, 36 Am. Rep. 166; *Detroit* v. *Corey*, 9 Mich. 165, 80 Am. Dec. 78; *Hawver* v. *Whalen*, 49 Ohio St. 69, 14 L. R. A. 823; *Susquehanna Depot* v. *Simmons*, 112 Pa. 384, 56 Am. Rep. 317; *Lancaster Ave. Imp. Co.* v. *Rhoads*, 116 Pa. 377; Smith, Neg. 88.

If the contract is to perform some work which will necessarily or probably injure others, the owner cannot escape liability by having the work done by a contractor.

Lloyd, Building Contracts, p. 124; *Ellis* v. *Sheffield Gas Consumers' Co.* 2 El. & Bl. 767; *Clark* v. *Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Congreve* v. *Smith*, 18 N. Y. 79.

The exchange procured this nuisance to be committed, and it does not appear to have objected that the ordinance was not complied with, or to the manner in which the work was being carried on.

Sutherland, Stat. Constr. § 443; *McCall* v. *Chamberlain*, 13 Wis. 637; 1 Shearm. & Redf. Neg. § 13.

Where the contractor obligates himself to act according to the direction of an architect, the owner is liable.

Faren v. *Sellers*, 39 La. Ann. 1011; *Schwartz* v. *Gilmore*, 45 Ill. 455, 92 Am. Dec. 227; *Homan* v. *Stanley*, 66 Pa. 464, 5 Am. Rep. 393; 14 Am. & Eng. Enc. Law, p. 832; *Bower* v. *Peate*, L. R. 1 Q. B. Div. 321; *Matheny* v. *Wolffs*, 2 Duv. 137; *Jager* v. *Adams*, 123 Mass. 27, 25 Am. Rep. 7; *Blyth* v. *Birmingham Waterworks Co. Proprs.* 11 Exch. 781; *Vanderpool* v. *Husson*, 28 Barb. 197; *Harper* v. *Milwaukee*, 30 Wis. 365; *Hundhausen* v. *Bond*, 36 Wis. 29.

The same duty devolved upon the defendants Neff and Bayley to erect and maintain barriers upon this sidewalk that did upon the defendant exchange.

The ordinance was valid.

Easton Comrs. v. *Covey*, 74 Md. 262; *Sangamon Distilling Co.* v. *Young*, 77 Ill. 197; *Baumgartner* v. *Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Miller* v. *Valparaiso*, 10 Ind. App. 22.

The ordinance imposed a joint responsibility. The owner or contractor means such contractor as had work to do abutting upon the street, the character of which work might be dangerous to the traveling public. It was a joint and several liability.

Weisenberg v. *Winneconne*, 56 Wis. 667; 17 Am. & Eng. Enc. Law, p. 604, note 3; *Zeller* v. *Martin*, 84 Wis. 4.

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

The claim made by the defendant the

Builders' Exchange, the owner of the building, that Neff and the Bayleys were independent contractors, seems to us well founded. It is true that in their contracts it is provided that the work is to be performed under the direction and to the satisfaction of the architects, acting as agents of the owner, but it is entirely certain from the whole contract that this is simply a reservation of the right of inspection. It is not a reservation of power to control the manner of the work, to change materials to be used, or prescribe ways and methods in which the work is to be carried out. The contractors have agreed to build the building according to fixed plans and specifications, and of certain materials. They can do the work in their own manner and with their own machinery, providing they comply with their contract. The architect can only require that the building be such as the contract demands. He has no control for any other purpose. We do not regard this reservation of the right of inspection of the work as changing the character of the contract. *Hughbanks* v. *Boston Invest. Co.* (Iowa) 60 N. W. Rep. 640. It is evident that the falling of the brick was collateral to the contract, and was, if negligence at all, the result of negligent acts on the part of some of the workmen employed by the contractors, and was not the necessary or natural result of any act which the contractors were employed to do. In this situation the owner is not liable, at least in the absence of some other distinct ground of liability. *Hundhausen* v. *Bond*, 36 Wis. 29; *Hackett* v. *Western U. Teleg. Co.* 80 Wis. 187.

In the present case, however, the plaintiff claims another distinct ground of liability on the part of the owner of the building, as well as the contractors, arising out of the failure to make a covered passageway along the Fifth street front of the building, thus violating the city ordinance referred to in the statement of facts. This ordinance was passed by the common council before the erection of this building was begun, and provides in substance that "any owner or contractor who shall hereafter build or cause to be built" any building abutting on a public sidewalk shall, after the completion of the first story, cause a roofed passageway to be built in front of the building, upon the sidewalk, under pain of a certain fine or imprisonment. The power to pass this ordinance seems clear. The charter gives the common council power "to control and regulate the construction of buildings," "to prevent and prohibit the erection or maintenance of any insecure or unsafe buildings," "to control and regulate streets," "to prevent the encumbering of streets and alleys in any manner and protect the same from any encroachment or injury," and "to regulate the manner of using the streets and pavements." Laws 1874, chap. 184, subchap. 4, § 3. An ordinance passed by the common council, which is within its power to pass and is reasonable, has the effect of law within the corporate limits. This ordinance, we think, is entirely reasonable, and it was therefore law to all intents and purposes, and it required both the owner and contractor to construct a covered way over the sidewalk where this accident happened. Had such a way been constructed the plaintiff could not have been injured. The failure to perform this statutory duty must be held negligence. 2 Thomp. Neg. p. 1232; *Mueller* v. *Milwaukee Street R. Co.* 86 Wis. 340, 21 L. R. A. 721, and cases cited; *Karle* v. *Kansas City, St. J. & C. B. R. Co.* 55 Mo. 476. If by reason of such negligence damage directly results to any one for whose benefit the law was passed, and who is not guilty of contributory negligence, a civil action for damages may be maintained. *Bott* v. *Pratt*, 33 Minn. 323, 53 Am. Rep. 47; *McCall* v. *Chamberlain*, 13 Wis. 637. Nor can the nonperformance of such a duty be excused by the plea of an independent contract by which another has agreed to perform the duty. Thomp. Neg. p. 904. The plaintiff's contention that the failure to comply with this ordinance constituted negligence on the part of the owner and on the part of Neff, who was the contractor for the walls and brickwork, must certainly be sustained. The situation of the Bayleys is somewhat different, but still we think that they are contractors who are building a building within the meaning of the ordinance. Doubtless the ordinance would not apply to a painter or a plumber, or a mere plasterer or decorator, or any one whose work does not constitute a substantial part of the building. But the iron work in this case is certainly an integral and substantial part of the building. It consists of iron girders, beams, and floor joists, evidently set in the walls, and without which there could be no building, but a mere shell. The mason and the iron contractor evidently must and do work together to make this building. The work of one seems to be fully as important as that of the other, and neither can do his work if the work of the other is not done. We hold, therefore, that the word "contractor," in the ordinance, applies as well to the Bayleys as to Neff, and that all the defendants are within the terms of the ordinance. The ordinance being a reasonable and valid one, and framed to protect the passenger from injury, when a passenger who is exercising ordinary care is injured by reason of the failure to comply with its provisions he may undoubtedly base a claim of negligence on account of such failure against all whose duty it was, under the ordinance, to make the covered way. These considerations demonstrate that there was no error in overruling the motions for nonsuit and the motions to direct verdicts made by the several defendants. A new trial of the case will be necessary, however, because of certain errors, which we will briefly state:

1. The jury were instructed on the subject of damages that the plaintiff would be entitled to compensation for the pain and suffering which she had endured, also for the pain which it may be likely, or that there is a reasonable probability, that she will endure in the future. This was error. The plaintiff is only entitled to recover for such future pain as the evidence shows she is reasonably certain to endure. *Block* v. *Milwaukee Street R. Co.* 89 Wis. 371, 27 L. R. A. 365.

2. The jury were also instructed as fol-

lows: "I instruct you, gentlemen, that a person is not guilty of contributory negligence in a case where that person receives an injury, being in a place of danger, because that person does not exercise his best judgment in avoiding injury and escaping from danger when warned. So, if the plaintiff, at the time the brick was seen to be falling from the top of that building, was warned and told to escape,—told to get away from the falling brick,—she is not chargeable with negligence because she did not use the best means of escaping from receiving an injury at that time, because, being in a place of danger, she is not chargeable with negligence if she did not use the best means of escaping." This was misleading in the present case, because no facts in evidence warrant it. The plaintiff denies having received any warning, and the evidence of the defendants' witnesses who testify to having shouted at the plaintiff when the brick was falling shows affirmatively that the plaintiff did not understand or know that she was in any danger, and did not adopt any course of action while facing an imminent danger or sudden peril. Under such circumstances the charge in question should not have been given.

3. The defendants Bayley were not parties to the suit as originally brought, and before they were made parties the deposition of one Kneer was taken. Upon the argument of the case the attorney for the defendant Neff was allowed, against objection, to read a part of this deposition to the jury, against the Bayleys, in reply to the argument of Mr. Sutherland on behalf of the Baylcys. This was error. It could not be used as against the Bayleys, because they were not parties to the action when it was taken.

4. The charge was erroneous, also, when treating of positive and negative testimony. The trial judge practically told the jury that negative testimony was confined to that of a witness who, though present at a transaction, says that he did not see or did not hear. This is too limited a rule. Testimony which is positive in form may amount merely to negative testimony. *Ralph* v. *Chicago & N. W. R. Co.* 32 Wis. 177, 14 Am. Rep. 725; *Draper* v. *Baker*, 61 Wis. 450, 50 Am. Rep. 143. It is erroneous, also, to say that the positive testimony of a witness to the existence of a certain thing, and the testimony of another witness that such a thing did not exist, are equally credible. This instruction ignores every well-settled principle which is to be applied in determining the credibility of witnesses, and lays down the rule that one witness will counterbalance another. *Draper* v. *Baker*, *supra*.

Numerous other questions were presented and argued, but we think the general principles laid down in this opinion so far simplify the questions presented that upon a new trial many of these questions will not again arise, and we do not deem it our duty to consider them in this opinion.

Judgment reversed upon all the appeals, and action remanded for a new trial.

OHIO SUPREME COURT.

CINCINNATI STREET RAILWAY COMPANY, *Plff. in Err.*,
v.
Alta G. MURRAY, Admrx., etc., of John L. Murray, Deceased, *et al.*

(53 Ohio St. 87.)

*1. **The act of May 4, 1891,** 88 Ohio Laws, 582, provides, in substance, that before a street car shall cross over a railroad track at grade, the street car shall stop not less than 10 nor more than 50 feet from the railroad track, and some employee of the street-railroad company shall go ahead of the car, and ascertain if the way is clear and free from danger for the passage of such car, and said car shall not proceed to cross until signaled so to do by such employee, or said way is clear for the passage over said track. In the absence of extraordinary circumstances, it is negligence to cause such street car to cross such railroad track without stopping the car and going ahead as required by this statute.

2. **Whether or not such violation of said statute** could be justified or excused by any circumstances whatever,—*quære*.

3. **In an action for damages,** to make such negligence actionable it must appear that injury was directly caused thereby.

4. **In a trial of an action for damages in such case** it is proper for the court to instruct the jury that such failure to stop the car and go ahead, as required by said statute, constitutes negligence, and if the evidence tends to prove that such negligence was the direct cause of the injury, the case should be submitted to the jury. Whether the evidence does or does not so tend is a question of law for the court.

5. **If there is only one employee operating such street car,** it is his duty to stop the car and go ahead and ascertain if the way is clear and free from danger, and if he finds the way clear for the passage over the track, he may cross over with his car without signaling to any one; but if there are two or more employees operating such car, such signal is required before crossing.

6. **Such stopping, going ahead, and signaling, are required** at a crossing having gates and a watchman, the same as at other crossings.

*Headnotes by the COURT.

(December 17, 1895.)

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a

---

NOTE.—The above case is believed to be the first to construe a statute such as that which is here involved, requiring certain precautions to be taken by employees in charge of a street car before crossing a railroad track at grade. As to the right to cross railroads, see *note* to Chicago, R. & Q. R. Co. v. West Chicago Street R. Co. (Ill.) 29 L. R. A. 485.

30 L. R. A.

See also 36 L. R. A. 657; 38 L. R. A. 516.

judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of her intestate. *Affirmed.*

Statement by **Burket, J.**:

This action was brought in the superior court of Cincinnati, by Alta G. Murray, administratrix of the estate of John L. Murray, deceased, against the Cincinnati Street-Railway Company, and the Baltimore & Ohio Southwestern Railroad Company, under §§ 6134 and 6135, Revised Statutes, seeking to recover the pecuniary injury resulting from his death by the alleged negligence of said two companies.

The injury occurred on October 4, 1892, at a point where Harrison avenue, in the city of Cincinnati, crosses the double track of the railroad. The avenue is traveled and thronged with persons, vehicles, and street cars, and crosses the railroad at grade. The railroad has a double track, and operates sidings and yard tracks in the immediate vicinity of the crossing, and seventy-five regular trains pass over this crossing every day, besides many switch trains, so that the crossing is regarded as dangerous.

The railroad company had gates at the crossing and a watchman to lower and raise the same, so as to prevent accidents at the crossing. The street car upon which Mr. Murray, who had paid his fare, was a passenger, approached the crossing from the east after dark in the evening. A train of cars was standing on the east side track of the railroad, near the north line of the avenue, and extending some distance north so as to obstruct the view of the main track from persons on the avenue east of the railroad. As the car approached the railroad crossing, the driver of the car checked his horses and brought his car nearly to a stop something less than 50 feet from the railroad, and the conductor of the car was about to step from the car and go forward to see whether it was safe for the street car to cross, when the watchman in charge of the gates called to the employees in charge of the street car to "come ahead" or "come on." The gates this time were in an upright position, indicating that it was safe to cross the railroad tracks. And the watchman who gave the signal to "come ahead" was at the same time sounding the gong signal which was attached to the gates, and was so sounding for the purpose either of indicating to persons about to cross that they should cross promptly and that it was safe to do so, or to warn them that a train was coming and not to attempt to cross, the evidence on this point being conflicting. The driver and conductor of the street car listened and heard no sound of a locomotive bell or whistle or other sounds of an approaching train, and their view of the main track was obstructed by the cars upon the side track. Thereupon the conductor resumed his place on the rear platform of his car, and the driver, in pursuance of the invitation and signal from the watchman to "come ahead," started the street car and attempted to cross the railroad tracks. When the street car was partly across the railroad tracks, and it was too late to avoid a collision by stopping the street car, a "cut of cattle cars," composed of two or three box cars, loaded with livestock, and being pushed by an engine from behind, came down the west track of the railroad, running at the rate of 20 or 25 miles an hour, and blowing no whistle, ringing no bell, and displaying no signal light, approached the crossing. The driver of the street car then made every effort to get his car across the tracks and avoid a collision, but the railway train struck the rear platform of the street car, after the whole of said car, except the rear platform, had passed over the crossing, and thereby Mr. Murray received the injuries from which he shortly thereafter died.

The case was tried to a jury, and verdict rendered against both defendants. A motion was made for a new trial, which was overruled, and judgment entered on the verdict. On petition in error to the circuit court, which then had jurisdiction, the judgment was affirmed. Thereupon the case was brought here by petition in error on part of the street railway company; and by cross petition on the part of the railroad company.

Messrs. **Paxton, Warrington, & Boutet** and **Kittredge, Wilby, & Simmons**, for plaintiff in error:

Several acts *in pari materia* and relating to the same subject are to be taken and comprised together in construing them, because they are considered as having one object in view and as acting upon one system.

The courts presume an intention in the legislature to be consistent in the making of laws, and also to have had a purpose in each enactment and all its provisions. Special circumstances often create a necessity for appropriate special provisions, differing from the general rule upon the same subject; and so, where such provisions are found in the statute, different from the general provisions that would apply to the case, the courts must assume that the special provisions were made for adequate reasons, and give them effect by construing them as exceptions to the general rule contained in the general provisions of the statute.

State v. *McGregor*, 44 Ohio St. 631; Potter's Dwarr. Stat. 272.

Under the issues as they were made in this case, the failure of the street-railway company to stop its car and send an employee forward, and to do the other things required by the statute, was a fact which, in connection with all the other facts in the case, and disclosed by the evidence, should have been submitted to the jury for their determination of the question whether the street-railway company exercised the degree of care which the law required of it, or whether it was guilty of negligence, which was the proximate cause of the injury.

Baltimore & O. R. Co. v. *Whitacre*, 35 Ohio St. 629; *Blamires* v. *Lancashire & Y. R. Co.* L. R. 8 Exch. 283; *Wakefield* v. *Connecticut & P. R. Co.* 37 Vt. 330, 86 Am. Dec. 711; *Meek* v. *Pennsylvania Co.* 38 Ohio St. 632; *Knupfle* v. *Knickerbocker Ice Co.* 84 N. Y. 488; *Horn* v. *Baltimore & O. R. Co.* 54 Fed. Rep. 301, 6 U. S. App. 381, 4 C. C. A. 346 (1893); *Cleveland*,

C. C. & I. R. Co. v. *Elliott*, 28 Ohio St. 340; *Bower* v. *Peate*, L. R. 1 Q. B. Div. 321.

Messrs. **Bateman & Harper**, for defendant in error Murray:

The court will give effect to all of the terms of the act, and will so construe it, if reasonably possible.

Re Hathaway's Will, 4 Ohio St. 383; *Woodbury* v. *Berry*, 18 Ohio St. 456.

The statute declares and imposes upon the street-railway company a duty. This duty is in behalf of every passenger it may carry, respecting his safety, while in the care of said company.

Hayes v. *Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410.

There is no duty without negligence resulting from its breach.

Shearm. & Redf. Neg. § 2; Whart. Neg. § 3; Pollock, Torts, 352.

The question as to whether that violation of law occasioned the injury, and the extent of that injury, was a question of fact to be determined upon the evidence by the jury.

Horn v. *Baltimore & O. R. Co.* 54 Fed. Rep. 301, 6 U. S. App. 381, 4 C. C. A. 346; *Pennsylvania Co.* v. *Bathgeb*, 32 Ohio St. 72.

A violation of the statute is negligence *per se*.

Salisbury v. *Herchenroder*, 106 Mass. 458; *Billings* v. *Breinig*, 45 Mich. 65; *Correll* v. *Burlington, C. R. & M. R. R. Co.* 38 Iowa, 120, 18 Am. Rep. 22; *Lloyd* v. *Perry*, 32 Iowa, 146; *Dodge* v. *Burlington, C. R. & M. R. R. Co.* 34 Iowa, 276; *Philadelphia, W. & B. R. Co.* v. *Stebbing*, 62 Md. 504; *Keim* v. *Union R. & Transit Co.* 90 Mo. 314; *Fath* v. *Tower Grove & L. Railway*, 105 Mo. 537, 13 L. R. A. 74; *Siemers* v. *Eisen*, 54 Cal. 418; *Weber* v. *Kansas City Cable R. Co.* 100 Mo. 194, 7 L. R. A. 819; Shearm. & Redf. Neg. § 13a; *Central R. & Bkg. Co.* v. *Smith*, 78 Ga. 694; *Chicago & E. I. R. Co.* v. *Boggs*, 101 Ind. 522, 51 Am. Rep. 761; *Hazard Powder Co.* v. *Vogler*, 58 Fed. Rep. 152; *Terre Haute & I. R. Co.* v. *Voelker*, 129 Ill. 540; *Piper* v. *Chicago, M. & St. P. R. Co.* 77 Wis. 247; *Bott* v. *Pratt*, 33 Minn. 323, 53 Am. Rep. 47; *Kelley* v. *Hannibal & St. J. R. Co.* 75 Mo. 138.

Messrs. **Harmon, Colston, Goldsmith, & Hoadly** for Baltimore & Ohio Southwestern Railroad Company.

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

The errors assigned and relied upon arise upon the charge of the court to the jury as given, and refusal to charge as requested. The general charge as to the liability of the street-railway company in so far as the points made in the argument are concerned, is embraced in the following:

"The Cincinnati Street-Railway Company, at the time and place mentioned, through its agents or servants, was bound to exercise the highest degree of care which prudent men are accustomed to employ under similar circumstances, and to the end that the passenger might be safely carried to the end of his journey, however, without being an insurer of the safety of the passenger, for that the company did not undertake to do. Nor does it under the law stand as an insurer of the safety of the passenger.

"If the jury find from the evidence that the defendant, the Street-Railway Company, is a common carrier of passengers, and that on the 4th day of October, 1892, the plaintiff's intestate was a passenger on the car of the defendant, and having paid his fare, it was the duty of the said defendant to carry him safely to the point of his destination without injury; and when it is shown that the defendant failed to carry the plaintiff's intestate safely to the place of his destination, the failure puts the defendant prima facie or affirmatively in the wrong, and the burden of proof devolves upon the defendant to show that the injury was the result of another independent and intervening cause, and that the injury might not have been prevented by the exercise of that high degree of care to which we have alluded, and which prudent men are accustomed to employ under similar circumstances.

"The laws of Ohio make it the duty of a street-railway company to cause their cars to come to a full stop, not nearer than 10 nor further than 50 feet from the tracks of a steam railway at a crossing, before proceeding to cross; to cause some person in its employ to go ahead of the car and ascertain if the way is clear and free from danger for the passage of such street car, and not to proceed to cross until such action has been taken by such persons so employed and the way is clear for their passage over the said tracks. If you find that the death of the plaintiff's intestate resulted from the omission of such duty, or could have been avoided by the observation of said duty, you may consider it as the act of negligence on the part of the railway company, because of the invitation of the steam railway to come across, they should look and see that the way was clear, that does not relieve the street-railway company from its duty to its passengers as I have described."

The plaintiff in error excepted to the last of the above propositions of the general charge.

The court also charged the jury that both railroad and street railway might be found guilty of the wrongful acts causing the injury, if both were concurrent in point of time and fact, and the wrongful act of each was the direct and proximate cause of the injury.

At request of plaintiff below, the court gave the following special charges, to which plaintiff in error excepted:

"1. The statute of Ohio made it the duty of the Cincinnati Street-Railway Company to cause its car to come to a full stop not nearer than 10 feet nor further than 50 feet from the crossing, and before proceeding to cross said steam-railway tracks to cause some person in its employ to go ahead of said car and ascertain if the way was clear and free from danger for the passage of said street car, and not to proceed to cross until signaled so to do by such person so employed as aforesaid, or said way was clear for their passage over said tracks; and I charge you that the omission of such duty is negligence on the part of said defendant, which will render it liable in damages, if you find that the death of the decedent resulted from such omission, or could have been avoided by the observance of this duty.

"2. So far as the street-railway company is concerned, the fact, if you shall find it so to be, that the gateman neglected to let down the gates, or invited the street-car driver to come ahead, does not excuse the company from its failure to send a person in its employ forward to examine the track, and to stop until such person shall have notified them to proceed."

The street-railway company then requested the following five special charges, which the court refused to give, and exceptions were duly taken:

"1. If you find that the defendant steam-railway company, in obedience to an ordinance of Cincinnati, had been and at the time of the accident was maintaining gates with a watchman at the crossing in question, then I charge you that the employees of the defendant street-railway company were not required at the same time and crossing first to stop the street car and then go forward to look for the approach of steam trains, but that such employees had the right to rely on the watchman with the gates of the steam-railway company.

"2. If you find that as the car of the street-railway company approached the steam tracks in question, the gateman of the defendant steam-railway company kept his gates open and by the use of this gong and oral invitation indicated to the driver of the street car that it was safe to, and he should drive across the tracks, and that the street-railway employees while in the exercise of their senses of sight and hearing did not know of such an approach of a train as to make it unsafe to cross the tracks, then I charge you that the street-railway employees were excused from stopping their car or going forward in advance of the car to examine for approaching trains, and that they were justified in accepting such invitation of the gateman and attempting to cross the tracks.

"3. If the jury find from the evidence that the gates established at the steam-railroad crossing were open at the time the street car approached the crossing; the open gates were an affirmative and explicit declaration that it was safe to cross, and that no train or locomotive was approaching the crossing near enough to make it unsafe for the employees of the street-railway company to act upon the invitation to cross; and if you find that the employees of the street railway in the use of their senses of sight and hearing did not know of the approach of a train and were not otherwise warned or advised of its near approach so as to make it unsafe to cross, they were not guilty of negligence in acting upon the invitation extended to them by the open gates.

"4. If you find that Harrison avenue and the steam-railroad track at the point where this collision occurred was a crossing much used both by the steam railroad and the street railroad and the traveling public generally, and the number of trains using the steam road and others using public conveyances and traveling along the street made it necessary and highly important for safety in crossing that persons driving wagons and public conveyances should cross over promptly and quickly, so that the passage of steam railroad trains and of persons desiring to use the street crossing should not be unduly delayed and hindered, and in order to avoid this you should find that it was necessary for the defendant's street car to cross over promptly and speedily—then I charge you that unless the employees of the defendant street-railway company were made aware, or by the exercise of their senses of sight and hearing could have ascertained, that a train was approaching, before they went upon the crossing, so near as to make it unsafe to cross, you may find that they were not negligent in acting upon the invitation presented by the open gates, or such other invitation, if you find any was given, by the employee of the steam railroad in charge of the gate.

"5. If the jury find that the defendant street-railway company's car was slowed up as it approached the tracks of the defendant Baltimore & Ohio Southwestern Railroad Company on Harrison avenue, and that thereupon and before the street car reached the side track of the steam railroad, the gateman of the steam-railroad company personally called to the employees in charge of the street car to "come ahead," or called to them in any other words to that effect, and in response to which the street car went ahead,—then I charge you that there can be no recovery against the street-railway company."

Section 2 of the act of May 4, 1891 (88 Ohio Laws) provides as follows: "Whenever the tracks of any street railroads in this state cross the tracks of any steam railway at grade, the street-railway company operating said line of cars shall cause their street cars to come to a full stop not nearer than 10 feet nor further than 50 feet from the crossing, and before proceeding to cross said steam-railway tracks, shall cause some person in their employ to go ahead of said car or cars, and ascertain if the way is clear and free from danger for the passage of said street cars, and said street-railroad cars shall not proceed to cross until signaled so to do by such person so employed as aforesaid, or said way is clear for their passage over said tracks."

The penalty for a violation of this section is $100, together with liability in damages to the party injured, on the part of both the street-railway company and its employee.

On the part of the street railway, it is contended that the above statute should be read *in pari materia* with that section of the railroad statute requiring gates and a watchman to be maintained at dangerous crossings, and that when the gates are open and such watchman is at his post and signals the street car to come on and cross, that the employees of the street-railway are thereby relieved and excused from stopping the car and going forward to ascertain whether the crossing is clear and free from danger.

We do not agree with this view. The watchman is placed at his post to prevent accidents and injuries at the crossing, and he and the railroad company are chargeable only with ordinary care, while the street-railway company is a carrier of passengers,

and as such is chargeable with a much higher degree of care.

The street-railway statute is for the protection of the lives of its passengers, and in addition is highly penal in its provisions, and by its terms makes no exception of crossings where there are gates and a watchman.

It is therefore clear that the car must stop and the employee go forward, whether there are gates and a watchman or not.

It is also contended, on the part of the street-railway company, that the court erred in its general charge, and in the special charge, in which the court called the attention of the jury to the above statute and the duty thereby imposed of stopping the car and going forward to see that the crossing is clear, and then added: "If you find that the death of the plaintiff's intestate resulted from the omission of such duty, or could have been avoided by the observation of said duty, you may consider it as the act of negligence on the part of the railway company, because of the invitation of the steam railway to come across, they should look and see that the way was clear, that does not relieve the street-railway company from its duty to its passengers as I have described."

The case was argued, both on brief and orally, as if the court had charged that the mere failure to stop the car and failure to go forward to see that the crossing was clear, constituted, *per se*, such actionable negligence as to warrant a recovery; and it is strongly urged that the question as to whether such failure to stop the car and go forward was or was not negligence on part of the street-railway company, should have been submitted to the jury. Four of the five requests to charge are also in line with this theory. But an examination of the above part of the general charge shows that the court only decided that in this case it was negligence to fail to stop the car and go forward, and then as to whether or not the injury was caused by such negligence was submitted to the jury. The language of the court is: "If you find that death resulted from the omission of such duty or could have been avoided by the observation of such duty."

This clearly leaves to the jury the question as to whether or not the injury was caused by the negligence of not stopping the car, and not going forward as required by statute.

True the effect of the charge was that the failure to stop the car and go forward was negligence. The charge in that regard was strictly correct. The statute requires that the car stop and that an employee go forward and ascertain if the way is clear, and a failure to obey the statute in this regard is negligence, but in an action for damages, and not for penalty, it is not actionable negligence, because to make such negligence actionable some injury must have been directly caused thereby. In such case if there is nothing which in law tends to justify or excuse such negligence, it is not only the right, but the duty, of the trial judge to say to the jury that such omission is negligence, and then, if the evidence tends to prove that such negligence was the direct or proximate cause of the injury, to submit that question to the jury; if the evidence does not so tend, a verdict should be directed for the defendant. Whether or not the evidence so tends is a question of law for the court, and not of fact for the jury.

It may well be doubted whether, under any circumstances, the street-railway company would be justified or excused for violating the statute, but that question is not necessarily involved in this case, as the facts shown at the trial did not even tend toward an excuse or justification.

The trial court in this case said to the jury that if they found that death resulted from the omission of such duty, or could have been avoided by the observation of such duty, the street-railway company would be liable. The true test in such case is, that the injury resulted directly from the negligence complained of, or was directly or proximately caused thereby; but, in the absence of a request to make the charge more specific in that regard, we cannot say that the street-railway company was prejudiced by the charge as given.

It is urged that this failure of duty on the part of the street-railway company was not averred in the petition, and that therefore it cannot be relied upon as a ground of recovery. *Baltimore & O. R. Co.* v. *Whitacre*, 35 Ohio St. 629. The statute prescribes the care to be taken by the street-railway company at a crossing, and the terms of the statute need not be pleaded, but in this case they were pleaded, and were, on motion, very properly stricken out. The petition avers that "the said street-railway company, without exercising any care on its part, negligently and carelessly caused said car, on which said decedent was riding, to be drawn across said steam-railroad tracks." If it drove on without exercising any care, it certainly did not stop its car nor go forward, because that would have been exercising some care, in fact such care as the statute requires. The averment of no care is broad and sweeping, and perhaps indefinite and uncertain, but all this might have been cured by motion.

It is also urged that it is not always necessary to stop the street car and go forward when a railroad crossing is reached, and that the last sentence of the section shows that if the track is clear the car may proceed without stopping and without any one going forward. The section of the statute in question, after providing for the stopping of the street car and an employee going forward to ascertain that the way is clear and free from danger, provides as follows: "And said street-railroad cars shall not proceed to cross until signaled so to do by such person so employed as aforesaid, or said way is clear for their passage over said tracks."

In many cities there is but one employee on a street car, and while he is bound to stop his car and go forward and ascertain if the way is clear and free from danger, he cannot well signal to himself to proceed, and in such case he shall not proceed to cross with his car, "until said way is clear for their passage over said tracks." This last sentence is clearly applicable only to cases where, after

one goes forward, there is no one left in charge of the car to whom a signal can be given. But this does not excuse the employee from stopping his car and going forward and ascertaining whether the way is clear and free from danger.

The railroad company in its brief, asks a reversal of the judgment against it only in case the judgment against the street-railway company should be reversed, but in oral argument it is urged that the judgment against the railroad company should be reversed, and that against the street-railway company affirmed. We find no error in the record prejudicial to either company, and therefore *the judgment against both companies is affirmed.*

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

HUDSON FURNITURE COMPANY *et al.*, *Plffs. in Err.*,
v.
Edgar HARDING.

(70 Fed. Rep. 468.)

1. **The relation to a note of a party whose name is signed on the back** of it is a question of general law on which Federal courts are not bound by state decisions.
2. **The liability of joint makers of a note** is controlled by the law of the place where the contract is payable.
3. **A state statute providing that all persons becoming parties to promissory notes** payable on time, by signature on the back thereof, shall be entitled to the same notice of nonpayment as indorsers, must control the decisions of a Federal court as to the rights of parties to a note payable in that state.
4. **State legislation with respect to the law merchant** must be recognized and enforced by Federal courts, although in the absence of such statutes they are not bound by state decisions on the subject.
5. **There is no common law of the United States,** except possibly as the common law of England has been adopted with reference to the construction of powers granted to the Federal Union.
6. **Insolvency of the maker of a note** is no excuse for failure to give notice of dishonor.
7. **The fact that persons who became joint makers of a corporation note were directors** of the company and constituted a majority of the board does not make it unnecessary to give them notice of dishonor of the note, when, by the law of the state, joint makers are entitled to the same notice as indorsers.

(October 7, 1895.)

ERROR to the Circuit Court of the United States for the Western District of Wisconsin to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Reversed*

Before Woods and Jenkins, Circuit Judges, and Baker, District Judge.

Statement by **Jenkins,** Circuit Judge:

This suit was brought to recover the amount of a promissory note executed by the Hudson Furniture Company (a corporation of the state of Wisconsin), dated Hudson, Wis., March 26, 1892, payable April 14, 1893, to the order of Edgar Harding, the defendant in error, for the sum of $5,000, payable at the North National Bank, Boston, Mass. Prior to its delivery or acceptance, the plaintiffs in error severally signed their names upon the back thereof for the purpose of giving credit to such note with the payee. It was thereupon sent by mail from Hudson, Wis., to the payee, at his residence in the state of Massachusetts, with the request that he would accept it in lieu of and in extension of a note of the Hudson Furniture Company for a like amount then held by him, and maturing at or about the date of the new note. It was received by the payee in the state of Massachusetts, and there accepted by him for the prior obligation of the company, upon the faith and security of the individual names upon the paper. The note was not paid at maturity. It was not properly protested for nonpayment, nor were the plaintiffs in error seasonably notified of its presentment and nonpayment. At the time of its execution and delivery, the Hudson Furniture Company was insolvent, to the knowledge of the plaintiffs in error, who were directors of the company, constituting the majority of its board of directors at the time of its execution, and so continued down to and after the maturity of the note.

By the statute of Massachusetts (Stat. 1874, chap. 404) it is enacted that "all persons becoming parties to promissory notes payable on time, by signature on the back thereof, shall be entitled to notice of the nonpayment thereof the same as indorsers."

The case was tried in the court below, without the intervention of a jury. The court found the facts as above stated, and, as conclusion of law upon such facts, held that the several individual defendants (plaintiffs in error here) were "joint and several makers of said note, and therefore not entitled to protest of said note," and judgment was rendered against all the defendants for the amount due upon the note.

It is assigned for error that the court erred in the following respects: (1) In the finding and decision of the said circuit court that at the time of the execution and delivery of the note upon which this action was brought to the plaintiff, the defendant, the Hudson Furniture Company, was insolvent;

NOTE.—See also Gatton v. Chicago, R. I. & P. R. Co. (Iowa) 23 L. R. A. 556, as to the question of a national common law.

(2) in that the said court also found and decided that such insolvency was known by the defendants, Phipps, Coon, Jones, and Goss; (3) in the finding and decision of the said court that the said Phipps, Coon, Jones, and Goss signed the said note; (4) in the finding and decision of said court that said Phipps, Coon, Jones, and Goss were not entitled to protest of said note; (5) in the finding and decision that plaintiff recover from the defendants above named the amount due on said note, with interest and costs; (6) in the finding and decision of said court by which judgment is ordered according to the findings.

Messrs. **John C. Spooner, A. L. Sanborn, James B. Kerr,** and **Charles P. Spooner,** for plaintiffs in error:

The obligation of the Hudson Furniture Company was a Massachusetts contract, for the note signed by it was payable "at North National Bank, Boston, Mass."

Dan. Neg. Inst. 879; Edwards, Bills & Notes, 178; Rorer, Interstate Law, 85; *Andrews* v. *Pond*, 38 U. S. 13 Pet. 65, 10 L. ed. 61; *Wooley* v. *Lyon*, 117 Ill. 244, 57 Am. Rep. 867.

The obligation of Phipps, Coon, Jones, and Goss commencing and to be performed in Massachusetts, the law of that state must govern it.

Tilden v. *Blair*, 88 U. S. 21 Wall. 247, 22 L. ed. 633; *Lee* v. *Selleck*, 33 N. Y. 615; *Gay* v. *Rainey*, 89 Ill. 221, 31 Am. Rep. 76; *Freese* v. *Brownell*, 35 N. J. L. 285, 10 Am. Rep. 239; Rorer, Interstate Law, 2d ed. pp. 86–90.

Under the law of Massachusetts notice of protest was required.

Mass. Stat. 1874, chap. 404; *National Bank of the Commonwealth* v. *Law*, 127 Mass. 72.

Where any controversy arises as to the liability of a party to a bill of exchange, promissory note, or other negotiable paper, in one of the Federal courts of the United States, which is not determined by the positive words of a state statute, or by its meaning as construed by the state courts, the Federal courts will apply to its solution the general principles of the law merchant, regardless of any local decision.

1 Dan. Neg. Inst. § 10.

The statute became a part of the contract.

Gregg v. *Weston*, 7 Biss. 360; *Brabston* v. *Gibson*, 50 U. S. 9 How. 263, 13 L. ed. 131; *Dundas* v. *Bowler*, 3 McLean, 397; *Pierce* v. *Indseth*, 106 U. S. 546, 27 L. ed. 254; 1 Dan. Neg. Inst. 908; Tiedeman, Com. Paper, § 216, and cases cited; *Bull* v. *First Nat. Bank*, 14 Fed. Rep. 612.

The known insolvency of the maker of a promissory note for six months previous to and at the time of the making of the note does not excuse the holder from a seasonable demand on the maker and due notice to the indorser.

Farnum v. *Foote*, 12 Mass. 89, 7 Am. Dec. 35; *Sandford* v. *Dillaway*, 10 Mass. 52, 6 Am. Dec. 99; *Granite Bank* v. *Ayers*, 16 Pick. 392; *Lee Bank* v. *Spencer*, 6 Met. 308, 39 Am. Dec. 734.

The Massachusetts statute is applicable.

Lane v. *Vick*, 44 U. S. 3 How. 464, 11 L. ed. 681; *Scott* v. *Sandford*, 60 U. S. 19 How. 393, 15 L. ed. 691; *Oates* v. *First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *Brooklyn City & N. R. Co.* v. *National Bank*, 102 U. S. 14, 26 L. ed. 61; *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359; *Pana* v. *Bowler*, 107 U. S. 529, 27 L. ed. 424; *Bucher* v. *Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795; *Re Burrus*, 136 U. S. 586, 34 L. ed. 500; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 369, 37 L. ed. 772; *Nathan* v. *Louisiana*, 49 U. S. 8 How. 73, 12 L. ed. 993; Tiedeman, Com. Paper, § 3.

Defendants are not liable because they are officers of the corporation.

Tiedeman, Com. Paper, § 334; *Musson* v. *Lake*, 45 U. S. 4 How. 262, 11 L. ed. 967; *Rothschild* v. *Currie*, 1 Q. B. 43; Story, Eq. Jur. § 370; *Banfield* v. *Whipple*, 14 Allen, 13.

Messrs. **Ray S. Reid, F. H. Boardman,** and **M. H. Boutelle,** for defendant in error:

Plaintiffs in error were joint and several makers of the note in suit.

Rey v. *Simpson*, 63 U. S. 22 How. 341, 16 L. ed. 260; *Good* v. *Martin*, 95 U. S. 90, 24 L. ed. 341; *First Nat. Bank* v. *Lock-Stitch Fence Co.* 24 Fed. Rep. 221.

The Massachusetts statute is not applicable.

Swift v. *Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Luke* v. *Lyde*, 2 Burr. 883; *Watson* v. *Tarpley*, 59 U. S. 18 How. 517, 15 L. ed. 509; *Brooklyn City & N. R. Co.* v. *National Bank*, 102 U. S. 14, 26 L. ed. 61; *Hollingsworth* v. *Tensas*, 17 Fed. Rep. 109.

Plaintiffs in error are liable if the Massachusetts statute is held applicable.

By the common law of the state of Massachusetts, as it existed at the time of the passage of the statute in question, a party signing his name in blank upon the back of a note prior to its delivery to the payee was a comaker, and as such liable,

Union Bank v. *Willis*, 8 Met. 504, 41 Am. Dec. 541; *Way* v. *Butterworth*, 108 Mass. 509.

The statute in question provides that such party shall be entitled to notice the same as an indorser. This act, being in derogation of the common law, is to be strictly construed, and the common law held repealed thereby no further "than is expressly declared, or the clear import of the language used absolutely requires."

23 Am. & Eng. Enc. Law, p. 388.

Numerous conditions exist in the law, dispensing with the necessity of demand and notice:

1. Where the drawer, by virtue of the relations existing between himself and his drawee, has no reason to expect the paper to be cared for.

2. Where the facts are such as to make it the duty of the drawer or indorser to provide for the payment of the paper.

3. Where the relations between drawer and indorsers are such that the indorser must know, or the law will impute notice, of the nonpayment or dishonor.

Tiedeman, Com. Paper, § 355; 2 Dan. Neg. Inst. § 1685; *Hull* v. *Myers*, 90 Ga. 674.

Jenkins, Circuit Judge, delivered the opinion of the court:

We are not at liberty to review the evidence to ascertain whether the finding of the court below upon the facts was warranted by the testimony. We are restricted to the con-

sideration of the question whether the facts as found support the judgment rendered. *Jenks* v. *Stapp*, 9 U. S. App. 34, 3 C. C. A. 244, and 52 Fed. Rep. 641. We must therefore consider the case upon the assumption that, at the time of the execution of the note, the Hudson Furniture Company was insolvent, to the knowledge of the individual parties to the note, who were its directors. Whether the term "insolvent," as employed in the findings, was used in the sense of inability to meet obligations as they mature, and in contradistinction to "bankruptcy," meaning an absolute inability to pay a debt, without respect to time,—a want of assets convertible into money sufficient to pay the debt,—it is not necessary for us to consider. It may be observed, however, that it appears from the record that this corporation continued a going concern after the making of the note, and until February 11, 1893, when, at a meeting of the stockholders of the company, it was resolved that owing to the large loss of the company in its business during the previous year, as disclosed by the treasurer's report, the board of directors was authorized to proceed at once to collect all outstanding accounts, sell the property of the company, and apply the proceeds to the payment of its debt, and generally to do every and all things necessary to wind up the affairs of the company at the earliest date practicable.

"Insolvency," in a popular sense, means "bankruptcy." There is, however, a state of insolvency which does not necessarily imply bankruptcy. This is true, doubtless, within the experience of most merchants and corporations engaged in trade. It is the incident of nearly every business that periods of depression are experienced, when there is a total inability to meet obligations as they mature; not from want of sufficient assets, but from inability to turn them presently into money for the payment of debts. That is a state of insolvency which, continuing, may ultimately result in bankruptcy. It, however, often occurs that by prudent management, well-directed energy, and by the indulgence of creditors, the business is kept upon its feet, and, with the advent of more prosperous times, at last re-established upon a sure and solvent basis. We are unable to say in what sense the term "insolvent" was employed in these findings of fact. The history of the company, as we read it in the evidence, and as stated in the letter inclosing and asking acceptance of this note by Mr. Harding, indicates that the company was financially embarrassed, but that its directors hoped, through the indulgence of its creditors, to restore the company to a solvent condition, and to pay its notes after the end of the then current year. We have said this much, not that we deem the fact essential to a correct decision of the case, but simply to call attention to the necessity that, in findings of fact which are to be presented for review in this court, care should be taken that terms should not be employed which are susceptible of double or of doubtful interpretation. This is of importance, since we are without authority to review the evidence to ascertain the sense in which terms are employed, or to declare the sense in which they should have been used.

It is settled doctrine that the Federal courts, in the exercise of their co-ordinate jurisdiction, are not bound by the decisions of the state courts upon subjects of general law, but are at liberty to follow the convictions of their own judgment. *Swift* v. *Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Brooklyn City & N. R. Co.* v. *National Bank*, 102 U. S. 14, 26 L. ed. 61; *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359; *Myrick* v. *Michigan C. R. Co.* 107 U. S. 102, 27 L. ed. 325; *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 106, 37 L. ed. 101. Therefore, notwithstanding it has been held by the supreme court of the state in which this note was executed that parties standing in like relation to bills and notes with the plaintiffs in error here are to be treated as indorsers (*Blakeslee* v. *Hewett*, 76 Wis. 341), the Supreme Court of the United States, in *Good* v. *Martin*, 95 U. S. 90, 24 L. ed. 341, and *Bendey* v. *Townsend*, 109 U. S. 665, 667, 27 L. ed. 1065, 1066, has determined that they must be treated as joint makers of the note with the party who appears thereon as maker. And such is also the law of Massachusetts. *Union Bank* v. *Willis*, 8 Met. 504, 41 Am. Dec. 541; *Brown* v. *Butler*, 99 Mass. 179; *Way* v. *Butterworth*, 108 Mass. 509; *Allen* v. *Brown*, 124 Mass. 77. We are therefore constrained to hold that the plaintiffs in error were joint makers with the Hudson Furniture Company of this note, and, if the contract is to be controlled by the law of the state of Wisconsin, were not entitled to notice of protest. Being joint makers of the note, their liability is controlled by the law of the place where the contract is payable, because they are deemed to have reference to the law of such place in the construction of the obligation assumed. *Brabston* v. *Gibson*, 50 U. S. 9 How. 263, 277, 13 L. ed. 131, 137; *Calhoun County Supers.* v. *Galbraith*, 99 U. S. 214, 218, 25 L. ed. 410, 411; *Pierce* v. *Indseth*, 106 U. S. 546, 27 L. ed. 254; 1 Dan. Neg. Inst. 4th ed. § 895. It would be otherwise with respect to the indorser of a note, for he is treated as in fact entering into a new obligation, undertaking that the maker will pay at the time and place stipulated, and that he (the indorser) will respond to his obligation at the place of the execution of his indorsement, if there delivered, in the event of dishonor and notice. If delivered at a place other than at the place of execution, the law of the place where delivered controls. Dan. Neg. Inst. §§ 868, 899; *Slacum* v. *Pomeroy*, 10 U. S. 6 Cranch, 221, 3 L. ed. 204; *Musson* v. *Lake*, 45 U. S. 4 How. 262, 11 L. ed. 967. The plaintiffs in error thus being joint makers of a note payable and delivered in the state of Massachusetts, their obligation is to be judged by the law of that state.

We are therefore brought to the inquiry whether the statute of that state to which reference has been made is operative to clothe the joint makers with the rights to notice of protest that an indorser is entitled to. This statute manifestly regards all parties to a note by signature on the back thereof, whether they were to be treated as guarantors or as

joint makers, in the light of sureties for the maker, and recognizes the equitable right of such parties to notice of dishonor of the note by their principal. It sought to place them, with respect to presentment, demand, and notice of dishonor, upon the same footing with an indorser. The statute was thus construed by the supreme judicial court of that commonwealth in *National Bank* v. *Law*, 127 Mass. 72, prior to the execution of the contract in question. We are, of course, bound by that construction. *Louisville, N. O. & T. R. Co.* v. *Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801; *Baltimore Traction Co.* v. *Baltimore Belt R. Co.* 151 U. S. 137, 38 L. ed. 102. So that, assuming the validity of that statute, any one becoming a party to a note payable on time by signature on the back thereof, whether he be treated as guarantor or joint maker, is in fact a mere surety for the maker; his liability is conditional and secondary; and before he can be charged, he must have the same notice of protest that an indorser by the law merchant would be entitled to under like circumstances. He stands in this respect in the shoes of an indorser. The statute entered into and is a term of the contract. The engagement of the plaintiffs in error, therefore, was that if, upon due demand, the note should not be paid according to its tenor, they would compensate the holder or a subsequent indorser who was compelled to pay, provided the requisite proceedings on dishonor were duly taken.

It is urged, however, that we must disregard this statute; and in support of this contention the broad doctrine is asserted that the several states of this Union have no right by statute to change the general commercial law. This contention is rested upon certain observations of justices delivering the opinions of the court in *Swift* v. *Tyson*, 41 U. S. 16 Pet. 1, 18, 10 L. ed. 865, 871, and *Watson* v. *Tarpley*, 59 U. S. 18 How. 517, 521, 15 L. ed. 509, 511. In the former case it is said: "In all the various cases which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the 34th section limited its application to state laws, strictly local; that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules or conclusive authority by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke* v. *Lyde*, 2 Burr. 882, 887, to be in a great measure, not the law of a single country only, but of the commercial world."

In the latter case the observation which is supposed to warrant the asserted restriction upon the rights of the states is as follows: "The general commercial law being circumscribed within no local limits, nor committed for its administration to any peculiar jurisdiction, and the Constitution and laws of the United States having conferred upon the citizens of the several states, and upon aliens, the power or privilege of litigating and enforcing their rights acquired under and defined by that general commercial law, before the judicial tribunals of the United States, it must follow by regular consequence, that any state law or regulation the effect of which would be to impair the rights thus secured, or to devest the Federal courts of cognizance thereof, in their fullest acceptation under the commercial law, must be nugatory and unavailing. The statute of Mississippi, so far as it may be understood to deny, or in any degree to impair, the right of a nonresident holder of a bill of exchange, immediately after presentment to and refusal to accept by the drawee, and after protest and notice, to resort forthwith to the courts of the United States by suit upon such bill, must be regarded as wholly without authority and inoperative. The same want of authority may be affirmed of a provision in the statute which would seek to render the right of recovery by the holder, after regular presentment and protest, and notice for nonacceptance, dependent upon proof of subsequent presentment, protest, and notice for nonpayment. A requisition like this would be a violation of the general commercial law, which a state would have no power to impose, and which the courts of the United States would be bound to disregard."

It may not be denied that the language employed gives color of authority to the pretension. It is therefore necessary to ascertain the precise questions there involved, in order to discover whether the remarks quoted were pertinent to the subject under discussion, and necessary to be determined, and so authoritative and binding upon us as decisions of the court. In the former case the question was whether a certain defense to a bill of ex-

change, being a contract made within the state of New York, and governed by its law, was available; and this contention was rested upon the ground that the courts of New York had decided affirmatively upon that question. The supreme court held: First, that the question had never been definitely determined in the courts of that state; and, secondly, if it had been so determined, the decision would not be binding upon the Federal courts with respect to principles established in the general commercial law, under the 34th section of the judiciary act of 1789; that decisions of the state courts do not constitute laws within the meaning of the act, but are merely evidence of what the laws are; and that the term "law," as there used, refers to the acts of the legislature or long-established local customs having the force of law. It is to be observed that the judgment in that case was carefully limited to the effect of decisions of local tribunals. Mr. Justice Story, delivering the opinion, remarks with respect to the facts of the case that "it is observable that the courts of New York do not found their decisions upon any local statute or positive, fixed, or ancient local usage, but they adduce the doctrine from the general principles of commercial law." The decision in the case upon the precise question presented is now universally recognized as correct, but whatever was said with respect to local statutes and their effect was upon a question not involved in the case. The language of Cicero, adopted by Lord Mansfield, and quoted by Mr. Justice Story, is undoubtedly correct,—that the law of negotiable instruments is in a great measure, not the law of a single country only, but of the commercial world. That was the statement of an historical fact, as true to-day as in the time of Cicero. The underlying principles of the commercial law are the same in all commercial countries; but, as matter of fact, the customs and laws of the various commercial nations differ widely with respect to negotiable paper. The law merchant, as we have received it from the common law, grew out of the customs of the merchants of London, and in many essential particulars is at variance with the commercial law of continental Europe. The language quoted from Cicero by no means suggests, nor is it true, that it is beyond the power of each sovereignty to change the commercial law to suit its pleasure. In the latter case, of *Watson* v. *Tarpley*, a statute of the state of Mississippi provided that "no action or suit shall be sustained or commenced on any bill of exchange until after the maturity thereof." This statute was invoked in defense of an action in the Federal court prior to the maturity of the bill against the drawer of the bill upon protest for nonacceptance. A question in the case was whether the statute of a state could thus restrict the right of a party to pursue his suit in a Federal court. The court held adversely upon that question. It is to be noted that the statute relied upon did not go to the question of liability upon the contract, nor impose any new term upon commercial contracts, but merely affected the remedy thereon, postponing suit until after maturity of the bill. The decision was certainly correct, because no state statute can thus control the remedy of a suitor in a Federal court.

The observations referred to in both the cases were certainly *obiter* so far as they seem to imply or can be properly construed as holding that a state is without power with respect to contracts made within its jurisdiction, and controlled by its law. In view of the eminent learning of the distinguished jurists referred to, their observations are to be treated with great deference; but, if susceptible of the meaning contended for, they cannot be held to declare the settled law of the land without determination of the question by the supreme court in a cause wherein the question was involved and necessary to be decided.

There are a number of decisions of the supreme court which distinctly recognize the right of such legislation by the state. Thus, in *Bank of United States* v. *Donnally*, 33 U. S. 8 Pet. 361, 8 L. ed. 974, it is asserted that: "The general principle adopted by civilized nations is, that the nature, validity, and interpretation of contracts are to be governed by the law of the country where the contracts are made, or are to be performed [the remedy being governed by the *lex fori*]."

In *Munson* v. *Lake*, 45 U. S. 4 How. 262, 278, 11 L. ed. 967, 973, the question being whether the contract between the holder and indorser of the bill in controversy was to be governed by the law of Louisiana, where the bill was payable, or by the law of Mississippi, where it was drawn and indorsed, the court says: "This part of the contract was, by the agreement of the parties, to be performed in Mississippi, where the suit was brought and is now depending. The construction of the contract, and the diligence necessary to be used by the plaintiffs to entitle them to a recovery, must therefore be governed by the laws of the latter state."

In *Brooklyn City & N. R. Co.* v. *National Bank of The Republic*, *supra*, Mr. Justice Harlan speaking for the court, observes (page 25 of 102 U. S. and 66 of 26 L. ed.): "According to the very general concurrence of judicial authority in this country as well as elsewhere, it may be regarded as settled in commercial jurisprudence—there being no statutory regulations to the contrary—that where negotiable paper is received," etc.

And so in *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 101, 37 L. ed. 97, Mr. Justice Gray, delivering the opinion of the court, remarks upon the question then under consideration that "it is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states."

The contention that this statute of Massachusetts is invalid and inoperative goes to the extent of depriving a state of power to legislate with respect to the law merchant. It presents a bold and far-reaching proposition, striking at the root of power in the respective states to which we are not prepared to yield assent. We are referred to no provision of the Constitution which expressly

or impliedly inhibits the exercise of such power by the state. The contention assumes that there is a commercial law of the United States distinct from and independent of the law of the states. Whence came it, and how was it adopted? Was it the common law of England or the civil law of continental Europe? Was it a law appropriated by the nation upon the adoption of the Constitution? It must, then, be universal in its application throughout the nation, overriding all state laws upon the subject and all right of the states to legislate. We know that most of the states are governed by the common law of England as modified and adapted to the peculiar circumstances and conditions of each, and that one state, at least, is governed by the civil law. And we know, moreover, that the commercial law existing in these various states, while alike with regard to underlying principles, is widely different in many essential respects. There is no common law of the United States, except possibly as the common law of England has been adopted with reference to the construction of powers granted to the Federal Union.

This subject received the consideration of the court in *Smith* v. *Alabama*, 124 U. S. 465, 478, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, and was there determined, Mr. Justice Matthews, speaking for the court, saying: "There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton* v. *Peters*, 33 U. S. 8 Pet. 591, 8 L. ed. 1055. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the state in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *New York C. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627, where the common law prevailing in the state of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the state; but the law as applied was none the less the law of that state. In cases, also, arising under the *lex mercatoria*, or law merchant, by reason of its international character, this court has held itself less bound by the decisions of the state courts than in other cases. *Swift* v. *Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Carpenter* v. *Providence Washington Ins. Co.* Id. 495, 10 L. ed. 1044; *Oates* v. *First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *Brooklyn City & N. R. Co.* v. *National Bank*, 102 U. S. 14, 26 L. ed. 61. There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The Code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority. *Moore* v. *United States*, 91 U. S. 270, 23 L. ed. 346."

Mr. Daniel, in his valuable treatise upon the law of Negotiable Instruments (secs. 863, 864), defines the principle which should rule the question in the following explicit language: "Each one of the United States is, in contemplation of its own and of the Federal Constitution, a distinct and independent sovereignty, with its own peculiar code of laws and system of judicature. And while, in the aggregate, they compose one integral confederacy, which is itself an independent nation, paramount in certain respects to the states, in all other respects the states retain their separate autonomies, and are deemed as much foreign to each other as if not in any wise associated together. The regulation of contracts comes peculiarly within the province of the states, and therefore contracts between citizens of the different states, while they may be enforced by process in the Federal courts, nevertheless are to be construed and effectuated, not by a general system of laws which overspread the whole country, but in accordance with the principles of international law which govern transactions between parties of different nations.

"Sec. 864. As long as all the parties to a bill or note are confined within the limits of a single state, the local law alone determines their rights and liabilities. No suit can be brought in a Federal court, and any question which may be litigated begins and ends with the local tribunals. But the vast and constant traffic between the states, and the general use of bills and notes as a medium of exchange, give circulation to those instruments from hand to hand, and from state to state; and questions of nicety are often presented in the inquiry by what law the rights and liabilities of the parties are to be ascertained. In some of the states, as in Maryland, the English statute of 3 & 4 Anne is in force. In others, as in Virginia, where none but notes payable at bank are negotiable, there are peculiar statutory provisions respecting commercial paper. In all of the states, each recognizes the precedents of its own courts, as independently of the rulings of the Supreme Court of the United States as of those of Great Britain, which may, indeed, shed great light on all commercial questions, but are of no binding authority. When suit is brought in one of the Federal courts, it, on the other hand, will be guided by the general law merchant in questions referable to it, and will follow its own views about it, unless the nature of the liability contracted has already been determined, in

the particular state of the contract, at the time it was entered into."

We are of opinion that these principles are not shaken by the *obiter dicta* to which reference has been made. It will thus be seen that, in the exercise of the concurrent jurisdiction of the Federal court with respect to all contracts not within the exclusive control of the Federal government, we administer the law of the state which controls the contract, and that each state has the right to impose such conditions and limitations upon contracts, not inhibited by the terms of its own or the Federal Constitution, as it may see proper. It is, of course, most desirable that there should be uniformity of laws with respect to commercial paper,—a necessity becoming more and more emphasized day by day, and which may possibly result in the grant of exclusive control of the subject to the Federal government. It is not, however, within our province to bring about such a result, however desirable. We are constrained to hold that the act of Massachusetts here in question was a valid exercise of power, and became a term of this contract. The nature of the liability at the time of the making of the contract was declared by the statute law of the state of the contract, and we must construe the contract in the light of such statute law.

We are thus brought to the question whether the known insolvency of the maker at the time of the execution of the note, and the fact that the plaintiffs in error were directors, constituting a majority of the board of directors, of the maker of the note, obviate the necessity of presentment of the note for payment, and the giving of seasonable notice of dishonor. The contract of the parties was conditional. It was, as we have seen, that if, upon due demand, the note should not be paid by the corporation according to its tenor, they would compensate the holder, or a subsequent indorser who is compelled to pay, provided the requisite proceedings for dishonor were duly taken. That there should be demand of payment and notice of dishonor were terms incorporated into this contract. *Rothschild* v. *Currie*, 1 Q. B. 43. The reason of the condition imposed by the law doubtless was that the indorser might take prompt measures for his security, and the law presumed injury from want of notice of dishonor. This presumption is certainly not refuted by proof of the solvency of the maker evidencing that no injury resulted from want of notice to the indorser. It is said, however, that insolvency known to the indorser dispenses with the necessity of notice, because nothing could be lost by default of demand and notice. We are not prepared to concur in the conclusion of fact. We have said that the solvency of the maker, when no possible loss could result to the indorser from want of notice, will not excuse failure to advise of dishonor. Certainly, in the case of insolvency notice is more essential, that the party to be charged may take prompt measures for his security. The insolvency of the maker might possibly affect the sufficiency of indemnity, but it would not necessarily result in a total failure of redress. That would be dependent upon the extent of the insolvency. There have been cases, invested with peculiar equities, in which courts have sought to evade this wholesome rule of the common law, and in which they have permitted evidence of no injury to excuse notice. We are not prepared to follow a rule that will tend to confusion in commercial law in order to relieve a supposed hardship. We concur with the supreme court of Massachusetts in *Farnum* v. *Fowle*, 12 Mass. 89, 92, 7 Am. Dec. 35, that "the hardship, if any, arises from a fluctuation of opinions, and an uncertainty as to rules; and seldom from an inflexible adherence to them; because, when it is once known that exactness in the performance of duty is to be required, parties will adapt themselves to such a state of things, and be always diligent and punctual to avail themselves of their contracts." And we concur with Mr. Daniel (Dan. Neg. Inst. § 1134) that it is "a total misconception of the obligation of an indorser to place his liability at all upon any question involving the pecuniary circumstances of his principal." Hardship is more likely to happen from speculation of courts and juries in the determination of the question of fact whether injury has or has not resulted from want of notice than from strict adherence to the law and to the terms of the contract. The better opinion is, and, as we think, the settled doctrine of this country is, that insolvency is no excuse for failure of notice of dishonor. *French* v. *Bank of Columbia*, 8 U. S. 4 Cranch, 141, 2 L. ed. 576; *Wilson* v. *Senier*, 14 Wis. 380; *Sandford* v. *Dillaway*, 10 Mass. 52, 6 Am. Dec. 99; *Farnum* v. *Fowle*, 12 Mass. 89, 7 Am. Dec. 35; *Granite Bank* v. *Ayers*, 16 Pick. 392; *Lee Bank* v. *Spencer*, 6 Met. 308, 39 Am. Dec. 734.

Nor do we think that the fact that the plaintiffs in error were directors and constituted a majority of the board of directors of the maker of the note is matter of moment or excuses failure of notice. The case of *Hull* v. *Myers*, 90 Ga. 674, is urged upon our attention in support of this contention. The decision of the court upon this question is bottomed, as we think, upon incorrect reasoning, and is without the support of authority. The court says: "Though the debt is his and not their own, primarily, yet, having all his assets and full power over them, and over all his business, they are bound to know all that he would be bound to know were his business and assets in his own hands and under his own management."

If we grant this, we have already seen that the settled law of the land is that knowledge by the indorser of the solvency or insolvency of the maker will not excuse want of notice. The court further observes: "In this instance the principal being a corporation, and the indorsers the corporate directors, the latter could have no right or reason to expect that funds would be provided for liquidating the debt, unless it was done by their procurement or through their agency."

This is true if it means that the funds to meet the note are in a sense to be procured through and appropriated to the debt by the

agency of the board of directors; but it is not necessarily true if it means that the funds are to be procured through the agency of the indorsers of the note. Their contract is personal and individual, and is not affected by their official relation to the company. The directors, in the management of the property of a corporation, have no duty imposed upon them or upon any member of the board to furnish funds for the uses of the corporation, save such as arise from the fact that the property of the corporation is committed to their care. Unless knowledge by the indorser of the insolvency of the maker of a note can avail to dispense with the necessity of a notice, we are unable to approve this decision. The defect in its reasoning seems apparent from the following clause: "A single director, or even a minority of the directors, indorsing a note for the corporation, might be entitled to notice of dishonor, for one only, or a small number, might have a right to suppose that the note would be attended to at maturity; but when the whole board, or a majority of its members, unite in the indorsement, each and all so indorsing should be charged with the duty and responsibility of protecting the paper, since the power to control the conduct of the corporation in respect to paying or not paying would be in their own hands."

It seems a curious conclusion that, because the note is indorsed by a majority of the board of directors, therefore the individual liability of each is fixed, and want of notice of dishonor excused, upon the ground that they should act together as a majority, and so could appropriate funds of the corporation to the payment of the note. The argument assumes that they must act together as a majority of the board of directors; that there are funds of the corporation which should have been applied to the payment of the note, and were not applied, because of the nonaction by the indorsers. The argument concedes that, if the note were indorsed by a minority of the directors, failure to give notice would not be excused. But by what right does the court assume that the majority of the directors indorsing the note will or should act together as a majority in the board upon any question affecting the interests of the company? The argument proceeds upon the theory that they should act in their own interest to protect their liability, and possibly in opposition to the interests of creditors. We think the case is founded upon a mistaken notion of the duties and obligations of directors. They are only to administer the property of the corporation as they find it. They are not obliged to furnish funds for the use of their principal, nor ought they, as directors, to protect their individual interests against the interests of their principal. It is, moreover, to be observed, that, in the case we have now in hand, the body of the stockholders, some two months prior to the maturity of this note, directed the officers of the company to wind up the affairs of the company at the earliest date practicable, to collect all its assets, sell all its property, and apply the proceeds to the payment of the debts of the company. The corporation then ceased to be a going concern.

We have held in *Sutton Mfg. Co.* v. *Hutchinson*, 11 C. C. A. 320, 63 Fed. Rep. 496, that "when a private corporation is dissolved, or becomes insolvent, and determines to discontinue the prosecution of business, its property is thereafter affected by an equitable lien or trust for the benefit of creditors. The duty in such cases, of preserving it for creditors, rests upon the directors or officers to whom has been committed the authority to control and manage its affairs. Although such directors and officers are not technical trustees, they hold, in respect of the property under their control, a fiduciary relation to creditors; and necessarily, in the disposition of the property of an insolvent corporation, all creditors are equal in right, unless preference or priority has been legally given by statute or by the act of the corporation to particular creditors."

It would have been a violation of duty for the plaintiffs in error, as directors of the company, after this resolution of the stockholders, to have sought to apply the assets of the corporation to the payment of this particular debt for which they were conditionally liable, and thus to relieve themselves of liability, to the detriment of the general creditors of the company. Their duty was to refrain from applying the assets of the corporation to the payment of this note if the assets of the corporation were insufficient to pay all debts in full. Their power by the resolution became limited, and their duty was to marshal all the assets of the corporation, and apportion them ratably among all the creditors of the corporation according to their equality of right. They could not legally have done that which the supreme court of Georgia, in the case referred to, holds that they should have done, and failure so to do wrought legal excuse for failure of duty on the part of the holder of the note. In this respect this case is distinguishable from the case of *Hull* v. *Myers*.

The court below held that the plaintiffs in error were joint makers of the note, and therefore not entitled to notice of protest. We have seen that, by the law of Massachusetts which governs this contract, they were entitled to notice, notwithstanding that relation to the paper. We hold that failure of notice is not excused by anything apparent on the record, and that the plaintiffs in error are discharged from liability upon the paper by reason of failure of proper demand and of seasonable notice of dishonor.

The judgment will be reversed, and the cause remanded, with directions to the court below to render judgment for the plaintiffs in error upon the findings.

MINNESOTA SUPREME COURT.

William Pett MORGAN, *Respt.*,
v.
William KENNEDY *et al.*, *Appts.*

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

***1. The common-law rule which holds a husband liable in damages** for slanderous words uttered by his wife, although he is not present, and in which he has not participated in any manner, has not been abrogated in this state by the passage of the statutes relating to married women.

2. The words alleged in the complaint as having been spoken of and concerning plaintiff were as follows: "He has been drunk throughout Thanksgiving week. He has not retired any night during that week other than in a state of drunkenness. He has drunken people in his room. He gets people in his room, and makes them drunk. He was drunk during the early hours of the morning after Thanksgiving." These words involved moral turpitude on plaintiff's part, as well as charged him with the commission of an indictable offense. *Held*, that they were slanderous *per se*.

*Headnotes by COLLINS, J.

(November 5, 1895.)

APPEAL by defendant from an order of the District court for Ramsey County overruling a demurrer to the complaint in an action brought to recover damages for slander. *Affirmed.*

The facts are stated in the opinion.

Mr. **Theodore M. Holland,** with *Mr.* **John L. Townley,** for appellants:

The unprecedented enlargement of married women's property rights, which took place even before Minnesota passed into statehood, and which was known as section 115 (106) of chapter 61 (71) of the Public Statutes of Minnesota of 1849–1858, had swept out of existence the

---

NOTE.—*Liability of husband and wife for the wife's libel and slander.*

I. *The common-law doctrine.*
II. *Effect of state legislation.*
III. *The question of the husband's presence and coercion.*
IV. *Joinder of parties and actions.*
V. *Necessity of service upon wife.*
VI. *Effect of death pending action.*
VII. *Husband and wife as witnesses.*
VIII. *Damages and evidence in mitigation.*
IX. *Effect of a judgment in such cases.*
X. *Action on bail bond in such cases.*

This note is confined exclusively to cases of libel and slander by the wife, and does not include other torts, although the same principles would apply as to them.

As to the responsibility of married women for the use and safety of premises owned by them, see *note* to Strouse v. Leipf (Ala.) 23 L. R. A. 622 (1894).

Upon the question of the husband's liability for the wife's torts, see *note* to Baker v. Braslin (R. I.) 6 L. R. A. 718 (1889) and to Prentiss v. Paisley (Fla.) 7 L. R. A. 640 (1890).

Introduction.

The principal case adds another to the list of states which hold that the rules and doctrines of the common law regarding the husband's liability for the wife's torts have not been abrogated by state statutes, and therefore the husband remains liable as at common law for a libel or slander committed by the wife.

I. *The common-law doctrine.*

The common-law liability of the husband for the torts of his wife, such as slander, is placed upon the same ground as his responsibility for other wrongs committed by her.

Thus, in an action to recover damages against the husband alone for slander uttered by the wife, the court stated the rule as follows: For the wife's torts, committed during coverture, the husband is responsible, and such torts may be committed in either of the following circumstances: First, where the husband is absent and has no knowledge of the intended act; second, where the husband is absent, but where the tort is done under his direction and instigation; third, where the husband is present, but the wife acts of her own volition; and fourth, where the tort is committed in the company of the husband, and by his command or encouragement. In the first three cases they are jointly liable, and the wife must be joined, for the reason that she is in reality the offending party, and if the marriage should be dissolved by divorce or the death of either before judgment is recovered, the liability of the husband ceases, he being joined because she cannot be sued alone; but in the fourth case, the law considers the tort as committed by the husband, and he alone is liable, but in order to exempt her from liability, the concurrence of his presence and his command must be shown; a wrong done by his direction, but not in his company, does not excuse her; nor does his presence if unaccompanied by his direction. The court further stated that the rule as laid down in 2 Kent, Com. 149, to the effect that "if committed in his company, or by his order, he alone is liable," was too broad. Koeminsky v. Goldberg, 44 Ark. 401 (1884).

The reasons for the rule of the common law in such actions have been thus stated: At common law the husband has the control, almost absolute, over her person, is entitled, as the result of the marriage, to her services, and consequently to her earnings, to her goods and chattles; he has the right to reduce her chose in action to possession during her life, can collect, and enjoy the rents and profits of her real estate, and thus has dominion over her property and becomes the arbiter of her future. The wife is in a condition of complete dependence, cannot contract in her own name, is bound to obey him, and her legal existence is merged in that of her husband so that they are termed and regarded as one person in law: as a necessary consequence he is liable for her debts *dum sola*, and for her torts and frauds committed during coverture, if they are done in his presence or by his procurement, he alone is liable, otherwise they must be sued jointly. Martin v. Robson, 65 Ill. 129 16 Am. Rep. 578 (1872).

So, it has been held that at common law a husband is liable for slanderous words spoken by his wife. McElfresh v. Kirkendall, 36 Iowa, 224 (1873).

And the party slandered has an action against them jointly, and the husband's property is liable to be taken in satisfaction of the judgment rendered therein. Hill v. Duncan, 110 Mass. 238 (1872).

To the same extent as if she alone were answerable. Austin v. Wilson, 4 Cush. 273, 50 Am. Dec. 766 (1849).

For torts such as slander committed by the wife not in the presence of her husband and not by his coercion they are jointly liable, and must be joined in the action. Smith v. Taylor, 11 Ga. 20 (1852).

See also 36 L. R. A. 709; 39 L. R. A. 734.

last remnant of the husband's common-law liability for his wife's torts, in this state.

Under similar provisions, the identically same question arose in Illinois which is the question in this case,—whether a husband was any longer liable for his wife's slanderous words. The court held not.

Martin v. *Robson*, 65 Ill. 129, 16 Am. Rep. 578.

Similar decisions were made in *Norris* v. *Corkill*, 32 Kan. 409, 49 Am. Rep. 489, and *Bocard* v. *Kettering*, 101 Pa. 181.

Could it, after the passage of those acts, any longer be said that "the husband is the custodian of her fortune," or that he "adopts the wife and her circumstances together," or that "he takes her fortune, if she has one, and assumes all the liabilities therefrom,"—all of which are the reasons and only reasons assigned for his common law liability for her torts?

Schouler, Dom. Rel. pp. 102, 103.

Nothing short of a positive re-enactment of the husband's liability would suffice to overcome the legislation of 1849–58.

Bingham v. *Winona County Supers.* 8 Minn. 443.

We do not conceive of any reason why the fact that the legislature expressly declared that in this one particular instance of desertion the husband shall not be liable for his wife's torts, committed in the carrying on of her separate business, should prevent the remaining legislation from having its necessary and natural effect, to wit, to absolve him from liability for her personal torts.

The New York courts hold that the husband is exempted from liability for the wife's torts committed by her in the conduct of her separate estate, while they hold him liable for her personal torts.

Quilty v. *Battie*, 135 N. Y. 201, 17 L. R. A. 521; *Rowe* v. *Smith*, 45 N. Y. 230; *Fiske* v. *Bailey*, 51 N. Y. 150; *Baum* v. *Mullen*, 47 N. Y. 577; *Fitzgerald* v. *Quann*, 62 How. Pr. 331, reversed, 109 N. Y. 441.

Some very respectable authorities hold that to charge a person orally with an indictable crime, involving moral turpitude or subjecting him to infamous punishment, is actionable *per se*.

Kinney v. *Nash*, 3 N. Y. 177; *Hewit* v. *Ma-*

So it has been held that such doctrine applies so long as the relation of husband and wife continues, no matter whether their separation be permanent or temporary, unless it operates upon the marriage so as to make that civil relation cease. Head v. Briscoe, 5 Carr. & P. 484 (1833). In that case the husband was held liable for the wife's libel, although they were permanently living apart.

And it has been held that the old principles and precedents of the common law must stand with respect to actions of this nature until they have been changed by intelligent legislative enactment, and that judicial decisions cannot attempt to think what the legislature ought to have done. McNicholl v. Kane, 2 City Ct. Rep. 57 (1884).

II. *Effect of state legislation.*

The effect of recent state legislation with reference to the rights and liabilities of married women has not been uniform as to the husband's common-law responsibility for the wife's torts, such as libel and slander, only a very few of the states holding that such legislation has entirely abrogated the common-law rule.

In Illinois the decisions of the court are strong in the construction of the statutes of that state as abrogating, to a great extent, the principles of the common law. So the statutes of Kansas, Indiana, Massachusetts, Pennsylvania, and Vermont would seem to follow in the same line to some extent, although in Pennsylvania the statute of 1887 is the only one upon which the courts have placed such a construction. In other states, however, such as Iowa and Texas, the courts have held that the common-law doctrine has not been abrogated by state statute.

The common-law rule was declared abrogated by the Illinois statute of 1869, in the case of Martin v. Robson, 65 Ill. 129, 16 Am. Rep. 578 (1872), an action for slander brought against both husband and wife.

By the statute in question in that action, a married woman is "entitled to receive, use, and possess her own earnings, and sue for the same in her own name, free from the interference of her husband." *Ibid.*

The operation of this statute, the court held, was to discharge the husband from his liability for the torts of the wife during coverture, which he neither aided, advised, nor countenanced. Martin v. Robson, 65 Ill. 129, 16 Am. Rep. 578 (1872).

And this for the reason that if the wife alone was entitled to receive and appropriate to her own use damages recovered for slander of herself, she should answer for her slander of others. Martin v. Robson, 65 Ill. 129, 132, 16 Am. Rep. 578 (1872).

The decision was also based upon the theory that the statutes in question give the wife during coverture the sole control of her personal estate and property acquired in good faith from any person other than her husband, and her own earnings for labor performed for any person other than her husband or minor children, with the right to use and possess the property and earnings free from the control and interference of her husband. Martin v. Robson, 65 Ill. 129, 16 Am. Rep. 578 (1872).

And upon the further ground that since the passing of such statute the husband cannot enjoy the profits of her real estate without her permission. He has no control over her separate personal property, it is not subject to his disposal, control, or interference, all her separate property being under her sole control, to be held, owned, possessed, and enjoyed by her the same as though she was sole and unmarried. He has no right to use or dispose of a horse or cow, without her consent. He can no longer interfere with her choses in action; they are under her sole control. The product of her labor is her exclusive property, which she alone can sue for and enjoy. Any suit or action for earnings must be in her own name, and she may sue and possess them free from the interference of her husband or his creditors. *Ibid.*

With reference to the above-mentioned acts, the court stated that the intention of the legislature was to abrogate the common-law rule, to a great degree, that husband and wife were one person; and that the intent to give to the latter the right to control her own time, to manage her separate property, and contract with reference to it, was plainly indicated by those statutes, which while they did not expressly repeal the common-law rule, that the husband is liable for the torts of the wife, made such modification of his rights and her disabilities as wholly to remove the reason for the liability; that the rights acquired by the husband by virtue of the marriage had almost all been taken away, and the disabilities of the wife had nearly all been removed, and therefore a liability which had for its consideration rights conferred should no longer exist when the consideration had failed; and that if the relation of husband and wife had been so changed as to deprive him of all right to her